

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Huichings v. Nunes, from Jamaica ; delivered on the 22nd July, 1863.*

Present :

LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THIS Appeal is from a Judgment of nonsuit directed by the Supreme Court of Jamaica to be entered in an action of trover after a verdict for the Plaintiff, evidence on each side having been adduced before the jury, and leave having been by the learned Judge who tried the cause reserved to the Defendants to move for a nonsuit. The rule *nisi* for a nonsuit, and the rule absolute upon it, are stated in page 4 of the printed Record of proceedings and are in these words :—

“ B.

“ At a Supreme Court of Judicature holden at the Town of Saint Jago de la Vega, October 1861. Friday 11th.

“ Between Henry Huichings, Official Assignee for the County of Surry, and as such the Official Assignee of Moses Ramos, an Insolvent Debtor, Plaintiff, and Ralph Nunes and Benjamin Nunes, Defendants.

“ On motion of Mr. Advocate-General, and pursuant to leave reserved, it is ordered, That the verdict for the Plaintiff be set aside, and a nonsuit entered :

“ 1st. The action was misconceived, and there was no conversion.

“ 2nd. That at the time of demand the goods were not in possession of Defendants, so as to be by them delivered to the party demanding.

“ 3rd. That there was no evidence that the terms of the agreement were ever complied with.

“ 4th. That no property in the goods ever passed to the official assignee under the circumstances proved.

“ Or for a new trial.

“ Because the verdict was contrary to law, contrary to evidence and against the weight of evidence.

“ Unless cause shown to the contrary by Tuesday the sixteenth day of October instant.

“ (True copy.)

“ (Signed) WM. THOS. MARCH,

“ Clerk of the Supreme Court and Crown of Jamaica.”

“ C.

“ At a Supreme Court of Judicature holden at the Town of Saint Jago de la Vega, February 1862. Monday 10th.

“ Between Henry Hutchings, Official Assignee for the County of Surry, and as such the Official Assignee of Moses Ramos, an Insolvent Debtor, Plaintiff, and Ralph Nunes and Benjamin Nunes, Defendants.

“ After argument by counsel of the order *nisi* made herein during the last October term of this Court, it is now ordered, That the said order *nisi* be made absolute for a nonsuit.

“ By the Court.

“ (True copy)

“ (Signed) WM. THOS. MARCH,

“ Clerk of the Supreme Court and Crown of Jamaica.”

The learned Judge's notes of the trial are in pages 5, 6, and 7 of the printed record.

The Appellant's "Case" printed for the purpose of the present Appeal, contains statements as to the origin and nature of the dispute between the parties to this effect :—

“ This is an Appeal from the Judgment of the Supreme Court of Jamaica in a suit commenced in that Court, in the month of June 1861, by the Plaintiff (the now Appellant) against the Defendants (the now Respondents), to recover the value of certain goods claimed by the Appellant on behalf of the creditors of Moses Ramos, an insolvent debtor.

“ Moses Ramos, before and at the time of his insolvency, carried on business as a merchant at Kingston in Jamaica, under the style of 'M. Ramos and Co.,' and the Respondents also carried on business as merchants at the same place, under the style of 'Nunes Brothers.'

“ The form of action was 'trover,' and the pleadings were to the following effect :—

“ The first count of the Declaration stated that Moses Ramos, before he became insolvent, was the owner of the goods in question, and that before the insolvency the Defendants wrongfully converted them to their own use.

“ The second was a similar count, stating the property in the goods at the time of the wrongful conversion to be in the Plaintiff as official assignee.

“ The Defendants merely pleaded 'Not guilty,' which plea, according to the laws then in force in the Island of Jamaica, put in issue both the wrongful conversion and also the title to the goods.

“ The cause came on to be tried on the 4th of July, 1861, before the Honourable the Chief Justice of the said Supreme

Court, whose notes of the evidence and of the proceedings at the trial will be found detailed at length in the Appendix.

“The material facts of the case were as follows:—

“On the 29th of February, 1860, Moses Ramos ordered from Messrs. Pearce and Gray (who were merchants at Baltimore, and had dealt with him previously in the same way of business) a quantity of goods consisting principally of dry provisions, to be shipped to him, at his risk and expense, from Baltimore to Kingston.

“On the 28th of March following, this cargo was duly shipped, and sent from Baltimore to Kingston in the brig ‘Condor,’ accompanied by a letter, with a bill of lading, and an invoice of the goods in the usual form, the invoice being made out to M. Ramos and Co., and the goods being deliverable by the terms of the bill of lading at the port of Kingston to Messrs. M. Ramos and Co., or his assigns, he or they paying freight thereupon.

“The shipment took place upon such terms and under such circumstances as clearly to pass the property in the said cargo to Moses Ramos, subject only to any right of stoppage *in transitu* which might arise in favour of Messrs. Pearce and Gray.

“On the 31st of March, 1860, and whilst the ‘Condor’ was on her voyage to Kingston, a fiat of insolvency issued against Moses Ramos, and the Plaintiff was then duly appointed the official assignee of all his property, real and personal.

“By the 25th section of the Act of Assembly of Jamaica, 11th Victoria, cap. 28, the whole of the property of an insolvent debtor, real and personal, is vested in his official assignee, immediately upon the fiat of insolvency being duly issued.

“Meanwhile, on the 28th March, a firm of merchants in Kingston, who acted there as the general agents of Messrs. Pearce and Gray, sent a letter to them of that date, announcing the failure of M. Ramos and Co., and offering to do everything in their power to protect their interests on the arrival of the ‘Condor.’

“A similar letter was also sent to Messrs. Pearce and Gray by the Respondents, who had transacted some little business with them previously to the month of February 1860. In that month Mr. Gray was staying for a few days at Kingston, and being well acquainted with Mr. Ralph Nunes, one of the partners in the Respondents’ firm, he made some inquiries of him with reference to the solvency of M. Ramos and Co., and requested him to keep Messrs. Pearce and Gray generally informed about the state of parties in Jamaica, which Mr. Nunes promised to do.

“On the 29th March, Ramos himself wrote a letter to Messrs. Pearce and Gray, informing them of his failure, and stating that he thought the most fair and honourable way of acting towards them was by handing the cargo which he had ordered to the Respondents, as agents for Messrs. Pearce and Gray, and that he had accordingly given them (the Respondents) a letter to that effect.

“This letter to the Respondents was dated the 29th March, 1860, and was in the following terms:—

“Gentlemen,

“We hereby agree and authorize you to take charge of, on arrival here, our expected cargo of breadstuffs, &c., &c., from



Baltimore, put up by Messrs. Pearce and Gray of that place, and to dispose of same to the best advantage for their benefit, after which to remit the proceed thereof to them.

“ We are, your obedient servants,

“ ‘ M. RAMOS & Co.’

“ By the 67th section of the above-mentioned Colonial Statute it is enacted, ‘ That if any person in contemplation of his becoming insolvent, or being in insolvent circumstances, shall convey, assign, transfer, charge, deliver, or make over, any estate, real or personal, security for money, policy of assurance, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to, or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed fraudulent and void, as against the official assignee of such person.’

“ On the 21st of April the ‘ Condor ’ arrived in Kingston harbour, with the cargo on board.

“ Immediately on her arrival, Mr Ralph Nunes went on board and demanded from the captain a package of the cargo, in the name of the whole, on behalf of the shippers Pearce and Gray. The captain acceded to the demand, and gave him a keg of lard, which he accordingly marked and appropriated with the concurrence of the captain and mate.

“ Mr. Nunes then returned and ordered the vessel up to Kingston, and the cargo was placed by the captain at the disposal of the Respondents.

“ Shortly after this, a notice of the Appellant’s claim to the goods was given to the Custom-house authorities, and the Respondents were obliged to give to the Custom-house a bond of indemnity before they were allowed to take possession of them.

“ On the 21st of April, and subsequently on the 3th of May, whilst the goods were in the Respondent’s possession, a demand of them was made on behalf of the Appellant, but the Respondents declined to give them up; and they subsequently (on the 14th of May) sold them for the sum of 1,701*l.* 14*s.*

“ The letters of Messrs. Lyons and Company and of the Respondents, dated the 28th of March, reached Messrs. Pearce and Gray on the 16th of April; and on the same day, the latter executed and sent a power of attorney to Mr. Ralph Nunes, which will be found set out at length in the Appendix.

“ This power of attorney arrived at Kingston, and was received by the Respondents on the 5th May.

“ The letter of M. Ramos and Co., dated the 29th of March, reached Messrs. Pearce and Gray on the 20th of April.

“ The main contention at the trial, on the part of the Defendants, was that the property in the goods never passed to the Plaintiff, inasmuch as the Defendants had a right to stop the goods *in transitu*, or otherwise to retake possession of them in the name of Messrs. Pearce and Gray the consignors.

“ The jury found their verdict for the Plaintiff for 1,701*l.* 14*s.*, leave being reserved for the Defendants to move to set aside that verdict upon several grounds.”

These statements, so far as they extend, may be

considered not substantially inaccurate in point of fact.

Now it appears to their Lordships clear upon the evidence that on the 21st of April, 1860, in the circumstances in which Ramos, the purchaser from Pearce and Gray, the unpaid vendors of the goods in question, then stood, Messrs. Pearce and Gray had a right to stop those goods *in transitu*, and that if the steps which on that day Mr. Ralph Nunes took as stated by him in his testimony (to be found in pages 6 and 7 of the Record—testimony which their Lordships believe) ought to be considered to have been taken by him on the part of Messrs. Pearce and Gray, as effectually for all purposes now material as if Messrs. Pearce and Gray had then themselves taken those steps personally, there was a rightful and sufficient stoppage *in transitu*, available against Mr. Ramos equally and the present Appellant, and the Appeal must fail. Ought then, those steps to be considered as having been so taken? Their Lordships are of opinion that this question must be answered in the affirmative.

Together with, if not independently of, the evidence of general agency given by Mr. Ralph Nunes (p. 6) and by Mr. Gray (pp. 21, 22, 23, 24), their Lordships think that the letter of Messrs. Pearce and Gray, of the 16th of April, 1860, though not received in Jamaica until the early part of May 1860, was sufficient to warrant for all purposes what was done there as on behalf of Messrs. Pearce and Gray on the 21st of April, 1860. That letter, which must certainly, we think, be taken to have been despatched before that 21st of April, was, so far as it relates to the present dispute, in these terms:—

“Per ‘Henry Payson,’ viâ Port Maria.

“Messrs. Nunes, Brothers, Kingston, Jamaica.

“Dear Sirs, Baltimore, April 16, 1860.

“Asking your attention to the accompanying press copy of our respects, April 11, we have now to own receipt of your esteemed favours, 26th and 29th ultimo, with particulars relating to the failure of Messrs. M. Ramos and Co., which we sincerely regret. We are glad, however, to learn that his course has been an open and honest one. His yielding up everything speaks well for his principles and views of commercial integrity, and doubtlessly will materially assist him in recommencing business. The course he pursued in reference to the *cargo* sent out by us was such as we anticipated his doing, and for your very prompt and friendly action in the matter we shall ever entertain a grateful appreciation of the valuable service rendered. The fact of all

the shipping documents being dated after the failure precludes the possibility of its coming into the assets, as the *assets* of this cargo did not really exist at the time M. R. and Co. failed. Everything is so clear, in our opinion, that we do not deem it necessary to enter into further argument touching the matter, leaving all to your good management. By this conveyance we send you power of attorney, to use in the matter in case of necessity; in disposing of the cargo use your own judgment. We should, however, like to have it realized and remitted for in colonial bank bills as soon as practicable."

With this letter are connected these statements in Mr. Gray's evidence:—

"*Defendants' 7th Interrogatory.*—Whilst in Kingston in February 1860, had you any conversation with the Defendants, or with either of them, and which of them, in relation to said Mr. Ramos? If yea, please state the same.

"*Answer.*—I had a conversation with the Defendant Ralph Nunes, with whom I was intimate and in friendly relations, and requested him to keep us posted about parties in Kingston. This was about the time of the writing of my letter to Mr. Pearce, of which an extract is already filed with the Commissioner.

"*Defendants' 9th Interrogatory.*—When did you first hear from Mr. Ramos, or from any person in his name, that he had failed? And if you have any letter announcing such failure please produce it.

"*Answer.*—We received on the 20th April, 1860, a communication from Ramos and Co., per R. de Leon, dated 29th March, 1860, and which is now handed to the Commissioner, marked Exhibit No. 2.

"*Defendants' 10th Interrogatory.*—Had you previously received information from any other person or persons; and if yea, when and from whom?

"*Answer.*—On the 16th April, 1860, we received a communication from E. Lyons and Son, dated the 28th March, 1860, and which is now handed to the Commissioner, and marked Exhibit 3; and on the same day, by the same mail, we received a communication from Messrs. Nunes, Brothers, dated the 26th March, 1860, and which is now handed to the Commissioner, marked Exhibit No. 4.

"*Defendants' 11th Interrogatory.*—Please say whether, on receipt of said letter from Messrs. Nunes, Brothers, your firm took any and what action thereon, and if by letter please produce, if you can, a copy thereof, and state, if known to you, when said letter was dispatched.

"*Answer.*—Our firm took immediate action by addressing Messrs. Nunes, Brothers, on the same day, the 16th April, 1860, a letter, inclosing a power of attorney, and which was dispatched on the same day by the 'Henry Payson.' We are unable to supply a copy of the power of attorney, but I hand herewith a copy of our letter which inclosed said power, marked Exhibit 5. We intended to confirm fully their acts as our agents, and to confirm any verbal authority derived from myself when I was in the Island in February 1860.

"*Defendants' 12th Interrogatory.*—When you received the



letter from Nunes, Brothers, already filed by you with the Commissioner, marked Exhibit No. 4, were you surprised that they had intervened in your behalf as your agents to exercise the right of stoppage *in transitu*, or that they were willing to accept an abandonment of the cargo from Mr. Ramos on your behalf?

"*Answer.*—No, Sir, I was not surprised that they had done so."

"*Plaintiff's 1st Interrogatory.*—You speak of Messrs. Nunes, Brothers, as your agents; please state what was the nature and extent of their agency for you.

"*Answer.*—Previous to my arrival at the island, of which I have spoken in my examination in chief, our house had had limited business relations with them, but expected them to be of extensive character. While there, my presence led to further business relations with Nunes Brothers, such as their chartering a vessel, loading and sending her to our consignment, said vessel being returned to them by us with a full cargo.

"*Plaintiff's 2nd Interrogatory.*—Was that the extent of their agency for you which induced you in your examination in chief to speak of them as your agents?

"*Answer.*—They had no specific power to act for us in any other case, not anticipating such a necessity. We considered the agency mutual at both ends. We should have felt authorized to act for them in any similar emergency, and expected them to do the same for us.

"*Plaintiff's 3rd Interrogatory.*—What kind of agency did you consider mutual at both ends, and why did you so consider it?

"*Answer.*—In matters pertaining to business, because there was mutual confidence reposed by each in the other.

"*Plaintiff's 4th Interrogatory.*—Did you repose in each other any other confidence than that which was necessary for attention to particular business entrusted by the one to the other?

"*Answer.*—I did, I think. I can say we did, growing out of the fact of our intimate relations there. Mr. Ralph Nunes and I carried on a private correspondence.

"*Plaintiff's 5th Interrogatory.*—Did you before leaving the island give Messrs. Nunes, Brothers, or either of them, any authority to do more for you than to keep you informed of the condition of parties there during your absence; or did you request either of them to do more? If you answer in the affirmative please state what further you authorized or requested.

"*Answer.*—There was no specific authority given to either party for any purpose. My memory does not serve me sufficiently to give the extent of any verbal communication bearing upon authority."

Upon the whole of the materials before their Lordships, they are of opinion that a rightful, a valid, and an effectual stoppage, *in transitu*, by Messrs. Pearce and Gray, through their agent, was proved in the action to have taken place on the 21st of April, 1860, and that the action, consequently, was wholly groundless.

We may add expressly with regard to stoppage *in transitu*, as distinguished from rescission of the contract of purchase, that in our opinion the language of the power of attorney, stated in p. 28 of the Record, accompanying as it did the letter of the 16th of April, did not prevent Mr. Nunes from acting or lessen his power of acting for Messrs Pearce and Gray by stopping *in transitu*. The expressions "to stop the goods *in transitu*," and "to stop the cargo *in transitu*," are used in Mr. Nunes' evidence; and we are of opinion that he meant to stop, and did stop, the goods *in transitu*. It was said that the rights of the Respondents or their grounds of defence ought to be considered as restricted by the finding of the jury; but their Lordships do not see any foundation for that contention, or for any allegation that the views of the evidence which we have stated ourselves to take are not open here, or were not open to the Court whose decision is under appeal. Much stress was laid, in the argument on the Appellant's part, upon the case of *Bird v. Brown* (4 Exch.). By what, however, is proved to have taken place in the present instance previously to the stoppage, and particularly by the letter of the 16th of April, despatched, as already mentioned, earlier than the 21st of April (the day of the stoppage), this case, in their Lordships' opinion, is rendered materially different from that of *Bird v. Brown*, and prevented from being affected by it. With respect to the reasons so ably given in the Judgments delivered by Mr. Justice Cargill and Mr. Justice Ker, their Lordships think it right to say that if stoppage *in transitu*, properly so called, there had been none, they are not convinced that the conclusion of those learned Judges against the Appellant ought not to be still maintained. Their Lordships' humble advice to Her Majesty will be that the Appeal should be dismissed, with costs.

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