

Tuesday, November 28.

FIRST DIVISION.

Lord Rutherford Clark, Ordinary.

GREIG & COMPANY v. MORISON (CONACHER'S
FACTOR).*Excise—Permit—2 Will. IV. cap. 16, sec. 12—Act
23 and 24 Vict. cap. 114, sec. 187.*

The manager of a distillery, which was under the charge of a judicial factor, sold spirits without a permit, and the buyers, who were aware of this, granted a promissory note for the price. The spirits were not forfeited to the buyers, but, on the contrary, were retained and consumed by them. The judicial factor, who had been ignorant of the spirits having been sent out without a permit, charged the buyers upon the promissory note. *Held*, in a suspension of the charge by the buyers, that the provisions of the statutes 2 Will. IV. cap. 16, sec. 12, and 23 and 24 Vict. cap. 114, sec. 187, barred the judicial factor from recovering the price, and charge suspended.

This was a suspension of a charge upon a promissory-note for £91, 7s. The complainers were Robert Greig & Co., spirit merchants, Perth, who were the granters of the note, and the charger was Robert Morison, judicial factor upon the sequestrated estate of Alexander Conacher, distiller, Pitlochry.

After Alexander Conacher's death, in 1858, his trustees first, and afterwards from 1865 Robert Morison, who had been appointed judicial factor upon his estate, continued the business of the Pitlochry Distillery, which he had himself carried on. Alexander Conacher junior had been practical manager under the factor, buying grain and selling spirits, and had conducted the money matters of the firm, but had no power to draw or accept bills. He absconded in October 1875.

On 4th August 1875 the complainers bought, and on the 6th they had delivered to them, from the Pitlochry distillery 126 gallons of spirits, and in payment of the price appearing on the invoice as made out by Conacher the complainers granted Morison a promissory-note for £91, 7s. at four months' date. The promissory-note was dated the 7th, although not granted till the 10th August. No permit was sent with the spirits as required by the Act 23 and 24 Vict. cap. 114, the 187th section of which provides—"If a true and lawful permit or certificate shall not be sent with any spirits to the buyer thereof, such spirits shall, if the same be not seized in the transit for want of such permit or certificate, be forfeited to the buyer thereof, and the seller shall be rendered incapable of recovering the same, or the value or price thereof, in any court of law or equity." The complainers were on the 28th February 1876 charged upon the promissory-note, and they now prayed to have the charge suspended.

It appeared that the respondent had not been aware of the order or delivery of the spirits until the 10th August, when the invoice of the spirits and the promissory-note were presented to him by the complainers' clerk. He thereupon, assuming that the account was for spirits duly and regularly sold and delivered, after payment of duty by Alexander Conacher junior to the complainers in

the ordinary course of business, received the said promissory-note and returned the said account to the complainers receipted, and marked "settled by bill."

The respondent further stated that the complainers never intimated to him that the spirits had been delivered without permit (of which they admitted they were aware), and that it was not till after the discovery by the Inland Revenue of various frauds committed during 1875 by Conacher against them that he knew of it. For these frauds the estate under management of the judicial factor had suffered severely in penalties. The complainers, though prosecuted and fined under the 170th section of the Act 23 and 24 Vict. cap. 114, had been allowed to retain and consume the spirits unforfeited.

The complainers pleaded—"The promissory-note charged on being for the price or value of spirits sent to the complainers, who were the buyers thereof, by the respondent, who was the seller, he is not entitled to either the spirits or the price or value thereof, or to sue for the same in any court of law or equity, and the protest, charge, and whole proceedings should be suspended, with expenses."

The respondent, *inter alia*, pleaded—" (2) The complainers having received value for the promissory-note charged on in the form of spirits belonging to the respondent, their note of suspension should be refused. (3) The spirits in question not having been forfeited to the buyers, but, on the contrary, they having been permitted to retain and consume them, they can take no benefit from the 187th section of the Act 23 and 24 Victoria, chapter 114. (4) The complainers having been aware that the spirits were sent by the respondent's manager, and having received the same without a permit, and having failed to inform the respondent thereof, while the respondent was himself ignorant of and innocent of all complicity in that irregularity, and the complainers having received and consumed the spirits in question, and granted a bill for the price voluntarily, and accepted a receipt for the price, are not entitled to any benefit from the 187th section of the Act 23 and 24 Victoria, chapter 114."

The Lord Ordinary sustained the reasons of suspension, and suspended the charge.

The respondent reclaimed, and argued that upon a sound construction of the 187th section of the statute forfeiture of the spirits is made a condition of the incapacity to recover the price.

At advising—

LORD PRESIDENT—The promissory-note charged upon here is alleged by the complainer to have been granted for the price of certain spirits sold and delivered by the parties in the management of the Pitlochry Distillery to the complainers upon the 4th and 6th August 1875. The promissory-note bears date the 7th, though it was not granted until the 10th August.

The statement of the charger and respondent is to the same effect. He further states that the spirits were sent out by Conacher junior in such a way as to constitute a fraud against the Revenue. But there is no doubt from the statement of the respondent himself that Conacher was specially empowered to represent the Distillery Company in the selling of spirits. Then it appears that the respondent was not aware that the spirits had

been ordered or delivered until 10th August 1875. when it seems the clerk came with the invoice for the spirits and applied for payment of the price. He received the promissory-note as security for the price, and granted a receipt.

There is no doubt that there was a sale of 120 gallons of spirits at the price of £91, 7s., and that the promissory-note was granted for payment of the price. It is also conceded that the spirits were delivered to the complainers without a permit, and that gives rise to the plea of the complainers, that if spirits be delivered without a permit there can be no recovery of the price from the buyer to the seller.

It is quite true that not only were the spirits delivered to the complainers, but that they were also used and consumed by them, and one can have no sympathy with them in the position they take up. But we have to deal with the construction of a statute, and we must be guided by its provisions.

The leading statute on the subject of permits is the Act 2 Will. IV. cap. 16, the 12th section of which enacts—"That in any action or suit at law or in equity, or on any bond, bill, note, or other security, contract, agreement, promise, or understanding, where the whole or any part of the consideration thereof shall be for the value or price of any commodities for the removal of which a permit is or shall be required, and for and with which a proper permit shall not have been given, the defendant in such action or suit may plead or give in evidence that such commodities were given without a permit accompanying them; and if the jury shall find that such goods were delivered without a true and lawful permit having been obtained for the removal thereof, they shall find a verdict for the defendant; and if such commodities shall have been sold for ready-money, or if the person selling the same shall otherwise have been paid or satisfied for the value or price thereof, it shall be lawful for the person who shall have been paid or satisfied such value or price, within twelve calendar months after payment or satisfaction made, to recover back from the seller of such commodities the amount of the value or price of such commodities, to be sued for and recovered by action of debt, or on the case, in any of His Majesty's Courts of Record." Nothing can be more clear and distinct than that clause. There can be no double construction of it, because if we consider it proved that the goods were delivered without a permit having been obtained, as required by law, then the defender may plead that as a defence to an action for the price; and if the price has been paid by the purchaser of the goods, then he is entitled to recover it back.

The application of that statute to the present case is very obvious. No doubt can be entertained under the section of the Act 2 Will. IV. cap. 16, which I have just read, that the consideration is the price of the goods. On the face of the record the facts are not disputed. But if it were necessary to go to the last excise statute, 23 and 24 Vict. cap. 114, we find a section, which has been chiefly dealt with in the argument, as clear as the one I have read. It is differently expressed, because it is applicable to spirits alone, whereas the section I have just read applies to all "commodities for the removal of which a permit is required." I think its meaning is that where spirits are

delivered to a buyer without being accompanied by a permit, all the consequences spoken of shall follow. They may be stopped in transit; they may be forfeited in the hands of the buyer; the seller shall not recover the price and shall forfeit the spirits. It would be a strong thing, notwithstanding the statute of 2 Will. IV., to give effect to the reading which is here contended for, that the seller is only to be excluded from applying for the price in the event of forfeiture. That would be virtually a repeal of the statute 2 Will. IV. But it is difficult to suppose any such intention on the part of the Legislature, and any such construction is excluded as being inconsistent with the section itself.

I am of opinion that the interlocutor of the Lord Ordinary is right.

LORD DEAS—I am of opinion with your Lordship that there is no justice in this claim. But the laws upon this and upon analogous subjects make injustice practicable in order to show parties the risk they run. Upon the law I have no doubt, and I need not repeat what your Lordship has already said.

LORD MURE—I see no difficulty in this matter. If I could deal with it upon equitable grounds I should give effect to the argument of the charger.

The Court adhered.

Counsel for Complainers—Scott. Agent—Robert Menzies, S.S.C.

Counsel for Respondents—Guthrie Smith—H. Johnston. Agents—Leburn & Henderson, S.S.C.

Wednesday, November 29.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

SAMUEL v. MACKENZIE & BELL.

Debts Recovery (Scotland) Act—Competency.

The 17th section of the Debts Recovery (Scotland) Act provides that "no interlocutor judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocacy, suspension, or appeal or any other form of review or stay of diligence, except as herein provided, on any ground whatever."—*Held* that the suspension of a charge upon a decree obtained under the Act is not thereby excluded.

This was a suspension brought by Ernest Samuel, jeweller, Glasgow, of a charge upon a decree obtained against him in the Sheriff-Court of Glasgow by Mackenzie & Bell, Glasgow, the respondents in the suspension.

The circumstances were as follows:—On 30th December 1875 the complainer had presented a petition for sequestration of his estates, wherever situated in Great Britain, to the Bankruptcy Court in London, the majority in number and value of his creditors being resident in England. The petition had been filed, and his creditors, among whom were the respondents, had duly lodged their names and designations and the