

firmly fixed in our law. In the case of nephews and nieces it applies, but it is not so clearly fixed when individuals are called *nominatim*. A distinction has been taken between persons called by name, others being passed by, and a whole class called. I should rather have favoured the issue of the person called by name, but that has been held detrimental to his issue. That may be the law, but it is not satisfactory. If parties were picked out as *personæ predilectæ*, being nephews or nieces, the presumption would naturally be that they intended to provide for children, but that case of *Hamilton*, which presses on my mind, has raised a distinction. Without saying that my mind is clearly made up on this subject, I think there is enough in the grounds first stated for the decision of this case.

LORD NEAVES concurred.

Agent for Archibald Robertson—D. J. Macbrair, S.S.C.

Agent for Miss Robertson—William Mason, S.S.C.

Saturday, December 18.

FIRST DIVISION.

RINTOUL & CO. v. THE PORT EGLINTON STORAGE CO.

Issue—Expenses—Procedure—Fraud—Reclaiming Note. An issue which charged fraudulent impetration of a delivery order for wheat having been withdrawn, as also one against the parties based on a charge of statutory fraud in regard thereto; and a single issue having been substituted radically different, and charging fraud at common law—*held* that the issue approved of being not a mere variation, but radically different from those disallowed, a reclaiming note was the proper procedure; and the expenses of reclaiming must be allowed to both defenders.

The pursuers, who are merchants and commission-merchants in Glasgow, on 19th October 1868 sold to John Craig, miller and grain-merchant, Glasgow, 500 bolls of American spring wheat at 25s. 3d. per boll; and on the same day gave a delivery order for the wheat, the price being payable by bill at two months. The following were the principal averments of the pursuers.

“The pursuers were induced to agree to the said sale, and to give the said delivery-order to the said John Craig by false and fraudulent concealment on the part of the said John Craig. It was not true that he required the said 500 bolls of wheat for the purposes of his business. At the time of the purchase the said John Craig was utterly insolvent, and he knew that he was so. He had resolved to stop payment, and had taken measures for this purpose, and he purchased the pursuers' wheat knowing that he was unable to pay for it, and without intending to pay for it. He did not purchase the wheat in the ordinary course of business; but he did so, although he intended immediately to stop payment, for the purpose of handing over the wheat in security or satisfaction of prior debts owing by him to the defenders, the Port Eglinton Storage Company, or to John Edgar Poynter, the sole known partner of that company, as a partner or as an individual, or

to the defender Robert Reid. These defenders, for themselves or others, were prior creditors of the said John Craig, and he had no means of paying their debts from his own funds, and thereupon the said John Craig procured the pretended sale of the pursuers' wheat, and the delivery-order therefor, for the fraudulent purpose of handing over the same to the said defenders, without paying the pursuers the price thereof. For some time prior to the pretended sale by the pursuers, the said John Craig had resolved to suspend payment, and to compound with his creditors by payment of a composition, and with this view he had advised with various parties, and in particular with Mr John Gourlay, accountant, Glasgow.”

The pursuers further averred that Craig, having thus fraudulently got the delivery-order, handed the same to John Edgar Poynter, who caused it to be presented at the ship for delivery of the wheat, not indorsed, and without any intimation of any alleged interest therein by Poynter. “At the same time,” they said “the defender Craig caused an intimation-note to be delivered to the defender Angus, requesting him to receive the said wheat in name of the defender Robert Reid, designing him as of No. 72 Great Clyde Street, but who was then unknown to the defender Angus, and was and is the defender Poynter's clerk or manager. These arrangements were made with the view of concealing from the pursuers, and at the ship, the fact that the wheat was being delivered to another party than Craig, so as to prevent the operation of their right of stoppage before or during delivery, and with the view of securing the storage with the defender Angus in name of Reid, for behoof of his employer the other defender Poynter.” They alleged that “the said defenders gave no value therefor to the said John Craig, and the whole of the defenders, excepting Robert Angus, fraudulently combined to get delivery of the wheat, and to defeat the pursuers' rights. The defenders Poynter and Reid fraudulently obtained the delivery-order, and in virtue thereof fraudulently caused the wheat to be stored with the said Robert Angus.”

The pursuers maintained that the delivery to Poynter and Reid was contrary to the Act 1696, c. 5, as Craig became a notour bankrupt within sixty days of the delivery; and they also contended the delivery was reducible at common law. They accordingly sought to have the contract reduced, and the wheat returned to them, or a sum of £1000 as damages. And their issues as adjusted in the Outer-House were:—

“(1) Whether the said delivery-order was fraudulently impetrated and obtained from the pursuers by the said John Craig, to the loss, injury and damage of the pursuers?”

and

“(2) Whether the said delivery-order was, on or about 19th October 1868, delivered to the defenders, the Port-Eglinton Storage Company, John Edgar Poynter, or Robert Reid, or for their behoof, and whether the said defenders, or any of them, obtained possession of the said 500 bolls of wheat within sixty days of the notour bankruptcy of the said John Craig, in security or satisfaction of a prior debt owing to them by the said John Craig, in contravention of the Act 1696, cap. 5, to the loss, injury, and damage of the pursuers?”

Against these issues all the defenders reclaimed,

on the ground that the issues were not supported by the statements in the record.

LORD ADVOCATE and DEAS for Port Eglinton Storage Company.

SOLICITOR-GENERAL and BALFOUR for Craig's trustee.

GIFFORD and WATSON for pursuers.

The pursuers proposed to withdraw their issues, and frame one based on a charge of fraud at common law, as they admitted that fraud could not under the circumstances be charged under the Act 1696, c. 5. The following was the issue ultimately approved of:—

“Whether a delivery-order for 500 bolls of wheat dated 19th October 1868, granted by the pursuers in favour of the said John Craig, was fraudulently obtained from the pursuers by the said John Craig when he knew that he was insolvent, for the purpose of handing over the same to the Port-Eglinton Storage Company, without paying the pursuers the price of the wheat? and Whether the defenders, the Port-Eglinton Storage Company, John Edgar Poynter, and Robert Reid, or any of them, did, in the knowledge of the said John Craig's fraud, and in combination with him, fraudulently obtain possession of the said 500 bolls of wheat?”

The defenders thereon asking expenses, it was contended for the pursuers that under sections 27 and 28 of the Court of Session Act 1868, and section 6 of the relative Act of Sederunt, no expenses should be allowed. By these sections it is provided that a party shall apply by motion and not by reclaiming note where he desires to have the terms of one or more of the issues varied, but not where he seeks to have one or more of the issues disallowed *in toto*; and in the motion the particular variation sought is to be specified precisely.

The Court held that this was a case where it was right to present a reclaiming note and not to apply by motion. Both of the pursuers' issues had been disallowed as not coming out of the record; and the issue adjusted was radically different from those disallowed and not a mere variation of the terms. The Court also allowed the expenses of reclaiming to both defenders.

Agents for Pursuers—J. & R. Macandrew, W.S.

Agents for Port-Eglinton Storage Company—Duncan, Dewar, & Black, W.S.

Agents for Craig's Trustee—G. & H. Cairns, W.S.

Saturday, December 18.

CLINTON *v.* TREFUSIS.

Courtesy—Burgage—Entail—Inféttment—Superiorities—Trustees. Held courtesy is due to a husband out of lands held by his late wife under an entail in which terce and courtesy were not excluded; out of superiorities and burgage subjects in which she was infétt; but *not* out of lands held by her under an entail which excluded terce and courtesy; *nor* out of lands in which she was not infétt, but which were destined to her, and of which she received the rents, though, for motives of convenience, her father's trustees had been infétt in them.

Sir John Hepburn Stuart Forbes left a trust-disposition and settlement, dated 16th May 1851, whereby he conveyed to his wife, Lady Harriet

Stuart Forbes, and certain other persons therein named, as trustees, his whole estates, heritable and moveable, to be held by them for the purposes therein mentioned. By the fourth of these purposes he directed his trustees to dispone and convey his whole heritable estate and subjects to and in favour of such party or parties, and at such time or times as he might have already appointed, or as he might thereafter appoint by any writing under his hand. With special reference to this trust-disposition, and the purpose thereof above mentioned, he, by deed of directions dated 10th August 1858, directed and appointed his trustees, as soon after his death as convenient, to dispone, convey, and make over to his said daughter, Lady Clinton, the whole of his lands and estate, heritable and moveable, which by law he could dispone, convey, and bequeath, subject to the provisions of her marriage-settlement, and of a special bequest of a sum for the endowment of the Church of St John, New Pitsligo.

With the view of carrying out the purposes of the trust, notarial instruments were expedé in favour of the trustees in the lands and barony of Pitsligo, in the fee-simple portion of the lands of Invermay, and in the fee-simple portion of the lands of Fettercairn; while with their authority and consent, and for the purpose of more conveniently granting entries to the vassals, a title was made up in the person of Lady Clinton to the feus at Greenhill and Morningside, and she was duly infétt therein. She was also served heiress of tailzie and provision in the entailed portion of the lands of Fettercairn, and in the entailed portion of the lands of Invermay; and decreets of service in her favour were duly recorded in the Register of Sasines to the effect of completing her title by inféttment in these lands. Her title was also completed to the house or tenement in the town of Perth, which was held burgage of the magistrates of that town, to the effect of infétting her therein.

In consequence of some family arrangements, it was considered advisable for the trustees to maintain for some time the title in their favour in the fee-simple properties in which they were infétt, as above referred to; but these purposes had all been fulfilled, and the deeds to be granted by the trustees for denuding of the properties and conveying the same to Lady Clinton were in course of being executed by them at the time of her death, but the execution of them had not been completed when that event occurred. It thus happened that at the time of her death she was infétt in the entailed estates of Fettercairn and Invermay, in the superiority of the feus of Greenhill and Morningside, and in the house or tenement in the town of Perth, while the trustees were infétt, under Sir John H. S. Forbes' trust-disposition, and for the purposes specified in the relative deed of directions above-mentioned, in the fee-simple portions of the estates of Fettercairn and of Invermay, and in the lands and barony of Pitsligo. Although the trustees were so infétt in these estates, the rents were, with their knowledge and consent, collected for behoof of Lord and Lady Clinton, and were paid over or accounted for directly to his Lordship. Any new leases which have been granted of the farms on the fee-simple estates since Sir John H. S. Forbes' death were in the names of Lord and Lady Clinton, as having the beneficiary interest therein; but any sequestrations or removings against tenants were brought in the names of the trustees, as being infétt for the time in said estates.