

No 26. Edinburgh, the three seals were entire, and therefore the Post-master was not chargeable with the contents.

In *answer* to these reasons, the substance of the proof before the inferior court was resumed, viz. Mrs Mackaill deponed upon the inclosing of the four guineas in a letter sealed with three seals and tipped with wax on both sides, and addressed to the Lieutenant. Margaret White, a common carrier of letters to and from the post-office of Falkirk, deponed, That she delivered the letter to Janet Thomson the defender's spouse, who was constituted by him to receive the letters, and at delivery she acquainted her that there were four guineas in it. Jean White deponed, That she was present when the letter was delivered, and heard the former witness acquaint the Post-master's wife with the contents. The defender's wife deponed, That she received the letter, and that Margaret White told her that it contained some gold, but did not remember the quantity; that she left the letter with her husband to be dispatched with the rest. Hamilton the defender likewise deponed, That he found amongst other letters in his office one with something weighty in it, and was going to mark it a double letter, but did it not, and sealed it up in the bag with the rest. Mr Bray deponed, That upon receiving his letter in the post-office of Edinburgh he immediately opened it, and finding that it ought to have contained four guineas, but that it did not, he complained to the servants of the office; and of these, two deponed conform to him, with this addition, that Hamilton sent along with the same packet a bill or label, which is usual, to take care of two letters of his own marked W. H. which were carefully delivered.

From this proof it was *contended* for the charger, That the suspender was justly decerned, since he had accepted the charge of a letter with gold in it, and had not observed the usual caution of marking the letter, so as special care might have been had of it: That the formalities mentioned in the first reason of suspension were sufficiently answered, by the delivery of the letter to his wife the *institor*, and acquainting her of the contents: That though the seals remained whole, yet it was easy enough to imagine that the gold might have been taken out.

THE LORDS found the letters orderly proceeded.

Act. *Ja. Boswell.*

Alt. *Arch. Hamilton, sen.*

Clerk, *Mackenzie.*

*Fol. Dic. v. 4. p. 61. Edgar, p. 105.*

1724. December 23.

VOLRATH THAM Merchant in Gottenburg *against* CHARLES and RICHARD SHERIFFS, Merchants in Prestonpans.

No 27.

A party in Sweden who had written to a correspondent that

IN the month of September 1718, James Sheriff, brother to the defenders, sailed with a cargo of herrings belonging to himself and them, having a discretionary power from the defenders to carry them to any port in Sweden, where

he could dispose of the herrings for a home cargo of iron and dales; and in case he could not get such a cargo in Sweden, he was to proceed to Dantzick. He arrived at Gottenburg, having with him a recommendatory letter from the defender Richard to Mr Tham, desiring his assistance in disposing of the herrings, and referring as to particulars to his brother, who had a commission to manage the whole affair.

The pursuer, in the view of assisting James Sheriff, applied to the King of Sweden's Commissioners at Gottenburg, offering them the herrings for the service of his Majesty's army, and to take iron in return for them.

On the 19th of September 1718, the pursuer acquainted the defender Richard, by a letter, of his having made such application to the King's Commissioners; and by another letter of the 18th of October, he acquainted the same defender, That he had sold to the King's Commissioners the herrings at 20 dollars per barrel, and was to receive the iron at 16 dollars per ship's pound, and that in fourteen days or thereby, the ship would be ready to sail with the iron. By a third letter of the 17th November, the pursuer acquainted the same defender Richard, That the iron was put on board as the proceeds of the herrings; and on the 20th of November James wrote to his brothers, that he had concluded a bargain with the pursuer for the iron, but mentioned nothing of any bargain with the King's Commissioners.

James accordingly sailed with his cargo, brought it home and divided it with his brothers, according to their respective proportions of the herrings; but the true fact was, that the iron bargained for from the King not having been delivered at that time, the pursuer, in hopes that it would be delivered in a short time thereafter, had put on board the defender's ship iron of his own and of other peoples, then in his custody, to the value of what he expected from the King, and having continued in expectation of the King's iron till his Majesty's death, which happened in the January following, and for some months thereafter, he wrote no account to the defenders of the disappointment, nor made he any demand on them for the higher value at which he was obliged to replace the parcels of iron he had taken and applied to the use of the defenders; but at last having lost all hopes of getting the King's iron, he raised this process against the defenders for the value which he had been obliged to pay for that iron, wherewith he had replaced the iron which he had put aboard the defenders ship, and craved an act and commission for proving that the iron contracted to be delivered by the King for the defender's herrings never was delivered.

It was *objected*, That the point craved to be proved was a direct contradiction to the pursuer's letter of the 17th of November, wherein he acquainted the defenders, that the iron put on board their ship was the proceeds of the herrings. *2do*, Admitting their fact to be as stated, yet the defenders could not be liable, because the pursuer had plainly taken the risk and hazard of the King's iron upon himself, and must submit to the loss by it.

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he was to send him iron obtained from the Swedish government in exchange for his cargo of herrings, not having got the iron, claimed the price of other iron he had himself purchased and sent. Found barred by the terms of his letter, contrary to which he could not be allowed to aver or prove any thing.

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It was *answered*, That the contracts with the King's Commissioners were entered into with the consent, participation and knowledge of James Sherriff the defender's trustee; so that the risk behoved to be his and his constituent's, and not the pursuer's, who merely out of respect and favour to the defenders had accommodated them with iron which belonged to other people, to expedite their affairs.

*Replied*, That when a factor furnishes goods of his own to his constituents in expectation of receiving other goods contracted for to replace them, and does not acquaint his constituents, he, the factor, would fall to have the profit of these goods, which he expected, if their value should rise before delivery; he therefore must submit to the loss, if their value should fall, or if the goods should never be delivered: And that the defenders were neither to have the loss nor profit of the bargain between the pursuer and the King's Commissioners, seems evident from James Sherriff's letter of the 20th of November, which mentioned an absolute bargain for the iron with the pursuer, but took no notice of any concern in the bargain with the King's Commissioners.

THE LORDS found, that the pursuer having advised by his letter of 17th November 1718, that iron was loaded for the proceeds of the herrings conform to James Sheriff's commission, as supercargo by the freighters, and his letter of the 20th November, the pursuer cannot now be allowed to prove contradictory facts to his former correspondence; And found James Sherriff's knowledge (though partly concerned in the outward cargo) that part of the pursuer's or other peoples iron in his custody was shipped aboard in return of the outward cargo, not relevant against the defenders; and found no presumption that James Sherriff did advise the freighters of the true fact.

*Act. Dun. Forbes. Alt. Ja. Graham, sen. Reporter, Lord Grange. Clerk, Murray.*  
*Fol. Dic. v. 4. p. 58. Edgar, p. 134.*

1730. June 18.

SELWYN *against* ARBUTHNOT.

No-28.

A BANKER at Edinburgh got orders to remit his correspondent's money by a bill on the bank of England, but chose rather to remit it by a bill upon a private banker in London. The bill being taken out of the post office by some unknown person, who, upon a false indorsation and receipt, got the money from the banker on whom the bill was drawn. THE LORDS found the defender's remittance by bill on the private banker was on his own risk and hazard. (See APPENDIX.) See Baines against Turnbull, No 77. p. 1486.

*Fol. Dic. v. 2. p. 58.*