

No 41.

It would be attended with the worst effects in mercantile dealings, if a *bona fide* purchaser were to be responsible for a breach of trust in the seller. The possession of moveables affords in all cases a presumption of property; and it would tend greatly to restrain the freedom of commerce, if before making a purchase it were necessary to enter into an investigation of the different relations which may subsist in the way of trade between one mercantile house and another, Erskine, B. 3. Tit. 3. § 34.; Boylston, 24th January 1672, *voce* SURROGATUM; Baxter against Bell, December 17. 1800, (See APPENDIX).

THE LORDS, upon advising the petition with answers, adhered.

Lord Ordinary, *Craig.*

Alt. *Burnst.*

Act. *Connell.*

Agent, *Jo. Masson.*

Agent, *James Hay, W. S.*

Clerk, *Menzies.*

Fac. Col. No 126. p. 279.

S E C T. II.

Effect of Transmitting Bill of Loading.

1764. *June 13.*

BUCHANAN and COCHRANE, Merchants in Glasgow, *against* ROBERT SWAN.

No 42.
Found that an assignment on the back of a bill of loading made a complete transference of the property.

In September 1748, M'Lachlan and Drummond, merchants in Maryland, shipped on board a vessel bound for Glasgow, 38 hogsheads of tobacco, consigned to James Johnston merchant there. Upon the back of the bill of loading is the following writing, 'I do hereby assign, transfer, and make over unto Robert Swan of Annapolis, merchant, the within bill of loading, for the consideration of L. 152 Sterling, by us received from him, this 20th October 1748, *per James M'Lauchlan for himself, and John Drummond.*' But the bill of loading, with this assignment on the back of it, came not to Johnston's hand, till long after the cargo was delivered to him.

The said cargo was arrested in the hands of James Johnston, 30th December 1748, by some creditors of M'Lachlan and Drummond, which pursued a multiple-pounding; in which, appearance was made for Robert Swan, who claimed preference upon the said assignment in his favour. It was *objected* by the arresters, That this assignment could not transfer the property without delivery; that the cargo still remaining the property of M'Lachlan and Drummond, was habily affected by the arrestments of their creditors; and that the

arrestments being laid in the hands of Mr Johnston, some weeks before Swan's assignment was intimated to him, the arrestments are clearly preferable.

No 42.

It was the opinion of the Court, that the assignment on the back of the bill of lading made a complete transference of the property to Robert Swan; and upon that medium he was preferred.

When it is the purpose of a bargain of sale, that the purchaser should have the immediate use of the subject, delivery is necessary to fulfil that purpose, without which the purchaser cannot have the use of the subject; and for that reason, delivery in such a case is necessary to transfer the property: Until delivery be made, the bargain is an inchoated act not completed. But where the purpose is to transfer the property of a subject which the purchaser has no immediate use for, the property may be transferred by consent alone; for delivery in that case would be a mere act of form without any use. For example, I have an hundred head of Highland cattle grazing in an inclosure in the county of Norfolk, waiting for a market; and needing ready money, I am willing to dispose of my property. If actual delivery be necessary for transferring the property, no man in this country will purchase, because he will not go so far to receive delivery. And beside it would be a cumbersome and empty form, to oblige a man to travel 400 miles, for no better purpose than to take so many cattle by the horns without moving them out of the place, they being to remain there for a market. Another case was figured, of selling a cargo while the ship was yet at sea, during which time there is no opportunity for persons at land to give or receive delivery. To require delivery in this case, or in cases of the same nature, would be a total bar to such bargains, however necessary for the support of credit and circulation of commerce.

It appears in general, that in every case where moveables are in the hands of a third party, with the proprietor's consent, and for his behoof, the property may be transferred by consent merely, without delivery. I give a block of fine marble to be polished for me; a man seeing it partly polished, wants to purchase, and I declare it to be his upon receiving the price agreed upon. Delivery in this case cannot be necessary, because the marble is to continue with the workman till the polishing be finished.

Fol. Dic. v. 4. p. 251. Sel. Dec. No. 216. p. 280.

1770. December 12.

ROBERT ARTHUR, Merchant in Irvine, *against* Messrs HASTIE & JAMIESON,
Merchants in Glasgow.

In the year 1764, Messrs Hastie and Jamieson entered into a contract with Archibald Dunlop merchant in Virginia; by which they became bound to furnish him with goods from Glasgow; and in return, Dunlop became bound,

No 43:

A merchant abroad having consigned a cargo of goods to his correspondent at home, and having transmitted him