## OPINIONS.

COALSTON. The will of the testator ought to be the rule; and his will appears from the narrative of the codicil.

Affirmed upon appeal.

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1766. *June 27.* JOHN MONTGOMERY, Merchant in Newry, Ireland, and the Executors of Thomas Atkinson, Merchant in Newry, Chargers, *against* CAPTAIN COLIN CAMPBELL, Commander of the Prince of Wales revenue sloop, suspender.

### JURISDICTION—STATUTE.

**1*st*, An unlawful seizure made at sea does not vest the admiral with a privative jurisdiction. 2*do*, Construction of the Act 1672, c. 3, and 1686, c. 14, as to the Importation of Irish Victual.**

[*Faculty Collection, IV.* 7; *Dictionary*, 7359.]

IN July 1761, John Montgomery and Thomas Atkinson loaded two ships with oatmeal, and took out their clearances at the custom-house of Newry, for North Faro, in Norway. While the two vessels were in the Sound of Mull, they were seized by Captain Campbell, an officer of the revenue, under pretence of their coming under the description of the statutes prohibiting the importation of Irish victual into Scotland. Various circumstances concurred to show that the clearance for North Faro was merely a cover, and that the voyage was intended for the north-west islands of Scotland. On the 1st September 1761, the vessels, having been carried to Fort-William, were unrigged, and their cargoes unloaded by the authority of Captain Campbell. Captain Campbell made an application to the Sheriff-substitute of Argyleshire, residing at Fort-William, setting forth, that, by various Acts of Parliament, the importation of victual from Ireland into Scotland is prohibited under certain penalties, besides forfeiture of the victual and bottom: that, by the said Acts, such victual, waterborne betwixt Loch Ryan and the Head of Kintyre, or the Head of the Western Isles, is deemed an importation; and, subsuming that the foresaid vessels were seized in those circumstances, carried by him to Fort-William, and their cargoes unloaded; and therefore praying the Sheriff to condemn the meal and the vessels as a legal seizure, and to inflict the other penalties directed by law. The shipmasters were examined, the depositions of witnesses were taken, parties were heard. On the 13th October 1761, the Sheriff pronounced the following interlocutor: "In regard it did not appear that the defenders had broke bulk since their cargoes were loaded in the port of Newry, and it has been fully proven that the Sound of Mull was the common and safe passage for vessels trading from the southward to the northward, assoilyied the defenders, or ordains their cargoes and vessels to be delivered back to them; the defenders being always obliged, before load-

ing their cargoes of meal, to grant hovering bonds, that they should regularly proceed on their voyages, and land their said cargoes of meal in and at some foreign port or ports, under the penalty of treble the value of their respective cargoes."

Upon pronouncing this judgment, Captain Campbell's agent entered what he termed an appeal to the Court of Session. The masters of the vessels, who had no concern with the cargoes, immediately, upon getting possession of their vessels, returned to Ireland, leaving the meal in the warehouses where Captain Campbell had lodged them. The proprietors of the meal pretend that they could not at that season of the year get vessels for transporting the meal to Faro, in Norway. Certain, however, it is, that the meal continued in the warehouses. On the 4th January 1762, the officers of the customs at Fort-William required the agent for Montgomery and Atkinson to receive the meal within twenty days, and to grant hovering bonds, in terms of the statute 5th Geo. II.; declaring, moreover, that, if he failed therein, they would of new seize and carry the meal into condemnation. The agent answered, that the interlocutor of the Sheriff limited no time for the granting of hovering bonds,—that it was impossible to receive directions from the Irish merchants within so short a space as twenty days, and that at no rate could a vessel be procured at that season of the year for transporting the meal. On the 16th January 1762, the same agent required Captain Campbell to pay the price of the meal and the damages, in respect that, through his fault, Messrs Montgomery and Atkinson had lost their market. On the 5th February 1762, an embargo was laid upon all shipping outward-bound with provisions; and this embargo remained in force for seven or eight months, whereby the exportation of the meal became impracticable. In April 1762, during the currency of the embargo, the collector, formerly the Sheriff who pronounced the decreet of absolvitor, and the controller of the customs at Fort-William, again made a seizure of the meal, and prayed the Sheriff to condemn it as not regularly exported, in terms of the former judgment: they also craved a warrant for exposing it to public sale on their account as seizure-makers. Although the agent for the Irish merchants represented that the embargo did at present render the exportation impracticable, and that he was willing to export as soon as the embargo was taken off, yet the sheriff, on the 23d June 1762, ordered the meal to be publicly sold, and the price to be lodged with the collector at Fort-William, upon his finding security to be answerable to whoever should be found to have right thereto. The meal and the bags were accordingly rouped, and sold at L.133 : 19 : 1. sterling, a price said to be much below prime cost. For reparation of the damages which they had sustained, Messrs Montgomery and Atkinson insisted in an action against Captain Campbell before the Court of Session.

After a very cursory defence, if any,—The Lord Strichen, Ordinary, on the 24th July 1763, pronounced decreet in terms of the libel. Captain Campbell, being charged on this decreet, offered suspension. He declined entering into the merits of the question, but pleaded that the present cause was maritime, wherein the admiral has a privative jurisdiction by the statute 1681; and therefore that the Court of Session was not a competent court, and its decree void.

On the 8th February 1765, the Lords pronounced the following interlocutor: "On the report of the Lord Auchinleck, the Lords repel the objection to the

jurisdiction of the Court, and remit to the Lord Ordinary to proceed accordingly."

On the 6th July 1765, the Lord Auchinleck, Ordinary,—"Found the seizure of the charger's meal was illegal, and that therefore the suspender is liable to make up to the chargers the damages arising from his illegal proceedings, viz. the prime cost of the meal in Ireland, the freight which the chargers paid, the interest upon both, with the expense of process, and appoints the suspender to give in his objections to the charger's claims for these several articles, within eight days, it being always understood that the chargers are to give up any claim to the price at which the corn was sold by the sheriff, and also to give up and assign to the suspender all claims against the collector and others, on account of this meal, with warrandice from fact and deed."

But, upon advising a representation, the Lord Ordinary took the cause to report.

The suspender endeavoured to show that the clearance to Faro was merely a cover; that no such voyage was intended, and that the destination of the vessels was to the Western Isles. The chargers, on the contrary, endeavoured to show that there was no purpose of landing the meal in Scotland, and that they had not transgressed, nor meant to transgress the law. The arguments, in point of law, were not pleaded from the bar by either of the parties according to the ideas of the bench, and therefore it would be superfluous to recite them.

On the 27th June 1766,—"The Lords, in respect of the Scots statutes respecting the importation of Irish victual, adhered" to the first interlocutor of the Lord Ordinary.

*Act.* J. Burnet. *Alt.* J. Mongomery. *Reporter*, Auchinleck.

## OPINIONS.

Justice Clerk. Where a statute prohibits the importation of goods, and evidence is brought of an intention to land, though bulk be not broke, this is importation in the construction of law. But this case is to be determined upon the Act 1672, c. 3, not upon British statutes. If the last part of the Act, 1672, be considered as abolished, many unjustifiable depredations have been committed by custom-house officers; and, if the circumstances in this case are not sufficient to authorise a seizure, the law will be eluded. The Act, 1686, c. 14, is explanatory of the Act 1672: it says that the meal shall be sunk,—which implies its being on board. The Act, 1672, speaks of vessels being seized.—How seize the vessel and let the meal go? This implies that the meal is understood to be on board. All the circumstances of the case show that an importation into Scotland was intended. The custom-house officer acted *bona fide*.

Alemore. If the custom-house officer had deviated a little from the law, while actually employed in executing the law, he might have been excused; but here he was acting without any law at all. By virtue of the Articles of Union, the laws as to Irish victual remain in force. The vessels must be taken in the act of landing. In those days, before the Union, there was no idea of importation without landing. Hence the Act, 1686, imposes a sort of delinquency on the vessel for three years. This meal was not seizable even by the

Act 1762; for Campbell, the custom-house officer, had no authority from the Privy Council.

KAIMES. The powers given to the Privy Council are now at an end. The custom-house officer was not bound to act; he therefore acted at his peril.

KENNET. The Scottish statutes imply an actual importation, and therefore the custom-house officer did wrong, and must pay damages.

PITFOUR. The former part of the Act, 1672, requires actual importation. The after part may go farther, though that is doubtful: but this is of no consequence in the present question, for the extraordinary powers committed to the Privy Council are not now executable: it would be dangerous to find the contrary. The powers formerly vested in the Privy Council, with respect to Jesuits, are, by an Act, *ultimo Annæ*, granted to the Court of Justiciary in place of the Privy Council,—upon this narrative, that the Privy Council has ceased.

COALSTON. The statutes relate to victual actually landed. If the law may be eluded in consequence of this interpretation, the Legislature, not the Judges, must provide the remedy.

PRESIDENT. Meal may be seized by any one: the Act, 1672, gives a share of the seizure to the discoverer: if one lays his boat to shore, this is importing into the country or port of Scotland; but this did not happen in the present case, and the Court cannot extend the words of a revenue law, in order to make it more beneficial to the revenue.

*Diss.* Justice-Clerk.

See Books of Adjournal 14th June 1672, advocate, Mr Archibald Beath, with the pleadings of Sir John Nisbet, and Sir Geo. Lockhart, therein engrossed; and M'Kenzie's Criminals, title *Murder*, § 18.

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1766. *July* 3. AGNES TENNENT, Spouse to Mr Andrew Chatto, Minister of the Gospel at Morebattle, and her Husband, for his interest, *against* Mr WILLIAM BAILLIE, Advocate.

## SUCCESSION.

Interpretation of the word "Heirs" in a Settlement.

[*Faculty Collection, IV.* 66; *Dictionary*, 14,941.]

THE competition between Agnes Tennent and William Baillie was concerning the succession to the estate of Stonnipath, in consequence of a settlement made by Mr William Walker, the proprietor. For understanding the nature of this competition, the following genealogical tree is necessary:—