

Pollock and Caldwell *pleaded*, in a reclaiming bill, That in the contract *empti venditi*, there is no bargain where the sale or price is *collata in arbitrium* of either of the parties; and that, as in this case, the purchasers were not to be bound, unless, upon inspection of the shipping-book, they should think proper to accept of the tobacco, so neither could the seller be bound to deliver.

*Answered* for Graham and Co.; The contract *empti venditi* may either be simple and absolute, or conditional, suspensive, or resolute, according to the agreement of parties. In the present case, the bargain was compleat in all its parts, under this condition only, that if, upon inspection of the shipping-book, the quality of the tobacco should not be found to answer expectation, the pursuers should be at liberty to declare off; and that contracts of sale may be made under such condition, is evident from many texts of the Roman law, particularly from *Inst. lib. 3. tit. 24. § 4.* and *L. 3. D. De contrah. empt.*

'THE LORDS adhered to the Lord Ordinary's interlocutor, and found expenses due.'

Act. Loshart.

Alt. Walter Stewart.

Clerk, Pringle.

*Fol. Dic. v. 4. p. 250. Fac. Col. No 103. p. 242.*

1766. January 4. HUNTER against CHALMERS and Co.

GEORGE CHALMERS and Co. extensive dealers in the corn-trade, employed Philip Scott, who kept a grocery-shop in Berwick, to purchase corn for them in Berwickshire and Northumberland. In these counties, the rents being paid in money, the farmers must have ready money for their corn, in order to pay their rent. Chalmers and Co. accordingly took always care to lodge cash in the hands of Philip Scott, to enable him to pay ready money for all the corn they commissioned him to purchase, for which he was to have two and half *per cent.* Business was thus carried on for several years till Philip Scott became bankrupt, indebted to the company, and indebted to several tenants in Berwickshire, from whom he purchased corn, without paying the price, somewhat above L. 1000. These tenants, in name of John Hunter, their assignee, insisted in a process against Chalmers and Co. for payment of this sum, upon the following medium, That Philip Scott was factor or agent for the defenders, who consequently are liable to pay the price of the corn purchased by Philip for their behoof.

It was admitted for the pursuer, that when a merchant here commissions wine from Bourdeaux, the factor there is understood to purchase the wine in his own name, because the vender knows nothing of the Scotch merchant, and would not trust him; for which reason, the Scotch merchant paying the price to his factor, is not liable to pay it a second time to the person who sold it to the factor. The present case is apposite. It was necessary that Scott should

In what cases is it understood that a factor employed to purchase goods can bind his constituent?

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be empowered to bind the company his constituents; for he, an unknown person, had no credit. Therefore, *in dubio*, it must be presumed, that Scott purchased in name of the company, not in his own name; not to mention, that it would have been folly in him to bind himself for the price without necessity.

On the other hand, it was urged, that in the present case it was a ready money commerce which required no trust; and, upon that plan, it was not necessary that Philip Scott should either bind himself or his constituents. He purchased from the farmers at a price prescribed by his constituents, and either did, or ought to have paid, ready money; and he was bound to deliver to his constituents the corn purchased upon his receiving the commission of two and a half *per cent*. To fortify this, it was observed, that in giving a commission to purchase goods, one especially that is to run on for years, is not rashly to be presumed, that the person commissioned would be trusted with powers to bind his constituents; because it is a most dangerous trust, such as no prudent man would give, if possible to be avoided. At that rate, the constituent may lie open for forty years to the price of all the goods purchased upon his account, though he has paid the money to his agent, or even though he has not received the goods.

Found no evidence in this case, that the defenders empowered Philip Scott to bind them for the price of the corns purchased by him; and upon that medium they were assolizied.

*Fol. Dic. v. 4. p. 250. Sel. Dec. No 236. p. 310.*

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Presumed delivery.—Symbolical delivery.

1785. January 26. JAMES HILL against GEORGE and JOHN BUCHANAN.

GEORGE and JOHN BUCHANAN having imported a cargo of tobacco, addressed the following letter, on 5th March 1783, to Wilson and Brown, merchants; ‘Gentlemen, We make you an offer of *thirty* hogsheads of tobacco, imported from New York in the Ruby, to be delivered to you or order, at Greenock, as it lies in the *King’s cellars*, and at the weight it passed at the King’s scales, one of which *thirty* hogsheads is still on board the ship, and shall be delivered to you when landed, at the price 23½d. Sterling per lb. you granting us bills for the same at six and seven months from this date. We are, &c.’

Of this offer Wilson and Brown notified their acceptance by a countermissive of the same date, thus; ‘Gentlemen, We are favoured with yours, of this date, making us an offer of your *thirty* hogsheads of tobacco, *ex Ruby*, at 23½d. per lb. for our bills at six months from this date, for the one half of the amount, and our bills for the other half at seven months from this date. We accept of your offer; and we are,’ &c. On the same day, samples of the 29 hogsheads were delivered.

Here it is to be remarked, that by “King’s cellars,” are not meant particular repositories appropriated for the service of the revenue, but all places in