

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

No 43. bills of the loading, the consignees found to have a special property therein, or right preferable to the diligence of other creditors, to the extent of the payments they had advanced, and the obligations they had come under for the consigner, at the date of the competing diligence.— Such right of special property extends not to the ship or the overplus of the ship's provisions and stores; and an arrestment used by the owner's creditor in the hands of the shipmaster, found sufficient to attach these subjects.— But the said arrestment found to be inept and insufficient to attach the freight both of the goods consigned, the property of the arrestor's debtor, and of separate goods on board, the property of other persons.

' That whatever tobaccos he shall ship for Clyde, shall be consigned by him to them for sale, to be disposed of by them to the best advantage; the net proceeds to be applied to the credit of the said Archibald Dunlop, his account, for the goods to be sent out to him.' Besides tobacco, the contract mentioned other goods to be assigned to them by Dunlop.

Dunlop having gone to Virginia, purchased the ship Betsy on his own account; and in implement of the contract shipped on board of her 288 hogsheads of tobacco; which, being short of a full loading, he procured freight for 140 hogsheads more, belonging to other merchants; so that the total amount was 428; as is usual also, when a cargo of tobacco is sent, he put on board 7960 staves; one half of which were his own property, the other being allowed to Conkie the shipmaster as his perquisite.

The bills of loading for the 288 hogsheads of tobacco and 7960 staves, as well as that for the 140 hogsheads sent on freight, were transmitted by Dunlop to Hastie and Jamieson as his consignees both of ship and cargo. The consignment was acknowledged in a letter from Dunlop to them, dated 25th May 1765.

The ship arrived in Clyde on the 25th of August 1765. In the morning of the 26th, Hastie, as consignee, went on board, and took possession of the vessel; and a few hours thereafter, Arthur, a creditor of Dunlop's, used arrestments in the hands of Conkie the master; and this diligence being loosed upon Hastie and Jamieson's finding surety to make the subject furthcoming, and Hastie and Jamieson restored to possession, Arthur arrested again in their hands.

A competition having ensued which of the parties had the preferable right to the subject arrested, Hastie and Jamieson, as consignees, for their own behoof, or Arthur in right of his arrestments, it was, by an interlocutor of the Court, dated 17th February 1768, determined in favour of Arthur upon his arrestment, both as to ship and cargo. That interlocutor being adhered to by subsequent judgments, Hastie and Jamieson appealed to the house of Lords; and upon the 10th of April 1770, the following judgment was given: "Ordered and adjudged, that the interlocutors of the 17th of February, 2d and 19th of July, and 29th of November 1768, and 2d March 1770," so far as they relate to the cargo, be reversed; and it is hereby declared, that the appellants have a special property therein, preferable to the respondent's arrestments. And it is further ordered and adjudged, that the said interlocutors, so far as they relate to the ship, and all the other interlocutors complained of, be affirmed."

The cause having thus returned with a decisive judgment upon two points, viz. That Hastie and Jamieson had a special property in the cargo, but that Arthur had duly attached the ship, it came to be a question, 1st, Over what particular subjects the special property extended? 2d, To what effect and extent it was to be maintained?

Upon the first point, Arthur, the arresting creditor, *pleaded*,

That, in virtue of his diligence, he was entitled, *1mo*, To the freight of the whole tobacco on board, as well of the 288 hogsheads, the property of Dunlop, as of the 140, the property of other persons; *2do*, To the lumber, ship's furniture, and whatever remained over of the ship's provisions and stores.

In support of this claim it was *maintained*, That, in the case of consignments, where a special property was created, the general rule of common law had been departed from; and it was held, that delivery of a bill of lading was a symbolical delivery of the cargo; and as a consequent thereto, that the terms of the bill necessarily determined the extent of the special property so vested in the consignee. When these principles were applied to the present case, it was clear, that as the freight neither was nor could be comprehended in the bill of lading, it did not, of course, fall under the right of special property thereby created, and was therefore capable of being attached by the diligence of creditors. The freight was perfectly distinct from the cargo; and in place of being considered as a concomitant of the cargo, it was truly in the same situation with the ship. The bills of lading always bore, that the cargo was to be delivered to certain persons, they paying freight for the same; such were the terms of the bill in the present case; so that the freight came to be considered as a necessary deduction from the consignment, and no part whatever of the special property.

The arrestment of this subject in the hands of the master was perfectly legal and competent. Freight was considered as preferable to any other debt to which the goods were liable; so that the shipmaster, who had the custody, could not be compelled to deliver the cargo till he had received either payment or security for the freight. Fran. Rouers, de Navibus et Naut. p. 87, 90. December 1683, Muir against Lord Lyon, No 64. p. 6260. Freight therefore being a debt, might, like any other debt, be attached by the arrestment of the creditor of the owner of the ship; and though an arrestment might be ineffectual where the master happened at the same time to be owner, yet when he was a different person, the mode of diligence was unexceptionable. Though the master was not properly debtor for the freight, he had, nevertheless, a right of recovering it for the owner; and as he had, besides, a hypothec upon the cargo to the extent of the freight, preferable to all other debts, it might properly be considered as lodged in his hands for behoof of the owner, and, as such, attachable by his creditors.

The arrester's claim for the lumber, ship's furniture, and provisions, was equally well founded. These fell to be considered as parts of the ship itself; and must, of course, be held as in the same situation. None of these articles were mentioned in the bill of lading, which simply bore the consignment of the cargo, viz. the tobacco; so that whatever was exclusive thereof must be held the absolute property of the consigner, open to the legal diligence of his creditors.

Hastie and Jamieson, the consignees, *pleaded*,

No. 43.

The right of special property, which consignees had in goods consigned to them by their foreign correspondents, in satisfaction and security of debts and engagements, though it might, in some particulars, be an exception from general rules, was not to the principles of the law of this or any other commercial country. The arrester's argument, that the bill of lading, in cases of this kind, was the symbolical tradition of the subject consigned, and measure of the right, had no foundation. It was the consignment itself which vested the special property in the consignee; the bill of lading, which was the act and deed of the shipmaster, was no doubt legal evidence of the consignee's right of special property in the particulars therein contained; but as many cases occurred in daily practice, where consignments were made without any bill of lading, it could not be essential to the constitution of such an assignment, far less to ascertain and circumscribe the measure of the right. The special property also, and preferable right in the cargo, had, in this case, been declared by the House of Lords, without any mention being made, or notice taken, of the bill of lading; so that it could not be considered as having had any influence upon the determination of the question.

The alleged connection between the ship and freight, and the conclusion drawn therefrom, that the freight should pass as a concomitant annexed to the ship, was a groundless conceit, neither founded on mercantile law and practice, nor supported by any authority. The admission, that the cargo was hypothecated for the freight, seemed to establish its connection with the cargo, and that the person to whom the cargo was consigned should be entitled to receive the freight of such goods as were liable to pay it. At all events, it was clear that the freight was not an accessory to the ship, but that the ship, the cargo, and the freight, were separate independent subjects; and hence it was a rule, when goods were thrown overboard to prevent shipwreck, or in redemption from an enemy, that the freight contributed its proportion of salvage *pro rata* with the ship and cargo.

Independent of these objections, the arrestment of the freight in the hands of Conkie was totally inept, and incapable of creating any preference. It was an established principle in law, that arrestment could go no farther than to attach the effects which were at the time in the hands of those against whom the diligence was used. Though the shipmaster, therefore, was held as custodian of the cargo, and as having authority to receive payment of the freight, yet as *de facto* he had not at the time of the arrestment received such payment, there was clearly not such an existence of debts and proper parties, as to render the diligence used of any effect. In order, properly, to attach any part of the freight, arrestment should have been used in the hands of those who were debtors therein, viz. the proprietors of the tobacco. No diligence of that kind had been used even as to the 140 hogsheads which belonged to different persons; and as to the 288, Dunlop's own property, on board his own ship, there was no freight in existence which could be attached at all. If these hogsheads, indeed, were

held upon the consignment to be the property of the consignees, they, and not Conkie, were the proper debtors in the freight; so that upon that view of the case, the arrestment in his hands was equally ineffectual and inept.

The arrester's claim for the lumber, ship's stores, and provisions, was totally unfounded. The word cargo, in its comprehensive sense, included whatever goods were put on board the ship, other than the accoutrements of the vessel itself, which alone were proper accessions to the ship. Though the ship's provisions and stores were primarily destined to the maintenance of the crew during the voyage; yet, whatever remained after her arrival in port, was a part of the cargo, which by universal practice, where there was a general consignment, were disposed of as such, and so accounted for.

The discussion as to the second point, the extent to which the consignees were entitled to plead their right of special property, as finally determined in their favour by the House of Lords, resolved chiefly into an adjustment of accounts betwixt them and Dunlop their debtor; into an investigation as to what debts were due, and obligations come under by them prior to Arthur's arrestment in Conkie's hands; and what was the amount of after consignments made by Dunlop to them, and whether these were to be taken into account, and imputed in extinction of the original claim.

Before advising, Arthur, the arrester, gave up his claim upon the staves, these being specially consigned by the bill of loading.

THE COURT pronounced the following judgment: "Find, that the arrestment in Conkie the shipmaster's hands, is effectual, in so far as respects the excrescence of the ship's provisions, and prefer Robert Arthur thereon; but in so far as respects the freight of the cargo, find, that the said arrestment was inept, and that Robert Arthur could draw nothing in virtue thereof; find, That Messrs Hastie and Jamieson, in virtue of their right of special property, are entitled to be preferred upon the cargo of the ship Betsy, in so far as it was the property of Archibald Dunlop; not only for payment of the sums they had advanced, but also for relief of the engagements they had come under for Archibald Dunlop, before the date of the arrestment in Conkie's hands. But before answer to the question, how far they were obliged to impute the subsequent consignment in extinction of said claims? remit to the Lord Ordinary to ordain them to give in a state of the account betwixt them and Archibald Dunlop, at the date of the arrestment in Conkie's hands, and of their after transactions with Archibald Dunlop."

Arthur gave in a reclaiming petition against this interplecutor, wherein he maintained the following propositions:

imo, That the right of special property, vested in consignees, was constituted by the bill of loading alone. A merchant at home, holding a bill of loading, readily advanced the sums drawn for by his correspondent; he considered it as a symbolical delivery of the cargo itself; as all the possession that could be obtained till the goods came home; as affording a lien upon these goods prefer-

No 43.

able to the other creditors of the consigner; and so much was it considered as representing the cargo, that it might be indorsed like a bill of exchange, and make an effectual transference of the property to the purchaser. No merchant would advance money upon the faith of a consignment, till he had the bill of loading in his possession which fixed the right. It could not properly be otherwise. If the merchant abroad, after consigning to one correspondent by bill of loading, had it in his power by letters to alter the consignment, the merchant at home could put no faith in the bill of loading; nor could he indorse it away or advance money upon so precarious a security. That the bill of loading was, in the present case, the foundation of this special right, was confirmed by the argument maintained, and judgment pronounced, in the House of Lords. The consignees had there argued, "That the bill of loading being made to them or their assigns, they could instantly have indorsed or assigned the same; that they had the legal possession by receipt of the bill of loading; that bills of loading are considered as such absolute assignments of the cargo, that, before the goods come to hand, they are frequently indorsed, which is considered as an effectual transfer of the property." Upon this reasoning the judgment of the House of Lords proceeded; and as it affirmed the interlocutor of the Court, in so far as related to the ship, and reversed only so far as related to the cargo, it demonstrated the right of the consignees to be founded on the bill of loading alone. This doctrine was in every respect consonant to the established notions of trade; as it was the law of commercial nations, that the person to whom the goods were consigned by the bill of loading had the property, and was the only one entitled to bring action against the master for delivery, Lord Raymond, Rep. 271. *Evans v. Martlet*.

2do, The freight of the cargo was not conveyed to Hastie and Jamieson; for the bill of loading, instead of making it a part of the consignment, expressly excluded and burdened the consignees with the condition of paying it. The argument, that the bill of loading was merely the act and deed of the shipmaster, and that 'he or they paying freight for the said goods,' were mere words of form, was not sufficient to destroy the import of what was thereby expressly declared, or to do away the distinction established between the cargo and the freight. Many deeds of the highest importance were printed; and in the present bill there were various parts inserted in writing, in Dunlop's own hand, which plainly distinguished the freight from the cargo, and that the former was considered as a necessary deduction even from his own goods.

3tio, By the practice and understanding of merchants, freight was not held to be an accessory to the cargo, but a burden merely, and a necessary concomitant with the ship. It was not due to the owner of the cargo, but by him to the owner of the ship; it was the hire of the vessel, without which the cargo could not be transported; and for that reason it was that the maritime laws of all nations had given a right of hypothec to the master of the vessel for the

freight. As by the decree of the House of Lords, therefore, Arthur had already a right to the ship, it followed that he had an equal right to the freight; which, though a burden upon the cargo, was truly annexed to the ship.

4^{to}, The petitioner's arrestment of the ship was not inept; but, by attaching the whole goods on board the vessel not consigned by the bills of lading, had legally affected the freight. By the maritime law, the master of the ship could not be compelled to deliver the cargo till he had received either payment of, or security for the freight. He was responsible to his constituents the owners, and was truly debtor to them for the amount. Till the freight then was paid, the cargo, to the extent thereof, was the *property* of the owners, the shipmaster the *custodier*, and in that state attachable by the owners' creditors. It was impossible to arrest the freight in the hands of those to whom the cargo was to be delivered. Till once they received the goods there was no debt in existence; and as freight was always paid, unless it could be arrested in the hands of the master before delivery, where the master was different from the owner, it could never by the creditors of the latter be attached at all.

The objection of the arrestments in the master's hands being inept was equally erroneous. The master, by his obligation in the bill of lading, was not only responsible, but absolutely debtor to the owners for the freight; and the petitioner had arrested not only the ship consigned, and the provisions aboard, but the whole cargo to the extent of the freight. Though the master was held to be only a trustee, yet arrestments had, in cases of a similar nature, been sustained, 13th February 1740, *Innes contra Creditors of Gordon*, No 51. p. 715. Arrestments also had been sustained so as to attach the stock of a company which was either in the hands of their supercargoes at sea, or of their factors abroad, 19th November 1742, *Nielson contra Rae*, No 52. p. 716. It was no objection to the arrestments that Dunlop was owner both of vessel and cargo. In mercantile practice, it was an usual custom for merchants, though proprietors both of vessel and cargo, to keep the accounts of each separate and distinct; and as the freight was, upon all occasions, a certain burden upon the cargo, it was always necessarily held to be separate from the consignment, whether the owner of the vessel and of the goods were the same or different. It was also erroneous to say that Dunlop was both debtor and creditor to himself, as the consignees had truly the special property in the consignment, burdened, however, with the necessary condition of paying to the master his freight.

THE LORDS, upon the 22d December 1770, refused the petition.

Lord Ordinary, *Pitfour*.
Clerk, *Gibson*.

For Arthur, *Adv. Montgomery, Rae, Gullen*.
For Hastie and Jamieson, *A. Lockhart*.

Fac. Col. No 57. p. 165.