On the 26th February 1771, "The Lords dismissed the process; assoilyied, and found expense of extract due."

Act. R. M'Queen. *Alt.* D. Grahame.

Reporter, Kennet.

1771. *January* 25, and *March* 7. WILLIAM OGILVY *against* DAVID ROSS, &c.

PERICULUM.

A at London sent a cask to B at Edinburgh, addressed "to B. Esq., by the ship Adolphus, Ross, master." The master, upon his arrival at Leith, lodged the cask with a warehouseman, who, being unable to discover B by the above address, kept the goods till they were spoiled. No bill of lading or receipt was transmitted by A to B, nor did he send notice that the goods were to be shipped. In an action against the master and the warehouseman; found that neither of them was liable for the loss.

[*Dictionary,* 10,099.]

GARDENSTON. This is a question of very great importance in a very small cause. I distinguish the case of the shipmaster from that of the warehouse-keeper. I am clear that the foreign merchant ought to give notice to the merchant here, that he may be on the watch to receive the goods on their arrival. The shipmaster is bound to transport the goods, and to deliver them when called for. It is not practicable for him to seek out the persons interested in the goods, nor is he bound so to do. All that he can do, is to lodge them in some cellar till they be called for. It is another thing, if it appear, from the proof, that the master or his mate denied that they had the goods, or refused to deliver them: in such case damage would be due. But here it is probable that no demand was made for the goods at the arrival of the ship. As to the owner of the warehouse, a different duty is incumbent upon him: if we suppose that he is not bound to make inquiry about the owner of the goods, the goods would remain undiscovered.

AUCHINLECK. The shipmaster was not bound to send about inquiring where Ogilvy lived. There was no sufficient inquiry made at the shipmaster by Ogilvy; no bill of loading was produced to him, nor was there any evidence of the authority by which he was questioned. As to the owner of the warehouse, the case is more difficult. If Ogilvy had lived at a great distance, he was not bound to inquire after him, nor did he know that there was *periculum in mora;* for there was no mention made of apples on the direction of the cask.

PITFOUR. I think, for the reasons already given, that the warehouse-keeper is liable. If those people do not know their duty, it is high time for us to teach it them.

HAILES. Concur in the opinion given as to the shipmaster. I do not

see that he could do more, or was bound to do more, than he did. As to the warehouseman, I understand that, in practice, all that is understood as required of him, is simple custody, for which he receives a small cellar-rent. Most people who have had occasion to get goods from London, know that they sometimes remain long in the custody of warehousemen without any inquiry made: those warehousemen are sometimes blamed for putting goods into their cellars too precipitately; but I never heard that they were liable in any diligence beyond that of custody.

Coalston. The whole confusion arises from the original neglect in not taking a bill of loading or receipt. I would assoilyie the shipmaster. I doubt as to finding the warehouseman liable: he probably did not know Mr Ogilvy: why should he have advertised goods, which were by that time, perhaps, not worth the expense of advertising.

Justice-clerk. I think that the apples were demanded at the time of the shipmaster's arrival; but still I think he is not liable in damages. He did not fail in his duty, nor did he refuse to deliver the cask to any person authorised to receive it. But the warehouse-keeper is liable, for he is the servant of the public, and has been careless: he is guilty of a *lata culpa* as *negotiorum gestor*.

President. I would assoilyie the shipmaster, and find the warehouse-keeper liable: he is precisely a *negotiorum gestor*. By the smell, he must have known that apples, a perishable commodity, were contained in the cask. Could he show that he had taken any measures for discovering Ogilvy, my opinion might be different; but nothing of this nature occurs here.

On the 25th January 1771, the Lords "found the warehouse-keeper liable, but assoilyied the shipmaster, and found no expenses due but expenses of extract;" altering Lord Elliock's interlocutor, (who had found shipmaster liable, and expenses due.) *Vide* 7th March 1771.

Act. P. Murray. *Alt.* G. Buchan, Hepburn.

Diss. as to the warehouseman, Coalston, Hailes.

A petition was presented, on advising which, with answers, the following opinions were delivered:—

March 7.—Coalston. The pursuer supposes that the defender was a *negotiorum gestor*, or one who had the custody of waif goods. He is nothing else but a depositary, bound to hold the goods till they are called for, and then properly proved. He is just in the same situation as the shipmaster, before the goods are deposited with the warehouseman. Nothing is more necessary than this idea of the nature and extent of his duty in the ordinary course of commerce. Unless where parties are supinely negligent, the bill of loading will prevent any mistake or difficulty in ascertaining property. If an intimation be required from the warehouseman, *Where* is he to intimate, *how*, and at *whose* expense?

Pitfour. It was vain for the warehouseman to keep the goods which he saw were perishing: he ought to have advertised them. The apples were lost by his supine neglect, and he must be answerable.

JUSTICE-CLERK. The warehouseman was a public custodiar, who receives a hire, and is bound *præstare diligentiam*.

AFFLECK. I was formerly of the same opinion; but Lord Coalston's argument now seems unanswerable. Why should the custodiar take the burden of seeking out the person whose goods are put into his hands?

BARJARG. It is the duty of the custodiar *præstare summam diligentiam;* but then it is the diligence of custody. If he keeps books whereby every one may discover his own, nothing more is required.

PRESIDENT. I was for the interlocutor; but now I see cause to alter.

ELLIOCK. I pronounced the original interlocutor; but now I am convinced that it was erroneous.

On the 7th March 1771, "The Lords assoilyied;" altering the interlocutor of the Inner House, and that of Lord Elliock.

Act. P. Murray. *Alt*. J. Boswell.

Diss. Justice-Clerk, Pitfour. Kaimes did not vote.

1771. *January* 25. ALEXANDER GREIG *against* WILLIAM GREEN.

PROMISSORY-NOTE.

Action of Recourse not competent against the indorser of a Promissory-Note.

[*Fac. Coll. V.* 209; *Dict.* 12,259.]

GARDENSTON. The Court has long ago got over what I considered the great difficulty, the finding promissory-notes valid, though informal; and yet it has persisted uniformly in giving them no farther privileges.

MONBODDO. A great lawyer in a neighbouring country, (Lord Mansfield,) observes, that the practice of merchants may become part of the common law. I see no reason for stopping. Since we have gone so far already in granting privileges to promissory-notes, I cannot draw the line here.

AUCHINLECK. Merchants found it convenient to introduce promissory-notes: one reason was, because many of their creditors could not write, and consequently could not draw bills; another, that promissory-notes are made to bear interest, which bills cannot regularly do. Promissory-notes are found valid, that men may not be suffered to counteract their own obligations; but it would be going much further to give them extraordinary privileges: This would be not only creating obligations contrary to decisions, but also creating obligations in which the indorser did not consider himself as originally bound.

ELLIOCK. I think it is not in the power of the Court to communicate the privileges of bills to promissory-notes.

JUSTICE-CLERK. There is no higher privilege belonging to bills of exchange