

1771. *December 10.*WILLIAM and HENRY KNOX and Co. Merchants in Dunbar, *against* WILLIAM LAW, Esq. Sheriff-depute of Haddington, and Others.

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The mode of striking the Sheriff-fuars of the county of Haddington. A reduction of them as erroneous, and as not in terms of the act of sederunt 24th December 1723, dismissed.

THE act of sederunt 24th of December 1723, declaring the manner of striking Sheriff's fiars, never had been in observance in the county of Haddington. Prior to Mr Law's appointment, different modes of fixing the fiar-prices had been in use; but, ever since that period, they had been ascertained in the following manner.

' In place of calling a jury, the Sheriff had been in use annually, in the end of February or beginning of March, to summons before himself between sixty and eighty buyers and sellers of all the different species of grain of the preceding crop, from the several quarters of the country; these he examines upon oath as to the different prices at which they have bought and sold, and from their evidence strikes the fiars in the following manner: He collects the total quantity proved of each species of grain and the price; from thence he finds the medium price of one boll; then he collects the total quantity of what is sold above the general medium, and finds the medium of that: He collects, in the next place, all that is sold below the general medium, and finds the medium thereof; to each of these mediums he adds two and a half *per cent.* The medium of what is sold above the general medium, with the aforesaid addition, constitutes the first fiars: The general medium, with the same addition, constitutes the second fiars: And the medium of what is sold below the general medium, with the like addition, constitutes the third fiars. The reason of the addition is, that above four-fifths of the grain of East Lothian, sold by the fiars, are sold by what he considers to be equal to two and a half *per cent.*; and that the greater quantity of the victual proved has been sold for ready money; and for what has not, a proportional allowance has been made. And it will be observed, that not one boll, which has not been sold and delivered within the county, is admitted into the *data* for ascertaining the fiars.'

The pursuers made purchases of grain to be delivered at the fiar-prices; when these were struck for crop 1769, they were dissatisfied with them, and brought an action of reduction, calling the Sheriff of the county, the Sheriff-clerk, Sir John Warrender, and Mr Hay of Drumelzier, from whom they had purchased; and concluded, that the sentence or decree of the Sheriff, whereby the fiars of barley had been struck for crop 1769, should be reduced and set aside, in so far as regarded their interest, having been fixed in the manner above mentioned, without observing the regulations of the act of sederunt; and, as the prices had thereby been raised so much above what they ought to have been, the barley being stated at 14s 7d. *per* boll, it should be declared, that the just price at which it ought to have been struck was 12s. *per* boll, and that their agreement should be regulated accordingly.

In support of their action, the pursuers *pleaded* ;

1mo, As the act of sederunt 1723 was a subsisting law, and was general, and extended to every county in Scotland, the Sheriff of Haddington was not entitled to ascertain the fiar-prices of grain in any other way than according to the regulations it prescribed. The usage that had been followed in this county was nothing to the purpose ; for if it had not, it ought to have been observed. No such period had elapsed as to render the enactment in disuetude ; and, as it was a positive law, meant for and attended with much benefit to the country, and had on that account been in very general observance in almost every county in Scotland, the disregard paid to it in this particular county, and introducing in its stead a mode of procedure by which the fiars came to depend upon the mere will and pleasure of one person, was an arbitrary act, which could not have the effect of legally fixing what ought to have been done in the most unexceptionable form.

2do, There were other particular exceptions to the mode followed by the Sheriff in fixing the prices not only of all but of the different kinds and qualities of grain. The distribution of each species of grain into three different classes of 1st, 2d, and 3d, was not only unnecessary but unequal. No grain of any kind was in use to be purchased at the rate either of the 2d or 3d fiars ; so that these were truly of no use, and had the effect only of perplexing a very plain matter by calculations upon *data* neither solid nor applicable. The only effect this distribution had, was to raise the first fiars higher than they ought to be. The purpose of the institution was to ascertain the medium selling prices ; the equitable rule to obtain this was to take the medium price of the whole quantity bought and sold ; but, instead of that, there was another medium taken of all that was above the former medium or the true price ; which, besides the absurdity of fixing more than one medium for the same thing, screwed up the first fiars to above what was really the just selling price.

The addition also of two and a half *per cent.* to each class was not founded on justice. It raised the price just so much beyond the agreement of parties, as it obliged the purchaser to pay the highest legal interest during the time that, by the bargain, the price was not payable. Neither was it a fact, that all the grain in the county was sold at six months credit ; so that the purchaser, whose price was payable at a certain period, was made to pay the same interest as those who were to pay at a more distant one : and if any part of the price was payable within the six months, he was made to pay interest even for that part also.

The evidence adduced, upon which the Sheriff made his calculation, was not so general and comprehensive as to give a true and just medium. The witnesses, whose depositions were taken, were mostly from the neighbourhood of Haddington ; who, from time to time, sold a few bolls of the best quality for ready money, and at a higher rate than the current prices of the county. By making a distinction of what sold above the general medium, and taking the

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medium of that as the first fiars, these necessarily came to depend upon and be fixed by the smaller quantity sold at the highest prices, instead of being regulated by the larger quantity sold at a lower price, more correspondent, however, to what was the true medium or current price.

3^{tio}, The defenders objection, that as the pursuers had made their bargains with a reference to these fiars, they were not now at liberty to draw back, supposing them to be even erroneous, had no foundation either in law or justice. In contracts of this kind, where a reference was made, it must be supposed to be implied that the fiars were to be struck in a regular and legal manner. The pursuers had shewn that the fiars had not been struck in a legal manner; they farther undertook to prove, that they were *de facto* much higher than the real medium of current prices. They were indeed in the same situation as if no fiars had been struck at all; in which event, in order to extricate the depending bargains, a proof of the true and just medium prices would have been allowed.

The defenders *answered*;

1^{mo}, The pursuers had no legal title to challenge the mode of striking the fiars either in general or for this particular year. The practice of striking fiars was for a public purpose, and had, on many occasions, been adopted by the courts of law as a rule of the presumptive values of grain; but the pursuers were under no obligation to contract for or buy grain upon the faith of these; and as the injury they complained of was of their own creating, and this injury was all the interest they pretended to qualify, it was contrary to every principle of law that they should, on that ground, have it in their power to controvert the acts of a public officer, and bring his conduct under the cognisance of a court of law.

If the pursuers could shew that the Sheriff had been guilty of injustice, or had fallen into mistakes *in calculo* in striking the fiars upon his own plan, there might have been some reason for listening to them; but, as this was not the case, and the complaint was levelled solely against the plan itself, they were not in good faith, and were grasping at an undue advantage in the present challenge. The defenders had contracted for the year 1769, upon the faith and belief that the same rule would be followed for that crop that had uniformly been followed for several years past. The pursuers had no reason but to expect the same. The former method neither was nor could be a secret, so that when both parties made their agreement, with an express reference to an expected and indeed certain event, it was the height of injustice for one party either to draw back, or to contend, that the fiars legally ascertained should be overturned and struck of new, in a different form, for the professed purpose of lowering the prices to their benefit.

2^{do}, It did not appear that the act of sederunt 1723 imposed any positive injunction upon the Sheriff to strike the fiars in the mode therein recommended. The original purpose of these fiars was to ascertain the Crown-rents: Anciently

they were struck by the Lords of Exchequer, upon information from the Sheriffs of the several counties; and at length this operation was devolved upon the Sheriffs themselves. When the fiars therefore of a county had been struck by the proper officer, in a fair and accurate manner, it did not occur that the Court had power to reduce or rectify them; merely because, in discharging that piece of official duty, that officer had followed his own judgment in place of the act of sederunt. The power of fixing the fiars being unquestionably vested in the Sheriff before the act, that enactment came with propriety to be considered merely as an advice and suggestion with regard to what occurred as expedient in the matter: But if, upon mature consideration and experience, it was found that the rules of that act, in place of aiding the fair and just ascertainment of fiars, were attended with contrary effects; it would be most extraordinary if the Sheriffs of Scotland, acting in their official duty, and to the best of their judgment, were for ever to be tied down to follow an erroneous plan, for no better reason but that this Court had once thought it a right one. The act of sederunt, accordingly, never had been observed in this county; and it had been found by experience, that the mode followed was much better calculated for ascertaining the truth, the prime object for which fiars were struck.

3tio, The particular objection stated to the defender's plan of striking the fiars was unfounded. The intention of striking fiars being to ascertain the just and real current prices of grain, and as there were three different qualities of grain in the county, there must of course be three different rates of fiars, corresponding to what was known and acknowledged to be the fact. The allegation, that three different *media* of the same kind was absurd; was readily conceded; but the fallacy of the proposition consisted in this, that there was not one, but three different *qualities* of grain in this county; and it would be as absurd to make one medium of three different things, as to make three different *media* of one thing. As it was necessary, therefore, to classify the grain, it did not occur upon what principles the respective fiars could be ascertained with precision in any other mode than what was followed, unless a proof should be brought of the whole grain bought and sold within the county; which, from the extent to which it would go, would render the matter inextricable. As to the allegation of the highest fiars being struck upon the evidence of a few witnesses, and as to a small quantity, the fact was the reverse; and, in this particular year, the fiars had been struck upon evidence of sales to the amount of 4000 bolls, 1500 of which had been sold above the general medium of the whole. The addition of two and a half per cent. to the different *media* was necessary; the absolute true price was the rule; and it was obvious that this was no more than the precise equivalent for six months credit.

THE LORD ORDINARY'S interlocutor was as follows: ' Having considered the mutual memorials, and the proof upon which the Sheriff of East Lothian proceeded in striking the fiars of that county, and the rules by which he came to strike the same, finds, That as the fiars of East Lothain have for several years

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been considered as more accurate than those of any other county in Scotland, and, upon that account, many bargains in all parts of the country have been, and are made, on a reference to these fiars; and particularly the pursuers, in this cause, made their bargains upon these fiars; and that it appears from the proof and rules by which the Sheriff proceeded in fixing the fiars in question, which, it is not denied, has been the rule he has formerly observed, that his method is well calculated for fixing the price of victual with the greatest accuracy, and which justly has given his fiars so great authority throughout the country; and as the pursuer's intention, by this process, is no other but to take an improper advantage of the defenders, who sold their grain upon the faith of the regular and exact East Lothian fiars, by endeavouring to get the fiars which have been struck set aside, and so turn all loose, as the time is past of striking them of new; and if they could be yet struck, insisting for a method of proceeding, which, though laid down by the act of sederunt in the year 1723, was found by experience to be attended with so many difficulties that it has gone into desuetude; and which, were it to be followed out, would be clearly counteracting the faith of the contract between the pursuers and the defenders, and, at the same time, would affect numbers of contracts of victual through all parts of Scotland; and therefore finds the pursuers are barred, by the good faith of their own contract, from insisting in this process—repels the reasons of reduction; assoilzies the whole defenders; and decrees and finds expenses due.'

At advising a reclaiming petition and answers, the Judges were unanimously of opinion, That the pursuers were barred *personali exceptione* from insisting in this action; and that this was sufficient to decide the cause. They all, however, agreed, that the method of striking the fiars in East Lothian was by much the best. Doubts also were thrown out as to the power and authority of the act of sederunt as a general directory law; and, at any rate, as it never had been observed in this county, it could not be founded on as fixing the rule.

THE COURT adhered *simpliciter*; and, upon advising a reclaiming petition, &c. 10th December 1771, varied only so far as to liberate from all expenses but those of extract. See PERSONAL OBJECTION.

Lord Ordinary, *Auchinleck*.

For Knox, &c. *A. Lockhart, Ilay Campbell*.

For Law, &c. *Sol. H. Dundas, M^cQueen*.

Clerk, *Tait*.

R. H.

Fac. Col. No 119. p. 349.

See APPENDIX.