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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.

No 37.

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

which goods are kept under the joint custody of the owner and of the officers of the customs. In this case the tobacco was lodged in Messrs Buchanan's own cellars.

Eight hogsheads were actually delivered to the order of Wilson and Brown, and shipped on their account. But, on the day following, Wilson and Brown became bankrupts; and then gave up to Messrs Buchanan the bill of lading that they had got on shipping these hogsheads, upon which the shipmaster, to whom the bill was returned, granted a new one in favour of Messrs Buchanan. An irregularity, however, having been committed in re-shipping the hogsheads, they were a few days after re-landed by order of the Custom-house officers, and placed in their former situation.

A sequestration of Wilson and Brown's effects having been awarded, under which Mr Hill was appointed factor, he instituted an action against Messrs Buchanan, for enforcing delivery of the tobacco; when the question occurred, Whether in those circumstances the sale had been so far completed as to transfer the property of the whole, or of any part of it to Wilson and Brown?

Pleaded for the pursuer; The bargain of sale was undoubtedly perfected by exchange of the missives, l. 35. § 5. D. De contrah. empt. Voet, ad eund. tit. § 24.; Erskine, B. 3. Tit. 3. By the same means, the transference of property was effected, even prior to any delivery; agreeably to the maxim established in this matter by the law of England; Blacst. Comment. B. 2. C. 30.; Assignees of Satterthwaite *versus* Devonshire; Burrow's Rep. v. 7. p. 931. Lewsley and Company *versus* Cam and Company, December 1777. Here, however, delivery has not been wanting. That of *eight* hogsheads is not questioned; and with regard to the remainder, besides the delivery of samples, which may justly be viewed as symbolical of the whole cargo, there is an implied tradition in the circumstances of the case. When goods in the possession of a third party are sold, the seller thus transfers the right under which that possession is held, and, by constituting the third party custodier for the purchaser, virtually makes delivery of the goods, or transfers the custody of them to the latter himself. Delivery is likewise implied of things placed out of the reach of the parties, such as goods when at sea, 13th June 1764, Buchanan and Cochrane *contra* Swan, No 42. p. 14208. Now, in the present case, *twenty-one* hogsheads being lodged under the charge of the revenue-officers, were truly in the custody of a third party; and such too was the case of the hogshead remaining on board; or perhaps it may be considered as in a situation inaccessible to the parties. The property thus vested in the bankrupts, is now attachable by their creditors.

Answered; It is established, both in the Roman law and in ours, that though the bargain of sale be completed, yet no transference of property can follow without delivery, which in this case was not made; the giving of samples having been intended merely to make known the respective qualities of the different parcels. Even the eight hogsheads, on the bill of lading being returned

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to the shipmaster, were again placed in the possession of their owners, along with all the rest of the goods; that hogshead included which was not brought ashore till after the missives were exchanged. It was in Messrs Buchanan's own cellars that they were lodged; and the circumstance of the revenue-officers taking charge of them there, cannot be imagined to have placed them in the custody of a third party. There was then, in fact, no delivery; neither could it, with justice, have been required, since the cause contracted for, on the other hand, was precluded by the bankruptcy of the purchasers. Not only, indeed, the price could not be paid, but even the stipulation of previously granting bills was not complied with. Since, then, no delivery has intervened, nor any title been created for claiming it, the property in question still remains with the purchasers.

The cause was reported by the Lord Ordinary; when the Court seemed to approve of the defender's argument. At the same time, it was

Observed on the Bench; Even though delivery of moveables has been made in consequence of a sale, the seller, if by any lawful means the subjects sold have come again into his possession, is entitled to retain them until he is secured in the price. In heritage, if after the execution of a minute of sale, the purchaser shall become bankrupt, the seller is entitled to refuse implement on his part.

THE LORDS assoilzied Messrs Buchanan.

Reporter, *Lord Gardenston*. For the Factor, *Morthland*. Alt. *Wilson*. Clerk, *Home*.
S. *Fol. Dic. v. 4. p. 251. Fac. Col. No 196. p. 307.*

. This case was appealed.

THE HOUSE OF LORDS, 11th April 1786, "Ordered that the appeal be dismissed, and the interlocutors complained of be affirmed."

1786. February 7.

CHARLES SALTER *against* The FACTOR on the Sequestrated Estate of
KNOX and COMPANY.

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How far, by the measuring out of goods, without farther delivery, the property is transmitted?

ON 13th December 1785, Charles Salter paid to Knox and Company L. 63 Sterling, as the price of sixty bolls of malt, to be afterwards delivered.

On 2d February following, Knox and Company gave notice to Charles Salter, that the stipulated quantity of malt had been then measured and set apart for him.

A few days after, however, Knox and Company stopped payment. The factor on their sequestrated estate took into his possession the whole malt found in their warehouses; and Charles Salter petitioned the Court of Session, that