

1801. *July 3.*

ROBERTSONS and AITKEN *against* JOHN MORE, Trustee on the Sequestrated Estate of SINCLAIR and WILLIAMSON.

SINCLAIR and Williamson, merchants in Leith, on the 25th February 1796, bought from Robertsons and Aitken, merchants in Eyemouth, $127\frac{1}{2}$ quarters of wheat. In April, Sinclair and Williamson freighted a small vessel, then lying at Eyemouth, for the purpose of bringing to Leith this and some other parcels of grain which belonged to them.

The wheat was shipped on the 6th of April, and on the same day, Robertson and Aitken transmitted an invoice and bill of lading to Sinclair and Williamson. The vessel arrived at Leith on the 8th of April.

On the 13th April, Sinclair and Williamson stopt payment; and on the same day, they wrote a circular letter to their creditors, notifying their inability to fulfil their engagements.

On the receipt of this letter, William Robertson, one of the partners of Robertson and Aitken, set out for Leith, and arrived there on the morning of the 15th April. It was admitted on all hands, that on his arrival, the whole cargo was still on board the vessel. It was also established, and indeed admitted, that on the same morning Robertson had an interview with Sinclair and Williamson; and it was but faintly denied, that at this interview Robertson declared to Sinclair and Williamson his intention to prevent the wheat from being delivered to them. It was further asserted by Robertson and Aitken, 1st, That Sinclair and Williamson, at this meeting with William Robertson, acquiesced in its being returned to Robertson and Aitken; and 2^{dly}, That on the same morning, and while the cargo was entire, William Robertson also intimated his intention of preventing the delivery of the wheat to the master of the vessel. These two assertions were not proved, and were denied on the other side.

Mr. Robertson, after taking these steps at Leith, came to Edinburgh, and agreed with a Mr. Murray to land and receive the wheat for behoof of Robertson and Aitken; but before Murray had got to Leith, Sinclair and Williamson had begun to unload the cargo, and Murray was prevented from interfering.

Upon this Robertson and Aitken instantly obtained a warrant from the Judge-Admiral, authorising them to unload such part of the wheat as should be found remaining in the vessel, and to lodge it in a granary for behoof of all concerned, which was done accordingly.

On the same day, (the 15th April,) Sinclair and Williamson's estate was sequestrated.

Soon after, Robertson and Aitken laid claim not only to the wheat landed by authority of the Judge-Admiral, but also to the price of that which had got into the possession of Sinclair and Williamson, on the

No. 3.

Putting goods sold on board a vessel, freighted by the purchaser, does not prevent stoppage *in transitu*. And in the particular circumstances of this case, the vender was found entitled to reclaim the goods, even after part of them had been removed from the vessel by the purchaser.

No. 3. ground that the whole had been stopped *in transitu*. The Judge-Admiral found, "That they had right to the wheat secured on board of ship, under the "warrant from this Court, and to no other wheat."

Robertson and Aitken having brought this judgment, in so far as it repelled their claim, under review by advocation, Mr. More, the trustee on the sequestrated estate of Sinclair and Williamson, in support of the judgment,

Pleaded: 1. Goods may be stopped as *in transitu*, where their delivery has been only *constructive*, as when they are sent by a common carrier. But when there has been actual delivery, the *transitus* is at an end, and there can be no stoppage. Now, in this case, as the wheat was put on board a vessel wholly freighted by Sinclair and Williamson, the delivery of the wheat must be held as completed at Eyemouth, equally as if it had been put into a granary at that place belonging to the purchasers.

2. But, even supposing the *transitus* not to have been at an end at Eyemouth, that part of the wheat of which Sinclair and Williamson got possession, was not effectually stopped at Leith. It is fixed law, that the stoppage of goods *in transitu*, operates a complete voidance of the contract of sale; 24th December 1796, Murray and Henderson against Kincaid, (not reported;) and it must be admitted, that by the shipment at Eyemouth, and the transmission of the bills of lading to Sinclair and Williamson, at least a *constructive*, if not an *actual*, delivery of the grain was made to them. The grain, therefore, was, to all intents, their property. Now, a private act of the sellers could not either reinvest them in the right of property, nor divest the purchasers. To accomplish this, there must be the warrant of a Judge. The intimation made to Sinclair and Williamson by the sellers on the morning of the 15th, that they meant to prevent delivery, could not therefore take the property out of Sinclair and Williamson, and before arrival of the warrant of the Judge-Admiral, authorising the sellers to take possession of the wheat for behoof of all concerned, that part of it, of which the proceeds are now claimed, was in the actual possession of Sinclair and Williamson.

Answered: 1. In order to prevent stoppage *in transitu*, the goods must either have come to the corporal touch of the vendees, or there must have been symbolical delivery. Here the delivery was merely *constructive*, and this, it is admitted, does not prevent the stoppage.

2. It is quite settled, that stoppage *in transitu*, even after constructive delivery, may be effected by the mere private countermand of the vender, without the aid of judicial authority. See opinion of the Judges in the English Cases; Atkins, vol. 1. p. 248, Snee against Prescott; Durnford, vol. 3, p. 469, Ellis against Hunt.

The Lord Ordinary "remitted the cause *simpliciter* to the Judge-Admiral."

But on advising a reclaiming petition for Robertson and Aitken, with answers, a great majority of the Court were of opinion, on the first point, that

the delivery at Eyemouth was *constructive* only, and consequently did not prevent stoppage *in transitu*.

No. 3.

On the second point, many of the Judges thought the intimation to the purchasers on the morning of the 15th April, sufficient to effect the stoppage; and nearly the whole Court were of opinion, that the shipmaster being the custodier for behoof of both parties, private intimation to him was effectual. And although there was no positive evidence of such intimation, yet the circumstances of the case created so strong a presumption that it had been actually given, that the Court seemed to hold the fact as established.

It was also observed from the Bench, That Sinclair and Williamson, by taking possession of the grain after their avowed insolvency, were guilty of a wrong, by which neither they nor their creditors ought to profit.

The Lords altered the judgment of the Judge-Admiral and Lord Ordinary, and found the sellers entitled to the proceeds of the grain which had got into the possession of Sinclair and Williamson.

Lord Ordinary, *Craig*.
Alt. *Geo. Jos. Bell*.

For Robertson and Aitken, *Baird*.

R. D.

Fac. Coll. No. 245. p. 549.

1807. *November 27.*

THOMAS BURNS, Petitioner.

THE superiority of certain lands in the parish of Linlithgow, belonging to the poor of that parish, were exposed to public sale, in the town-house of Linlithgow; by the minister and kirk-session.

The articles of roup bore, that the said superiority, which amounted to £175 of valued rent, "Should be exposed to public roup at the upset price of £180 Sterling, during the running of a half hour sand-glass, and the person offering the said sum, if no other shall appear, or the highest offerer at the outrunning of the glass, shall be preferred to the purchase. *2ds*, In the event of several offers being made, every offer after the first shall exceed the offer immediately preceding by twenty shillings at least, and become bound for the sums offered in terms, and upon the conditions of these articles."

The clerk of the roup having read the articles, stated, that although the articles bore that the subjects were to be exposed during the running of a half hour sand-glass, yet as a sand-glass was not at hand, and as a watch would measure the time with equal precision, the latter would be substituted, if the company had no objection. No objection was stated by those present, among whom was Mr. Alex. Monypenny, Writer to the Signet, and a watch was used.

The subjects were exposed, and the biddings continued till the price amounted to £250 Sterling. At this time Burns was the highest offerer; but about three or four minutes before the half hour expired, Mr. Alexander

No. 4.

Circumstances which constitute an irregularity in the manner of conducting a public roup.