1786. *August* 2. WILLIAM SIMPSON *against* The CREDITORS of DUNCANSON.

No 39.
What delivery requisite to transfer the property?

WILLIAM SIMPSON employed Duncanson to build a ship for him.

The materials composing the hull were to be provided by the builder; but the employer was to furnish the masts and other articles necessary for completing the vessel, and the price was to be paid in three different portions; one at laying the keel; another, when the vessel was built up and planked to the top of the gunwall; and the remaining sums when the ship was launched.

After receiving payment of the first portion, Duncanson, the shipbuilder, became insolvent. The factor on his sequestrated estate insisted, that the ship, in its then imperfect state, was to be viewed as still the property of the bankrupt, the proceeds of which were to be divided among his creditors in general. Mr Simpson, on the other hand, *contended*, That by the construction of the vessel in terms of the contract, it became his, *specificatione*; the builder being to be considered merely as a mandatary, who acquired, not to himself, but to his constituent.

The determination of the case was thought by the Judges to depend, not so much on general principles of law, as on the special terms of the agreement. By these the employer was to pay the price in different portions. Before payment, however, he had a right to see the work so far properly performed. Thus, as the builder proceeded, such an appropriation took place, as prevented his creditors from attaching the ship without refunding the sums advanced.

THE LORDS found the claim of Mr Simpson to be preferable to that of the creditors of the bankrupt.

Lord Reporter, *Monboddo*. Act. *Mat. Ross, Tait.* Alt. *Wight, Rolland.*

C. *Fol. Dic. v.* 4. *p.* 251. *Fac. Col. No* 290. *p.* 446.

1803. *November* 24. ARNOTS *against* BOYTER.

No 40.
A foreign merchant from whom goods are commissioned, is entitled to send the bill of loading to his own agent, and to demand security from the purchaser that the price will be paid when due.
On failing to grant such

MOENS and SON of Rotterdam, having shipped goods to the amount of L. 225 : 8 : 3, which had been commissioned (26th November 1802) by Stewart Boyter, merchant in Dundee, the invoice was sent to him; but they sent the bill of lading to Peter and George Arnots, their own agents in this country. Four months credit was to be allowed.

When the goods arrived, (14th December), Boyter had become embarrassed in his circumstances, although there was no insolvency. Accordingly, Messrs Arnot took a protest against him; and "declined delivering the said goods, 'unless Mr Boyter would give sufficient security for paying the value thereof, 'at the expiry of the credit specified in the invoice,' otherwise that he should be liable for any deficiency of price upon a sale of the goods. Upon the idea that he was not obliged by his bargain, and that it was not consistent with

No 40.
security, the purchaser must answer for the loss arising from non-implement.

mercantile practice to find security, he declined complying with their demand. The goods were lodged in a warehouse at Perth, and application was made by Messrs Arnot, to the Judge-Admiral, (January 27. 1803), praying that he should 'decern and ordain the said Stewart Boyter immediately to find security for the said price of L. 225: 8: 3, payable as aforesaid, (that is, at four months from the date of the invoice); as also to make payment of L. 8:4:2½, as the amount of freight, duty, and shore-dues, paid by them, conform to account thereof on the back of the bill of lading herewith produced, and all other expenses attending the said goods, or otherwise; and in case of his failing or delaying so to do, to grant warrant for selling by public roup the said goods, upon such articles and conditions as shall be approved of by your Lordships; and to report the sale thereof into Court, with an account of the charges attendant thereon; to appoint the free proceeds to be paid over to the petitioner, as agent aforesaid; to decern and ordain the said Stewart Boyter to make payment to the petitioner of whatever deficiency, if any, shall arise upon account of the price, and all charges, and the net procedure of said sale; and also to make payment to the petitioner of the expense of this application, and all consequences to follow hereupon.'

This petition was followed with answers and replies, and the Judge-Admiral decerned (25th February 1803) in terms of the prayer of the petition, and found expenses due.

A warrant was also obtained for selling the goods, upon which a loss arose of L. 90: 13: 2.

The Judge-Admiral adhered, (13th May 1803), by refusing a reclaiming petition.

A bill of advocation against this judgment was presented, and refused, (17th June 1803).

Boyter reclaimed; and,

Pleaded; By the terms of the bargain, no security was stipulated; the purchaser's credit was trusted for the price; and he was willing to proceed in fulfilling the contract on its original terms. If the purchaser had become actually bankrupt, the seller might have stopped the goods *in transitu*; and this is certainly the most unfavourable case for the purchaser in which the question can be considered. The seller might have held the goods against the creditors, and insisted on taking the full advantage which the disposal of them on his own account could give him, unless they found security for the price; but if the creditors did not choose to find security, or pay the price, he must content himself with taking the goods. The seller having exercised his right of stopping *in transitu*, having assumed the character of *proprietor* rather than trust to the dividend or the usual diligence as a creditor, cannot again assume the character of *creditor*, raise up the contract into full force, as if it had never been rescinded, and claim for a loss upon the sale, as for a balance of the price remaining unpaid. Although it may have been lawful to stop the goods *in tran-*

No 40. *situ*, it was not lawful for the seller also to insist upon security; and he cannot therefore have any claim for damages on account of the failure to give security. By stopping the goods *in transitu*, the contract is rendered null, consequently no action can possibly arise out of that contract which no longer subsists; Kincaid against Murray and Henderson, summer-session 1799*.

Answered; The foreign merchant, and his agent in this country, by offering to deliver the goods on security for the price, have fulfilled their part of the mutual engagements, and are entitled to indemnification by an *actio mandati contraria*. For upon just grounds of suspicion, factors are entitled to retain possession of goods belonging to their employer, not only in security of their engagements for the price of these particular goods, but even in security of any general balance of the price of goods formerly purchased; and even though it should be admitted that a factor, upon delivering the goods to a carrier or shipmaster, could not reclaim or stop them *in transitu*, upon a mere supposition of insolvency, this would not decide the present case, for there was here no stopping *in transitu*; the goods were never delivered, but sent by the foreign merchant to his own agent in this country, in whose possession they were to remain till the ultimate delivery should take place. When the commission was accepted, no security, it is true, was stipulated; but circumstances afterwards arose sufficient to destroy their confidence in his credit, and entitling them to make the finding security for payment a condition suspensive of delivery. This being the case, they had a right to send the goods to their own agent; and the result of the purchaser's failure in due implement of his contract, must be to subject him in the damages thence arising.

The Court, (24th November 1803), upon advising a petition with answers, adhered.

Lord Ordinary, *Dunsinnan*. Act. *Geo. Jos. Bell*. Agent, *Jo. Peat*.
Alt. *Forsyth*. Agent, *Jo. Maclashan*. Clerk, *Home*.

F. *Fac. Col. No* 123. *p*. 272.

* Not reported, see Appendix.

1803. *December* 8.

Hitchiner, Hunter & Company, *against* Stewart and Ninian.

No 41.
Sale of goods by a factor in his own name, and credit given to him in account with the purchaser, sustained against the constituent.

Hitchiner, Hunter & Company, gunpowder manufacturers at Stobbsmill, raised an action against Stewart and Ninian, merchants in Greenock, for payment of the price of a quantity of gunpowder. This gunpowder was sold to them by Messrs A. and J. Robertson, who, as the pursuers alleged, acted as their agents, and who sold it out of their magazine at Greenock.

Stewart and Ninian stated in defence, that they did not know that Hitchiner, Hunter and Company were the proprietors of this gunpowder, or that Robert-