No. 48. GEORGE DUNLOP and Co., Appellants.—*Spankie—Wood.*

EARL and COUNTESS of DALHOUSIE, Respondents.—*Lushington—Robertson.*

Landlord and Tenant—Sale.—Held (affirming the judgment of the Court of Session,) 1. That a bona fide purchaser from a tenant of part of his crop, which has been delivered and paid for, is liable in second payment to the landlord where the rent of that crop has not been paid; and, 2. That the purchaser is not protected, although the contract of sale be made by sample in public market.

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1ST DIVISION. Lord Corehouse.

THE respondents let the farm of Seggarsdean, in the county of Haddington, to Robert Amos, at a rent of L.400, payable in equal parts, on the 2d of February and 1st of August yearly. Amos died on the 21st of September, 1825. The rent for the crop of that year was payable on the 2d of February and 1st of August, 1826. On his death, the management of the farmwa s assumed by his son and heir, with the assistance of his widow. On the 30th of September, the son, Robert, went to the public market held upon that day at Haddington, and, along with James Amos, a relative, agreed to sell to the appellants, George Dunlop and Co., distillers at East Linton, sixty bolls of barley, of crop 1825, at the price of L.94, 10s., payable on delivery. The agreement was made with reference to a sample, the grain itself being at that time at Seggarsdean. It was alleged by the respondents, that all sales of grain in the Haddington market were made in bulk, and not by sample. Two days thereafter, the grain was carried by the son to the distillery of the appellants, where it was delivered, and the price paid to the widow. It was not alleged that in this matter the appellants acted otherways than in optima fide, and the case was judged of upon that footing. The respondents, on the 28th of October, (being after the delivery of the grain,) applied for and obtained a sequestration of the stock and cropping remaining on the farm, in security, and for payment of the rent for the crop of that year. The proceeds proved insufficient; and, in December thereafter, they raised an action before the Sheriff of the county against the appellants and James Amos, concluding for payment of L.94, 10s., as the value of the grain. The Sheriff pronounced this interlocutor:—'Finds the general right 'of hypothec, existing in favour of the petitioners (respon-'dents), not made special by sequestration, would not have ope-'rated as a legal bar to Robert Amos, tenant in the lands of

'Seggarsdean, if then in life, from selling by sample the sixty Dec. 7, 1830.
'bolls of barley mentioned in process, by bona fide sale in public
'market, and that such sale, implemented by delivery, made by
'an apparent heir, or by persons entitled to the office of execu-
'tor, and in possession and management of the farm, is equally
'good to a purchaser in open market: Finds, that the sale in
'question was made by the son of the deceased tenant in the
'farm, and the price received by the widow of the tenant who
'was in possession and management of the farm, against whom
'recourse is open; and that the defender, James Amos, had no
'interest whatever in the transaction, having only assisted the
'son of the deceased with his advice, and handed the price from
'the buyer to the seller: Finds the objection of constructive
'fraud has, in this case, no effect against a bona fide purchaser
'in public market, as the very existence of fairs and markets
'depends on the security of purchasers, who cannot possibly
'know the condition of every person they may happen to deal
'with there, nor know the nature of the title held by the repre-
'sentatives of a deceased tenant, who are in possession of his
'farm: Finds, that the transaction on the part of the purchaser
'was fair and open, and that no collusion whatever existed;
'and, therefore, assoilzies the defenders from this action, but
'finds no expenses due to either party.'

The respondents then brought an advocation, maintaining, 1st, That as the grain formed part of crop 1825, of which the rent had not been paid, and they had a hypothec over it for payment of the rent, they were entitled either to restitution of the grain, or to payment of its value. And, 2d, That although it was true that an agreement to sell the grain had been made in the public market, and their right might have been defeated if the contract had there been completed by delivery of the grain, yet as it was not so, and the transaction was concluded out of the public market, the appellants could not found any effectual plea in defence on the ground of the agreement made in the market.

To this it was answered, 1st, That although originally landlords had a right of property in the crop growing on their farms, yet this right had ceased, and tenants had, under the statute 1449, a real right in their farms, and consequently in the produce; that by the nature of the modern leases (by which rent was payable in money), landlords necessarily consented that tenants should have it in their power to convert the produce into money; and although it was competent, where the rent was not paid, for the landlord to retain the crop, or, before the price was paid

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by a purchaser, to get restitution or payment of the price, yet he could not insist, after the price had been bona fide paid to the tenant, that the purchaser should make a second payment; and, 2d, That sales in public market were protected against the effect of the landlord's hypothec; that there was no ground for the distinction between the sales by sample and in bulk; for although in the former case, the risk of the perishing of the grain lay upon the purchaser, yet so soon as delivery was made, and the price paid, he was effectually protected by the transaction having taken place in public market.

The Lord Ordinary pronounced this interlocutor: 'In respect 'that the barley in question was sold by sample, and was not 'brought to market and publicly exposed there in bulk, Finds, 'that the respondents (appellants), George Dunlop and Com-'pany, are not entitled, in this transaction, to the ordinary pri-'vileges of purchasers in open market; therefore advocates the 'cause; finds the said George Dunlop and Company liable 'to the advocators in the sum of L.94, 10s., with interest 'thereon, from 30th of September, 1825, as libelled: And in 'respect it is not alleged that the respondent, James Amos, had 'any interest in the sale, assoilzies him from the conclusions of 'the action; finds no expenses due to any of the parties, and 'decerns.'

The appellants then reclaimed, and the Court, after allowing reports as to the practice in Sheriff Courts, appointed the following query to be put to the other judges: 'On the suppo-'sition that Messrs Dunlop and Company in this case acted 'bona fide, and without any collusion with the widow and son 'of Amos the tenant, the Judges are requested to give their opi-'nion, Whether the sale by sample, as set forth in the papers, 'is valid and effectual to Messrs Dunlop and Company, as 'against the landlord's right of hypothec?'

Lords Justice-Clerk, Glenlee, Pitmilly, Cringletie, Meadowbank, Mackenzie, Medwyn, Corehouse, and Newton, returned this opinion: 'By the law of Scotland, a landlord enjoys a 'right of hypothec in the fruits produced on his farm, in secu-'rity of the rent of that year in which they are produced, and 'this whether he has used sequestration or not. It is the nature 'of the real right of hypothec to be effectual against every pos-'sessor of the subject hypothecated, and of course to give the 'landlord, while the rent remains unpaid, the power of recover-'ing the crop from any person in whose hands he may find it. 'This seems anciently to have obtained in all cases whatever; 'but for a long period a restriction of the right has, from favour

'to commerce, been admitted, where the article has been sold Dec. 7, 1830.
'in a public market. A sale in these circumstances, if the pur-
'chase has been in bona fide, is effectual; and if he has paid
'the price, he is not liable to any demand at the instance of the
'landlord. We do not, however, conceive ourselves authorized
'to hold that this restriction of the landlord's right extends to a
'sale by sample, such as that which has given rise to the present
'question. Another essential circumstance in proper sales in
'public market, and that which has chiefly weighed in the ad-
'mission of this restriction of the landlord's right, and of simi-
'lar restrictions, which, through favour to commerce, have
'obtained in other countries, is totally wanting here, and that
'is, the publicity caused by the open exposure of the goods, as
'on sale, to all frequenting the market. We can conceive,
'and we believe there may be, markets for sale by sample
'where such publicity may be secured; as where it should be
'required that samples of all grains meant to be sold, should be
'publicly exposed in a particular place, appropriated for the
'purpose of general examination, and in such a way as to show
'not only the quality but the quantity of each meant to be sold,
'with the names of the sellers; it being always understood that
'delivery is still required to complete the sale, and to exclude
'the landlord's right. But the market of Haddington is not of
'this nature, but one where grain is sold in bulk; and a sale
'by sample there has necessarily no more publicity than if made
'any where else. It is a mere private transaction, which may
'be unknown to all but the contracting parties, and which may
'not disclose to another mortal the seller's intention of dispo-
'sing of his crop. We see no reason why a bargain in such
'circumstances shall, merely because the buyer and seller trans-
'act privately in a place where there is a public market at the
'time, be entitled to any privilege, as against the landlord,
'which is not equally competent in every other bona fide sale.
'In England, and we believe in some other countries, where
'sales in public market, or market overt, are so greatly favoured,
'that stolen property may be thus effectually transferred, so as
'to cut off the right of the true owner, it is essential, we under-
'stand, to this effect, that the stolen articles be publicly exhi-
'bited for sale; and in the case of horses it is necessary that
'they be exposed for one whole hour together in the place used
'for such sales. Were stolen goods to be sold by sample, pat-
'tern, or description, without being brought to, or exhibited in,
'the market at all, the sale would have no effect against the
'owner. The reports in process by the Sheriff-clerks seem to

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'us of little or no consequence. In so far as any similar ques-
'tion is known to have occurred, the decision appears to have
'been in favour of the landlord; and the opinions of the report-
'ers, as to what they conceive is, or should be the law, are
'plainly of no weight. We are aware that many advantages
'may attend the practice of selling by sample, and that an esta-
'blishment of markets on this principle may be highly useful.
'But such considerations, however proper for the attention of
'the Legislature, can have no influence where the question is
'solely as to the existing law. We are of opinion, therefore,
'that holding Messrs Dunlop and Company to have acted with
'perfect bona fides, the sale by samples, as set forth in the
'papers, is not effectual to them as against the landlord's right
'of hypothec.'

In consequence of this opinion, the Court, on the 27th of February, 1828, adhered to the judgment of the Lord Ordinary. *

Dunlop and Co. appealed.

Appellants.—1. If a party who has the property of a commodity in himself, has sold and delivered it, and received payment, the purchaser thenceforward acquires the absolute property, and unless mala fides be established, his right cannot be affected by any claim which third parties may have against the seller. Till delivery, the property no doubt remains in the seller, and it is competent for his creditors to attach it in payment of their debts; but after delivery the property is completely vested in the purchaser, and cannot be touched by the creditors of the seller.

Tenants are proprietors of the crop raised on their farms, subject to a claim of rent by the landlord. At an early period they were not proprietors. The ground was cultivated by serfs or boors, adscripti glebæ, and, consequently, the crop raised was not their property, but that of the landlord, and so could not be disposed of by them. In a more advanced period a sort of partnership existed between the tenant and the landlord, the latter contributing the ground and stocking, (called steelbow,) while the former gave his labour and skill. At this time that which was called rent, but which was truly the landlord's share of the produce, was delivered in kind. In modern times, matters have been entirely changed. Tenants have become so

* 6 Shaw and Dunlop, 626.

wealthy that they can supply the capital requisite for cultiva- Dec. 7, 1830.
ting their farms; and landlords, in order to obtain payment of money rents, have found it advantageous to alienate the use of their farms, and consequently the produce, for payment of a certain yearly rent, or, in some cases, for slump payments, called grassums. There is no longer any sort of partnership, and the tenant thus becomes the proprietor of the crop. The landlord's original right of property has therefore ceased, for two persons cannot at the same time have each the entire property of the same subject. His right is now of the nature of a lien or security for payment of his rent. This lien or hypothec may no doubt be converted into a real right by sequestration; but if it be not so, it is competent to the tenant, as proprietor of the crop, to sell it, and by delivery to confer on the purchaser an absolute right. No doubt the landlord is entitled to receive payment if the price has not been paid to the tenant, but where it has been paid he is not entitled to make a purchaser pay a second time, just as if the tenant had had no sort of right to dispose of the crop.

2. But independent of the preceding plea, a sale made in public market is effectual to exclude the landlord's right. It is admitted that if the sale be in bulk it is so. But it is said that if it be by sample it is not so. There is no authority for such a distinction, and both commercial expediency and the interest of landlords are against it. In regard to a sale in bulk, it is plain that if the tenant can succeed in transporting the grain to the market, and there sell it, the landlord's right is at an end. But where the sale is by sample, the grain remains on the farm, and may be attached by the landlord at any time before delivery, and the publicity of transporting it to the place of delivery is as great as the act of carrying it to the public market. Therefore, in the case of sale by sample, the landlord has the grain within his power for a much longer time than if sold in bulk, so that sales by sample are not so dangerous to his interests as sales in bulk.

Respondents.—1. The question is not one of expediency, but one of legal right. Both the decisions and the institutional writers coincide in laying it down as settled law, that the crop of each year is pledged to the landlord for the rent of that year; and that although the tenant may have sold the crop, or although it has been carried off by his creditors in satisfaction of their debts, the landlord is entitled to restitution,

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2. By the law of Scotland, in order to constitute an effectual sale and transfer of the property, there must not only be an agreement to sell, but actual tradition, "traditionibus, dominia rerum, non nudis pactis, transferuntur." Where property is transferred in public market a purchaser is safe. But in order to this there must be a complete transfer. In the present case there was no such thing—there was merely an agreement or contract between the parties, which might have been broken off or defeated before the property was transferred; but it is admitted that the tradition so far from being made in public market took place privately. The appellants, therefore, cannot plead the benefit of public market. The rule is quite settled in England, that to enjoy that privilege the goods themselves must have been exposed in the public market.

LORD CHANCELLOR.—The case which your Lordships have just heard argued by the learned Counsel involves a question of Scotch law, and comes within the description to which I referred in my judgment this morning. It turns upon the principles of a law, in many respects very different from our own; and it is contended, on the part of those who are here to support the judgment, and justly held by the learned Judges themselves, that questions of this nature demand much attention before a satisfactory decision can be given. I have therefore listened with very great attention and anxiety to the arguments on the part of the appellants and the respondents, and to the reasons which have been given by the learned Judges upon this subject, and I must confess that the doubts (and I may say the difficulties) with which I was embarrassed from the beginning, have not as yet been removed. As the decision of your Lordships will go to establish one way or other, in the kingdom of Scotland, whether or not the law, with respect to this most important subject, is similar, and in unison with that of England (for at present it is widely different); a question will arise out of your Lordships' judicial determination, whether or not the very serious inconveniences shall continue to exist, in regard to the transactions of mercantile men with respect to the most important articles of life, or shall be removed by your Lordships acting in your legislative capacity? I therefore certainly do not feel that I ought at present to call upon your Lordships to come to any definitive judgment. I propose, therefore, to defer, for a few days, the further consideration of this question. During that interval, I shall deem it my duty (in order the more effectually to assist your Lordships in coming to a right decision), to read again carefully the whole of these voluminous

papers, and to examine more minutely the points which have been stated at the bar. With all the deference, and unfeigned respect, which is certainly due to the opinion of the learned Judges below on such a question, I shall—if I feel that those doubts, and I may say difficulties, have not been removed, there being no authority in any thing like recent or modern times, and after the law has assumed its present shape; for it is admitted by the respondents, that the law has undergone some change —I shall feel myself obliged, however reluctantly, to submit to your Lordships' approbation, the propriety of reversing this judgment. Dec. 7, 1830.

LORD CHANCELLOR.—My Lords, in this case, one of great importance to the general principles of the law of Scotland, which differ materially from the law of this country in the respects I am about to point out, I would move your Lordships to resume the further consideration, with a view to proceeding to judgment. My Lords, when this case was argued, which it was with distinguished ability and learning on both sides of the bar, it appeared to me to involve questions of apparently so alarming a description to the commercial interests of that part of the united kingdom, of a nature indeed so inconsistent with all principles, and so utterly repugnant to the most established doctrines of English commercial law, as well as the law of landlord and tenant, that I deemed it necessary, before I proposed to your Lordships either to affirm or to reverse the decision of the Court below, to take a short time thoroughly to examine the cases cited, and the authorities quoted on the one side and the other, in order that I might be able to advise your Lordships, upon more mature deliberation, and with greater security to the administration of justice. I have now gone through that enquiry, in addition to the attention which I bestowed on the argument at the bar, and the result has been, to remove all doubt which I then entertained upon what was truly the law of Scotland. My Lords, the facts of the case are extremely short. I will state them to your Lordships, and you will at once perceive, not only the nature, but the difficulty, and the great importance of the principle in question:—My Lord Dalhousie brings his action against a corn merchant in East Lothian, the county in which his estate is situated, for what is called repetition, which, your Lordships know, means payment back to him of a certain sum of money, being the value of sixty sacks of corn, purchased by that corn merchant in the public market-place of the town of Haddington, of a tenant of my Lord Dalhousie. I am exceedingly rejoiced at the presence of the noble and learned Lord (the Earl of Eldon), on this occasion; because, though he had not the opportunity of hearing the argument, he will, I am sure, agree with me in feeling the complete novelty to English lawyers, of the principle held in the Courts of Scotland, to which I am about to advert. Lord Dalhousie brings this action, not against his tenant, but against the purchaser from the tenant, in what we call market overt, public market, perhaps the greatest corn market in Scotland, that of Haddington, the capital of East Lothian. The tenant's rent was in arrear for that year, of which the corn sold was part of the crop. It is not pretended, indeed it is distinctly denied, and

Dec. 7, 1830. is negatived by the whole findings in the case, that the corn merchant had any knowledge whatever of the arrear of the seller's rent. It is admitted that he paid the full price for the corn; it is admitted that he was perfectly in bona fide through the whole course of the transaction; that there was no fraud, no collusion whatever between the tenant and the purchaser, with respect to the rights of the landlord, nor any intention, on the part of the purchaser, to defeat the landlord's claim. Now, the decision of the Court of Session, is neither more nor less than this, that the landlord has a right to call upon the purchaser, and say,—'Not-'withstanding you were a bona fide purchaser, without notice, in open 'market, but a purchaser by sample and not in bulk, you must pay 'to me the whole price which you have already paid to the seller, that 'being due to me, the landlord, in respect of my tenant's rent which 'was in arrear for that year, of the produce of which the corn sold 'formed a part.' The first thing which strikes every one is, that if this judgment be consistent with law, it becomes extremely difficult, if not quite impossible, for any person safely to deal in corn; because, when he goes even into the public market, he must ask the question of every man who sells to him, if he is a tenant—'Is your rent in arrear? How 'stands your account with your landlord?' And, even if he is told that the rent is not in arrear, he still must act at his own risk; because, if the tenant should be found to have deceived him, though, true it is, he might have an action against him for the deceit, yet the falsehood of that representation would not defeat the landlord's right—the purchaser must equally pay the price of the corn over again; and therefore he must take another precaution—he must go and tell the landlord: 'I have been 'asked in Haddington market to purchase corn of your tenant, but not 'being sure how your account stands, I have come to you, twenty 'miles off, to know whether or not his rent is in arrear.' Nothing short of that can make a man safe, according to this decision. My Lords, if this were a question of English law, instead of Scotch law, so far it should seem, that nothing could be more simple or more easy than the decision of the case, and nothing more erroneous, not to say more startling, than the decision of the Court below; but then there come one or two admissions, and one or two statements, not contradicted on the other side, which plainly show that the Scotch law proceeds upon principles diametrically opposite to those of the English law. In the first place, if a tenant sells in bulk, in the most honest and regular way possible, to a corn-factor, or other purchaser, but not in the market, without any knowledge on the part of that purchaser of the state of the tenant's account with his landlord, or any fraud on the part of the purchaser, or any collusion, it is admitted on all hands—and no one conversant with the law of Scotland affects to doubt it—that the landlord may recover the goods by an action, in the nature of an action of trover, or the price of them, as being paid in the buyer's own wrong. In the next place, it is admitted, that if the sale is in the public market, and the purchaser acts bona fide, and without notice of the debt to the landlord, provided he has not paid the price, although the contract is

completely executed between them, the purchaser is bound to pay the price to the landlord. These being matters agreed to on both sides, it is quite evident to my mind, that the Scotch law proceeds on principles perfectly opposite to those of the law of England; and the more I have enquired, the more I have been satisfied of this. It appears that, in the times when the law was originally established, the landlords being the law-makers, the hypothec of the landlord over the tenant's stock is of a nature exceedingly different from, and much more extensive, than the security of the same kind which your Lordships have for your rents in this country. You can distrain the goods for rent, while they remain upon the farm, or a remedy is given under particular statutes, in case they are taken away in fraud of that right, to follow them within certain limits, and to deal with them according to those statutory provisions: but if the goods are sold to a bona fide purchaser, and he is not in collusion with the tenant, it is clear that you have no such right as the Scotch landlord has. The Scotch landlord has a right of hypothec in the most strict sense. He can follow the crop wherever it goes, unless in the one excepted case, where it is sold in bulk in market overt. The only question in this case, seemed to be this—those I have stated being the admitted principles of the Scotch law—Is a sale by sample equivalent to a sale by bulk in market overt? Now, referring to the principles of the English law, I consider that the landlord's right of hypothec in Scotland, is to be compared to the right the owner has in England, of recovering goods, the property of which has been sought to be changed by stealing those goods, though it cannot so be changed, but in which there is one exception analogous to the exception to the landlord's right of hypothec in Scotland, namely, the goods being sold in market overt. Your Lordships will, I apprehend, require no argument to show, that the law, with respect to market overt in England, applies only to sale by bulk, and does not at all apply to sale by sample. Your Lordships are aware, that it has been decided, that the whole sale must be completed in market overt. There is a celebrated case in Lord Coke's Reports, intituled, 'The Case of Market Overt,' in which it is held, that the goods must be sold in a shop accustomed to sell those goods, so that the possessor cannot change the property by selling silversmith's goods in a scrivener's shop, which was the question raised there, but the whole must be sold in the open market, not behind a screen or cupboard, but so that passengers passing by could see it;—they must be so sold, that the transaction of the sale must be visible to passers by; that is the foundation of the principle. Your Lordships see, therefore, that the English law principle with respect to sales in market overt, is the Scotch law principle, applying it in the one case to the non-change of property feloniously stolen, and in the other case, to the landlord's right of hypothec, which is peculiar to Scotland, and unknown to this country. My Lords, I have had a good deal of communication with very learned persons in Scotland, as to the practice among tenants, corn-factors, and merchants, and I find there was a great difference of opinion in the trade as to the rights of the respective parties, until this case of Lord Dalhousie. The largest corn-factors

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Dec. 7, 1830. in Scotland, whose transactions amount, probably, to as much as all the rest put together, say, that they never dreamt of such a risk being run, and that, having transacted business to the amount of hundreds of thousands of pounds, they never yet thought of asking the question—Whether the tenant was in arrear? But the decision in this case has created a great anxiety that the law should be settled one way or the other by your Lordships. My Lords, on the best consideration I have been able to give to this subject, on the ground on which the Scotch Judges put it, (admitting there is no decided case—admitting that the only cases resorted to as authority for their decision do not bear it out; because, in each of those cases, there was a great doubt upon the fact, whether the whole sale was in open market, and whether there was not collusion with the tenant,) on the principle of the law, upon the application of the principle of market overt,—which clearly is the doctrine to be applied in this case, as soon as we find the landlord has, what he has not with us, the right of hypothec,—it certainly appears to me, that the grounds of judgment, though at first they appeared to be incumbered with great difficulty, from their being so irreconcilable to our own notions, are well founded. If the case had been what we call doubtful, and, if it had been a measuring cast between the two grounds of decision, one should have leant very strongly against a doctrine so greatly tending to fetter commerce as one setting aside a sale by sample in a public market; but, however inexpedient such a law may be, and however much that inexpediency is to be complained of by his Majesty's subjects in Scotland, not only by the dealers in corn, but by all the consumers of corn,—however it may call upon your Lordships to apply, in your legislative capacity, a remedy for this, yet, in your judicial capacity, you have no course left but to affirm the almost unanimous decision of the Court below;—all the Judges were consulted—some of the ablest Scotch lawyers have appended their names to this opinion; and there is but one dissentient voice among the whole. It is not for Judges to decide, whether the law shall be put in force or not. Judges have but to administer the law. The Judges in Scotland have administered the law as they found it. Your Lordships are mere Judges by appeal, on their judgment, and therefore are acting as Scotch law Judges; and, in that capacity, I humbly submit, your only course is to affirm the decision. In the circumstances of the case, my Lords, I should not propose to your Lordships to give any costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed.

Respondent's Authorities.—Ross on Venders, &c. p. 188, 2d ed. 6 East, 437, 441. 4 Taunton, 531. 4 Barn. and Ald, 564.

A. MUNDELL—SPOTTISWOODE and ROBERTSON—Solicitors.