

1763. *January 11.*JOHN GRAHAM and Co., Merchants in Glasgow, *against* ROBERT POLLOCK and
THOMAS CALDWALL, Merchants in Paisley.

No 35.
Sale sustained
against the
seller, altho'
the buyer was
not bound
to stand to
it.

ROBERT POLLOCK and Thomas Caldwell sold 105 hogsheads of tobacco to John Graham and Co. upon the 3d of December 1755, at the rate of 2½d. Sterling per pound weight; and agreed to furnish them with the shipping-book, (which contained an account of the quantities and qualities of each hogshead,) whereby they were to judge of the quality of the same, and determine whether or no they were to adhere to the bargain.

This shipping-book, however, they neglected to shew to the purchasers; and, upon the 20th of the same month, they thought proper to make a new sale of the tobacco to Messrs Pagan in Glasgow, at the rate of 2½d. per pound, upon receiving L. 300 in cash, and a promise to pay the remainder of the price in five weeks.

Upon the 8th January 1756, Graham and Co. required Pollock and Caldwell, under form of instrument, to furnish them with the shipping-book; and received for answer, that, though there had been no concluded bargain, they would shew the said shipping-book betwixt and Wednesday se'ennight, if they could command it; but not upon the supposition of any bargain having been made, as supposed in the protest.

Graham and Co. having thereafter insisted for implement of the bargain, Pollock and Caldwell wrote a letter to them upon the 4th of February 1756, offering to refer the affair to the purchasers themselves, and to wait upon them for that purpose, at any convenient time.

Upon the 29th of December 1757, Graham and Co. finding that Pollock and Caldwell were unwilling to meet with them in terms of their letter, required them under form of instrument to attend at the house of James Paterson, vintner in Glasgow, upon the 3d of January then next, betwixt the hours of twelve and two, to hear and see the matter determined; and they having failed to appear, another protest was taken against them upon the 9th of January, upon which Graham and Co. agreed to discharge their claim, upon receiving payment of 50 guineas.

To this last protest, Robert Pollock made *answer*, That he was willing to pay 20 guineas, but would go no farther; upon which Graham and Co. brought an action before the admiral-depute of Clyde, concluding for payment of a certain sum, as the amount of the damages sustained through not-delivery of the tobacco.

The admiral-depute having pronounced decret in terms of the libel, the defenders brought the cause before the Court of Session by suspension; and a proof having been allowed, from which it appeared, that the greatest part of the tobacco might have been sold by Graham and Co. at a farthing per pound-weight of profit, the Lord Ordinary decerned against the suspenders for L. 88 : 8 : 7¼ Sterling.

Pollock and Caldwell *pleaded*, in a reclaiming bill, That in the contract *empti venditi*, there is no bargain where the sale or price is *collata in arbitrium* of either of the parties; and that, as in this case, the purchasers were not to be bound, unless, upon inspection of the shipping-book, they should think proper to accept of the tobacco, so neither could the seller be bound to deliver.

Answered for Graham and Co.; The contract *empti venditi* may either be simple and absolute, or conditional, suspensive, or resolute, according to the agreement of parties. In the present case, the bargain was compleat in all its parts, under this condition only, that if, upon inspection of the shipping-book, the quality of the tobacco should not be found to answer expectation, the pursuers should be at liberty to declare off; and that contracts of sale may be made under such condition, is evident from many texts of the Roman law, particularly from *Inst. lib. 3. tit. 24. § 4.* and *L. 3. D. De contrah. empt.*

'THE LORDS adhered to the Lord Ordinary's interlocutor, and found expenses due.'

Act. *Loxhart.*

Alt. *Walter Stewart.*

Clerk, *Pringle.*

Fol. Dic. v. 4. p. 250. Fac. Col. No 103. p. 242.

1766. January 4. HUNTER against CHALMERS and Co.

GEORGE CHALMERS and Co. extensive dealers in the corn-trade, employed Philip Scott, who kept a grocery-shop in Berwick, to purchase corn for them in Berwickshire and Northumberland. In these counties, the rents being paid in money, the farmers must have ready money for their corn, in order to pay their rent. Chalmers and Co. accordingly took always care to lodge cash in the hands of Philip Scott, to enable him to pay ready money for all the corn they commissioned him to purchase, for which he was to have two and half *per cent.* Business was thus carried on for several years till Philip Scott became bankrupt, indebted to the company, and indebted to several tenants in Berwickshire, from whom he purchased corn, without paying the price, somewhat above L. 1000. These tenants, in name of John Hunter, their assignee, insisted in a process against Chalmers and Co. for payment of this sum, upon the following medium, That Philip Scott was factor or agent for the defenders, who consequently are liable to pay the price of the corn purchased by Philip for their behoof.

It was admitted for the pursuer, that when a merchant here commissions wine from Bourdeaux, the factor there is understood to purchase the wine in his own name, because the vender knows nothing of the Scotch merchant, and would not trust him; for which reason, the Scotch merchant paying the price to his factor, is not liable to pay it a second time to the person who sold it to the factor. The present case is apposite. It was necessary that Scott should

In what cases is it understood that a factor employed to purchase goods can bind his constituent?