

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. Macglashan.

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.

son and Company acted as their consignees; that the order had been given by them to Robertson and Company, who executed it in their own name, and, as they understood, furnished it on their own account; and in evidence of this they produced the invoice which accompanied the goods, bearing that they were bought of Robertson and Company, together with an account-current, which had been sent them by that Company, instructing compensation of the article, in which the gunpowder is stated on the credit-side, leaving a balance due to the defenders.

No 47.

THE LORD ORDINARY " finds, that the gunpowder in question was purchased from and delivered by A. and J. Robertson, bearing to be on their own account, and not for behoof of the pursuers, as appears from the invoice which accompanied the same; and as the defenders positively deny, that they knew Robertson and Company were acting in the character of agents or consignees for the pursuers, or that the powder was part of the property consigned; and as there is no evidence produced or condescended on to instruct the contrary, assoilzies the defenders from this action, and decerns."

The pursuers reclaimed to the Court, and

Pleaded, A *rei vindicatio*, or an action for the price, is competent to the owner of a subject which has been disposed of by a person who is not proprietor. If, therefore, a mandatary who is employed to sell goods for the owner, sells them in his own name, he is guilty of a fraud, and the proprietor, upon shewing how he came to lose possession, will recover the property, Erskine, B. 2. Tit. 1. § 24. Dict. *voce* COMPENSATION; Alison against Fairholm, November 1765, *voce* SURROGATUM. It makes no difference whether the person got possession with the consent of the owner or without it; Street, June 9. 1669, *voce* SURROGATUM; Morrison against Creditors of Stewart, June 21. 1781*. Indeed, if a purchaser from an agent may, in a question with the constituent, plead compensation upon a debt due by the agent, the real owner cannot be said to have a claim against the purchaser for the price.

Answered, There is a great difference between fraud, on the part of a mandatary, who has the interim possession of another's goods, and a *vitium reale* in the subject. In the one case, if the purchaser of the goods be not a *particeps fraudis*, but obtain possession of them *bona fide*, though an action may lie against the mandatary at the instance of his constituent for the price, no such action is competent against a *bona fide* purchaser. But, in the other case, the owner has an action "*adversus quemcunque possessorem*." The reason of this distinction is, that when the owner intrusts his goods to another, he is himself in some degree to blame if that person is guilty of a breach of trust, and therefore the law does not give him an action against the third party for recovery, Stair, B. 1. Tit. 9.

* Not reported, See APPENDIX.

No 41.

It would be attended with the worst effects in mercantile dealings, if a *bona fide* purchaser were to be responsible for a breach of trust in the seller. The possession of moveables affords in all cases a presumption of property; and it would tend greatly to restrain the freedom of commerce, if before making a purchase it were necessary to enter into an investigation of the different relations which may subsist in the way of trade between one mercantile house and another, Erskine, B. 3. Tit. 3. § 34.; Boylston, 24th January 1672, *voce* SURROGATUM; Baxter against Bell, December 17. 1800, (See APPENDIX).

THE LORDS, upon advising the petition with answers, adhered.

Lord Ordinary, *Craig.*

Alt. *Burnst.*

Act. *Connell.*

Agent, *Jo. Masson.*

Agent, *James Hay, W. S.*

Clerk, *Menzies.*

Fac. Col. No 126. p. 279.

S E C T. II.

Effect of Transmitting Bill of Loading.

1764. *June 13.*

BUCHANAN and COCHRANE, Merchants in Glasgow, *against* ROBERT SWAN.

No 42.
Found that an assignment on the back of a bill of loading made a complete transference of the property.

In September 1748, M'Lachlan and Drummond, merchants in Maryland, shipped on board a vessel bound for Glasgow, 38 hogsheads of tobacco, consigned to James Johnston merchant there. Upon the back of the bill of loading is the following writing, 'I do hereby assign, transfer, and make over unto Robert Swan of Annapolis, merchant, the within bill of loading, for the consideration of L. 152 Sterling, by us received from him, this 20th October 1748, *per James M'Lauchlan for himself, and John Drummond.*' But the bill of loading, with this assignment on the back of it, came not to Johnston's hand, till long after the cargo was delivered to him.

The said cargo was arrested in the hands of James Johnston, 30th December 1748, by some creditors of M'Lachlan and Drummond, which pursued a multiple-pounding; in which, appearance was made for Robert Swan, who claimed preference upon the said assignment in his favour. It was *objected* by the arresters, That this assignment could not transfer the property without delivery; that the cargo still remaining the property of M'Lachlan and Drummond, was habily affected by the arrestments of their creditors; and that the