

his servant, or actually delivered to the purchasers; the latter averred, that it was part of the bargain that they should have the use of the granary; that they might have employed any person they thought proper to take charge of the granary when deposited there, which was at their own risk; and that though they happened to pitch on a servant of his Lordship, he was paid by them, and accountable to them alone for his conduct. They at first added, that the key of the granary was given to him by them, but they seemed afterwards to admit, that he had previously the charge of it from the Viscount.

It was *alleged*, on the other hand, that it was not part of the bargain that they should have right to the granary; but that it had been the practice of the family of Arbuthnot to indulge the purchasers of their farm-grain with the use of it; that the key was uniformly kept by the ground-officer; that there was grain in the same granary belonging to the Viscount; and that the servant receiving a gratuity from the purchasers, would not affect the question.

The Judges were at first much divided in their sentiments. The principal grounds of the opposite opinions have been already given.

THE LORDS, upon advising a petition for the Trustee, with answers and replies, (25th November 1797), "Found, That the petitioner as trustee for the creditors, has right to the price of the parcel of grain which was in the granaries, the key whereof was in the custody of a person employed by him, and also to the price of the parcel of grain which was under accepted precepts by the tenants;" but "found, That the respondent has right to the price of the parcel of grain which was in the hands of tenants who did not accept the precepts upon them."

A petition by the Viscount of Arbuthnot was answered, and the LORDS (19th June 1798), "Altered the interlocutor complained of, and preferred the petitioner to the price of the parcel of grain which was in his granaries at the time of the bankruptcy; and also to the price of that part of the grain which was in the hands of the tenants who had accepted the precepts."

The Trustee reclaimed. Answers followed. But the interlocutor was almost unanimously adhered to.

For the Viscount of Arbuthnot, *John Dickson, Arch. Campbell, junior.*

Alt. Hay, Ro. Craigie.

Clerk, Menzies.

D. D.

Fac. Col. No 89. p. 204.

1804. November 23.

COLLINS *against* MARQUIS'S CREDITORS.

JOHN MARQUIS, shipmaster in Dysart, commissioned from William and Thomas Collins, in Kent, a cargo of timber. It was shipped (26th March 1801) on board a vessel freighted by Messrs Collins*.

No 48.
The delivery
of a part of a
cargo does
not end the

* This was disputed, but the Court was satisfied of the fact.

No 48.
transit of
 the rest.

Unloading
 a cargo, and
 laying it
 down on the
 shore, is not a
 complete de-
 livery.

The vessel arriven at Dysart on the 10th April 1801, before which time, (20th March), letters of caption had been issued against Marquis upon a horn- ing, which he had suspended.

On the 11th the vessel began to unload, and the greatest part of the timber was laid down on the sands of Dysart, or conveyed in carts into Marquis's wood-yard.

The shipmaster having made a demand for his freight, which was not paid, he refused to deliver any more of the cargo; and (20th April) obtained from the Judge of the Court of Admiralty, a warrant to sell as much of it as would cover the freight.

On the day following, Marquis, upon application to the Sheriff, was interdic- ted from disposing of this cargo; and the creditors purchased the shipmaster's right of hypothec, by paying his freight and charges, taking an assignation from him. He also delivered to them the bill of lading. The rest of the car- go was then unloaded, and put into Marquis's wood-ward.

The execution on the caption bears date the 14th May, and next day Mar- quis's estate was sequestrated.

Messrs Collins having first presented a bill of suspension against selling the timber, brought an action against the Trustee, concluding for repetition of the whole timber, as having been fraudulently taken possession of by Marquis. THE LORD ORDINARY (12th May 1802) pronounced the following interlocutor: " Finds, That the said John Marquis having commissioned a cargo of timber, to be sent to him at Dysart, by the said Messrs Collins, they did accordingly ship for him, upon the 26th March 1801, the timber on board the brig Jean, Captain Sheddan, master, they having agreed with him as to the amount of the freight, to be paid on delivery, as is instructed by the bill of lading produced in process; finds, That the said vessel and cargo arrived at Dysart early in the month of April 1801; but, by that time, the said John Marquis having become utterly bankrupt, and unable to pay the freight; in consequence of which, the shipmaster refused to deliver the cargo, or to give him the invoice; finds, That, in these circumstances, the shipmaster could not warrantably deli- ver or transfer the cargo in question, either to the said John Marquis, or to his creditors, but was bound to have retained the same for behoof of Messrs Collins, the owners of the timber; and that, although the Creditors of Marquis obtained and took possession of the timber, upon their paying the freight to Captain Sheddan, the master, yet this transaction was illegal, and could not transfer the property to the prejudice of Messrs Collins; and in respect the cargo was af- terwards sold, and the price consigned, to be made forthcoming to those who should be found to have best right thereto, finds the said Messrs Collins and their attornies preferable to the proceeds of the said cargo; and therefore, in the suspension, suspends the letters *simpliciter*; and in the ordinary action, at the instance of Messrs Collins and their attornies, decerns in terms of the con- clusions of the libel."

The Creditors reclaimed, and

Pleaded, The shipmaster is merely the mandatary of the shipper, to deliver the cargo on receiving his freight; and this he could not refuse to do on being paid. He was not intrusted with the conditional delivery of the cargo, so as only to put Marquis in possession of it, if the price was then paid; nor had the purchaser at that time been rendered bankrupt, but, on the contrary, his warehouse continued open, and he traded as usual. The property of the timber, then, by the delivery, was completely transferred. No proof of actual fraud has been attempted; and insolvency, of itself, is not sufficient to afford a legal presumption of fraud, even though the delivery should take place within three days of actual bankruptcy; Allan and Steuart against Stein's Creditors, 4th December 1788, No 45. p. 14208.; reversed in the House of Lords. The right of stopping *in transitu*, in this case, was not used; the shipmaster only detained what covered his freight; but the sellers never appeared to exercise their right, till the whole was delivered either to the bankrupt or his creditors; and a partial delivery puts an end to the *transitus*; Slubey and Smith *contra* Hayward and Company, 2. H. Blackstone, 504.

Answered; The bankrupt circumstances of the purchaser, when the vessel arrived, prevented any effectual delivery being made to him. He was even unable to pay the freight; and therefore the shipmaster, who is appointed to watch over the interest of the person who employs him, could not warrantably transfer the cargo to the bankrupt or his creditors, without receiving or securing the price. The cargo, therefore, or at least a great part of it, never was legally in the possession of the bankrupt or of his creditors, for they cannot avail themselves of the breach of trust which they induced the shipmaster to commit. The creditors obtained, indeed, the bill of lading, which was the warrant for delivery of the cargo, upon paying the freight due to him; but this was after the bankruptcy, which first gave them a right to act. While the shipmaster retained the bill of lading, he preserved a real right over the whole cargo, part of which was still in the ship, part on the sands, and only a part in the wood-yard. But the cargo cannot be separated into parts, nor subjected to different rules. The right to the whole must be determined by the bill of lading.

THE COURT (24th November 1803) pronounced the following interlocutor:—"THE LORDS having advised this petition, with the answers thereto, find the respondents, Messrs Collins, preferable to the price of that part of the cargo which remained on ship-board, as also to that part of the cargo which remained upon the pier or shore upon the 21st of April 1801, the date of the Sheriff's interlocutor, in the application made to him by the petitioners, for inventorying and selling the wood in question: Find the petitioners preferable upon the price of that part of the cargo which was at that time within the wood-yard, or other premises belonging to John Marquis; and find the parties liable proportionally in the freight paid to the shipmaster; and in so far alter the interlocutor of the

No 48.

Lord Ordinary complained of; and remit to his Lordship to proceed accordingly."

Both parties reclaimed. Both petitions were appointed to be answered; but, on advising them (23d November 1804) the Court adhered.

THE COURT were, upon the whole, of opinion, that the circumstance of subsequent insolvency was not sufficient to prevent Marquis from receiving delivery of the goods he had commissioned some time before; that fraud did not give rise to the transaction, as he continued carrying on business as usual, although under diligence, which afterwards rendered him bankrupt. But they resorted to a distinction between what had actually come into his possession and what was still *in transitu* at the time of his bankruptcy, not listening to the plea, that the delivery of a part of the cargo barred the right of stopping as to that which was still undelivered.

Lord Ordinary, *Cullen.*
Alt. *Campbell, J. Clerk, Forsyth.*

Act. *Gillies.*
Agent, *Wm. Callender.*

Agent, *Jo. Peat.*
Clerk, *Home.*

F.

Fac. Col. No 185. p. 413.

1804. November 23.

MATHIE'S TRUSTEE *against* AUCHIE, URE, and Company.

No 49.

Goods bonded in the King's cellars for payment of the duties, may be reclaimed by the original seller, if the purchaser has not paid the price.

MESSRS Auchie, Ure, and Company of Glasgow, having imported a considerable quantity of rum into the port of Greenock, it was deposited in cellars belonging to Messrs Sandemans, who granted a bond for payment of the duties to Government. According to the established practice, founded on statute, one key of these cellars was kept by Messrs Sandemans, and another by the revenue-officer.

At a public sale, on the 15th December 1802, Auchie, Ure, and Company, sold to William Mathie thirty-two puncheons, at a certain price; for which an acceptance, at four months date, was given by the purchaser, in terms of the bargain, who, in return received from the seller an order upon Messrs Sandemans for delivery of the rum. This order was immediately intimated to them; and they in consequence made an entry in their books of the transference of the rum, by marking, opposite to each puncheon, the name of Mathie, as the new proprietor, to whom they were now to be deliverable.

Mathie, in consequence of this transaction, exercised his right of property, by taking eighteen puncheons out of the cellars, after having paid the duties. When the bill became due, the parties failed to retire it. Fourteen puncheons still remained in Sandeman's cellar. A petition was, in consequence, presented to the water-bailie of Clyde, praying for delivery of these to Auchie, Ure and Company, as the purchaser had failed to pay the price. This was opposed