

1748. November 18.

The TENANTS of WINTON *against* The BAKERS of CANONGATE and LEITH.

No. 31.

Whether
competent to
excuse an
unlawful act?

The rebels after the battle of Preston, when in possession of Edinburgh, and masters of the adjacent country, sequestrated the estate of Winton, and concussed the tenants to deliver their victual-rent, or part of it, to Robert Bartleman and James Miller, bakers in the Canongate, and James Gilchrist, baker in Leith, to be made into biscuit for the use of their army; and to Adam Cathrae, William Cockburn, John Pursell, William Richardson, William Barrowman, and Patrick Mathie, bakers in the Canongate, to whom they had sold it for a price.

The tenants pursued the bakers for the price of the victual received by them, who pleaded force used upon them; viz. on the first three to receive and manufacture the victual, and on the rest, in so far as the town was threatened with military execution if they did not supply the rebels with provisions; that they could not be provided with victual any other way, and an offer was made to them of this; that the orders of the rebels were all under the pain of military execution, and if ever this was not expressed, it was understood, so that an offer of the victual was equal to an order on them to take it; the first force being proved, it was not incumbent on them to show the continuance thereof; and the defenders had reason, if it had been left to their choice, rather to take the victual for a price and sell it out again to the rebels, than trust to be paid for their labour in manufacturing it.

Pleaded for the pursuers: That no force had been used against the defenders to oblige them to take the victual, but they had done it from a view of gain, as was evident from the bargain being offered to others, and refused: That if they had objected their inability to supply the rebels, they would only have forced them to bake what themselves would have provided, not to purchase. It would be a dangerous doctrine, and a screen to many acts of voluntary disaffection, if a force used for one purpose should defend all other compliances, where the force did not appear. The defenders, therefore, having received the pursuers' wheat, which was not *in commercio*, behoved to account for the value of it.

Part of the wheat was delivered to the first three on the 31st of October, when it was thought it could not be re-delivered to the rebels.

The Lords found the defenders Robert Bartleman, James Miller, and James Gilchrist, not liable for the value of the victual received by them from the pursuers preceding the 31st day of October, 1745; and with respect to that received the said day, appointed the defenders to condescend on the way and manner the said wheat was disposed of; and found the defenders liable for what grain they received from the pursuers.

Act. *Graham and H. Home.* For Bartleman, &c. *R. Craigie and Haldane*
For Mathie, &c. *Lockhart.* Clerk, *Forbes.*

D. Falconer, v. 2. p. 11.

* * * The reporter subjoins the following note:

“It is yet in dependence, how far, as joint purchasers, or joint receivers, they are liable *in solidum*.”