

1766. *June 13.* WALLACE and COMPANY, Linen Manufacturers at Aberbrothock, *against* PATRICK MILLAR, Merchant in Edinburgh, and Others, Creditors of John Weir.

LOCUS PŒNITENTIÆ.

When it is *pars contractus* that a bargain shall be reduced into writing, there is *locus pœnitentiæ* till that be done.

[*Faculty Collection, IV. 256. Dict. 8475.*]

IN 1763, Millar, Gibson, and Balfour, merchants in Edinburgh, entered into a contract of copartnery with John Weir, for carrying on the linen trade. By this contract, Weir was constituted acting manager: the firm of the company was *John Weir and Company*. John Weir and Company became concerned with Thomas Smith in a bleaching-field, at Ford, in Mid Lothian. At this bleaching-field it was proposed to bleach the linen of other manufacturers, as well as the linen of John Weir and Company. On the 29th March 1765, Wallace and Company, manufacturers at Aberbrothock, wrote to John Weir and Company, offering to send a considerable quantity of linen to bleach at Ford. On the first of April, John Weir and Company made an answer acknowledging the favour. By subsequent letters, the price to be exacted for bleaching was adjusted. In the beginning of May, Wallace and Company forwarded to John Weir and Company, five bales of green linen, containing 8183 stamped yards. On the 7th May, J. Weir and Company acknowledged the receipt of those linens, and desired that the remainder might be forwarded. On the 13th May, Wallace and Company acknowledged the receipt of the letter 7th May, and mentioned that they had sent the remainder of the linen in two bales, amounting to 32,262 yards; and they made an offer to the company of the whole linen at a certain price, payable in two or three months. On the 16th May, Weir returned an answer in his own name: He therein said, "You will please know that this is the last year of the contract of John Weir and Company, who are purchasing no more goods, but are selling off their stock, in order to bring their affairs to a period. As I am, however, to carry on the linen trade in my own name, as I did formerly, I shall take your offer, upon giving me four months' credit at the prices you fix, and shall give my acceptance, payable at that time, which shall be regularly retired when due." On the 17th May, Wallace and Company wrote an answer, resuming Weir's offer, and adding, "which we hereby condescend to. You may compute their amount and send us your acceptance, payable in four months, discounting two per cent." They add, "We have made out invoice of the linens on the other side, amounting to L.426 : 18 : 11, for which, if found without error, you may transmit us your acceptance." On the 23d May, Millar, Gibson, and Balfour, having reason to suspect Weir's circumstances, protested two bills of his, and pursued him for relief of a credit which they had given him. They also used arrestments in the hands of several persons possessed of his effects. On the 24th May, a meeting of Weir's creditors was called, and, upon the creditors agreeing to

follow joint measures, Millar, Gibson, and Balfour, gave up their preference. On the same 24th May Weir wrote to Wallace and Company, informing them that he had stopt payment. He said, " In this situation, I thought it would have been both unjust and dishonest to have accepted of your offers, although attended with the most favourable circumstances, and therefore decline having any concern with your goods. The first parcel is all cut and marked, and just going to be laid down upon the green. They shall be forwarded as soon as possible; and when convenient you may advise if you would have any of the broad kind put up in the broad way." On the 27th May, (Monday,) as soon as possible after the receipt of Weir's letter, Wallace and Company returned an answer, resuming Weir's letter, and adding, " As the linens are to be bleached and finished on our account, we believe it may not be amiss to make up part of them in the broad way." On the 1st June, Weir executed a disposition of his effects to Millar, as trustee for the behoof of his creditors. The linens were poided for the behoof of Weir's creditors. Wallace and Company insisted in an action against Millar, Gibson, and Balfour, and also against Smith, as partners in the bleaching-field at Ford. They set forth, that the company had agreed to bleach the linens, and had acknowledged the receipt of them. They concluded for delivery of the linen properly whitened, or for payment of the value, with damages: and they separately concluded against John Weir to the same effect. In defence against this action, it was pleaded for the proprietors of the bleaching-fields, that they could not be liable either for restitution of the linen, or for payment of its value, for that it had been poided by the creditors of Weir as his property. It was separately pleaded by Millar, as trustee for the creditors of Weir, that the sale of the linen to him was completed by the pursuer's letter of the 17th May 1765, and the property thereby transferred to him: That he could not, after stopping payment, and suffering diligence to go out against him, either re-deliver the goods, or resolve the sale, to the prejudice of his other creditors. On the 17th December 1765, the Lord Kennet, Ordinary, pronounced the following interlocutor: " In respect it appears that the sale of the cloth with Weir was never completed, repels the defences proponed for the defenders, and decerns them to deliver to the pursuers the above linen cloth, amounting to 11,409½ yards, properly whitened and dressed, in terms of the libel; the pursuers, on receiving the same, paying to the defenders for whitening the said cloth, at the rate of one penny sterling per yard; or otherwise to pay to the pursuers the value of the said cloth, as libelled; and finds the pursuers entitled to expenses, and allows them to give in an account thereof."

On the 3d February 1766, upon advising a representation with answers, the Lord Ordinary " adhered, but found no expenses due."

The defenders reclaimed, and answers were put in to their petition.

ARGUMENT FOR THE DEFENDERS:—

For completing a bargain of sale, two things are required,—*first*, the consent of parties, as to the subject to be sold and the price to be paid. *Secondly*, Delivery of the subject to the purchaser. In the present case those requisites concur. Weir, by his letter of the 16th May, offered to purchase the linen at a certain price, payable in four months: the pursuers, by their letter of the 17th May, agreed to sell at that price, and upon that credit. Here, then, was the consent of parties as to the subject and the price. The delivery to Weir is also proved: of the first parcel, by his letter 7th May; of the second, by his letter

16th May. Thus, when the terms of the purchase were adjusted, he had the linen in his custody. It is true that the linen was originally put into his hands to be whitened on account of the pursuers: but this will not vary the case; for it will not be said that, in order to complete the sale, Weir ought to have delivered back the linen to the pursuers, and they to have re-delivered it to him. It is true that the pursuers desired Weir to send his acceptance of a bill for the value; but the sending this acceptance was no condition of the sale. The pursuers trusted to Weir's security for payment of the price: His sending or not sending an acceptance was of no moment; for it will not be pretended that a bargain of sale cannot be completed until the seller obtain an obligation in writing for the price: besides, this proposal of sending an acceptance was made by Weir, not originally required by the pursuers. It may be a hardship on the pursuers thus to lose part of the price of their goods, by becoming creditors to Weir; but, in transactions with a person circumstanced as Weir was, such hardships are unavoidable. As, by the bargain and delivery, the goods became the property of Weir, they are affectable by his creditors, and it matters not to them when he made the purchase, or whether he paid the price or no. A similar question was lately decided. *Barclay of Almerycross* commissioned some iron from Sweden: he agreed to sell part of it to *Arnot*. *Arnot* used to manage the affairs of *Barclay*, and the whole cargo of iron was at that time in the custody of *Arnot*. When this contract was entered into, the circumstances of *Arnot* were desperate; he soon after stopt payment and left Scotland. *Barclay* claimed the iron as his property, and he proved that *Arnot*, before the time of the bargain, knew himself to be insolvent, and had mentioned to different persons his intention of stopping payment; and yet the creditors of *Arnot* prevailed in a competition with *Barclay*, and the iron was found to have been transferred to their debtor. Weir was rendered a retour bankrupt in terms of law, within 60 days after his letter of 24th May, whereby he departed from his bargain; and, therefore, he could not give a preference to the pursuers in prejudice of his other creditors. It is the same thing in law, whether this preference was sought to be established in the form of a conveyance of subjects that had been long his property, or in the form of a letter passing from a finished bargain of sale.

ARGUMENT FOR THE PURSUERS:—

Here there was no completed bargain of sale: The offer which Weir made, and which the pursuers accepted, was that of purchasing the linen at a certain term upon an acceptance in writing. Bargains of this kind may be completed without writing; but,—when the agreement is, that the bargain shall be completed by writing,—until the writing be granted there is no complete bargain. Weir, in this case, was so far from granting an acceptance, that he declined the bargain altogether: Conscious that his acceptance could not be retired, he would not undertake what his circumstances rendered it impossible to perform. It is unreasonable to suppose that the pursuers, by their letter of the 17th May, meant, *ipso facto*, to divest themselves of the property, without being possessed of a proper document for showing that the price of the goods belonged to them: if so, then the property remained with them until such document was transmitted; and, as no such document was transmitted, the property is still in them. But, supposing that the letter of the 17th May was intended to

transfer the property, still something remained to be done for completing the bargain, *viz.* delivery of the goods. *Traditionibus, non pactis, dominia rerum transferuntur*, is as much a principle of the law of Scotland as of the civil law. The linen had been delivered to the company, not to Weir; and, from their books, it appears that the property was therein said to be in the pursuers. So the possession stood on the 17th May; it was therefore incumbent on Weir to take possession in his own name, not by delivering the goods back to the pursuers, and by receiving them a second time from the pursuers, but by taking possession of the one parcel in the warehouse, and of the other on the bleaching-field of his company. Instead of doing this, Weir, by his letter of the 24th May, disclaimed the bargain altogether. But, supposing the property to have been intended to be transferred, and actually to have been transferred, still it was lawful in Weir to disclaim the bargain. Weir could not have received the letter of the 17th May until the 18th or 19th,—diligence was raised against him on the 23d,—a meeting of his creditors was called on the 24th: it was an act of justice and good conscience in him to give up a bargain made so recently before his bankruptcy: it would have been unjust, and against good conscience, for him to have adhered to a bargain which he could not perform, and thereby have divided the goods of the pursuers among his creditors. The decision in the question between *Barclay of Almerycross and the Creditors of Arnot* is not in point; for there the purchase of the iron was made by Arnot in the beginning of April 1760, and yet he did not stop payment till the 14th May 1760. The iron was originally delivered to Arnot, and had remained for some time in his possession, as his property. The bargain, payable at six months' credit, was so entered in Arnot's books; and it appeared, upon proof, that, although Arnot proved insolvent, he continued to transact business in his ordinary manner, after the bargain was concluded.

“ The Lords adhered.”

Act. D. Græme. Alt. A. Wight.

OPINIONS.

The Court was unanimously of opinion, that Weir was not precluded from giving up the bargain, and that, in giving it up, he behaved like an honest man.

1766. *June 17.* CHARLES and ROBERT FALLS, Merchants in Dunbar, *against* ALEXANDER PORTERFIELD of FULLARTON, Merchant in Glasgow.

What Negotiation required in Bills payable at sight.

[*Faculty Collection, IV. 374; Dictionary, 1593.*]

IN spring 1764, Mr Porterfield imported ten pipes of Madeira wine from