

1770. *March 1 and Dec. 7.* MESSRS HASTIE and JAMIESON *against* ROBERT ARTHUR.

SALE—ARRESTMENT.

A Merchant abroad having consigned a cargo of goods to his Correspondent at home, and having transmitted him the bills of loading, the Consignees found to have a Special Property therein, or right preferable to the diligence of other Creditors, to the extent of the payments they had advanced, and the obligations they had come under for the Consigner, at the date of the competing diligence. Such right of Special Property extends not to the Ship, or the overplus of the ship's provisions and stores, and an arrestment used by the Owner's creditor in the hands of the shipmaster, found sufficient to attach these subjects. But the said arrestment found to be inept and insufficient to attach the freight both of the goods consigned, the property of the Arrester's debtor, and of separate goods on board, the property of other persons.

[*Vide supra*, 1st December 1768.]

PITFOUR. The question before the Ordinary was, Whether the arrester or the consignee preferable? This depended upon the question where the property lay. It seemed plainly in Dunlop. No allegations of practice or expediency can get the better of the principles of law. Hastie and Jamieson were no more than the factors for Dunlop. There is no meaning in the words *jus quæsitum*, unless you bring this right to a legal sense. Was it property, *pignus*, or hypothec? What is pleaded for Hastie and Jamieson would be destructive of trade: it is the life of trade that the transmission of property may be known, and latent deeds rendered ineffectual. It is a rule as old as the Romans, and adopted by every commercial nation,—*traditionibus, non nudis pactis, dominia transferuntur*. Every nation will deal confidently with us if that is the rule: but otherwise, no nation will trust us. Every private hypothec must be ruinous. It is said that an arrester cannot take a subject but *tantum et tale*, as in the debtor: Does that imply that all the latent obligations of the debtor go along with the subject? The proof offered is not relevant. Merchants, who have lost by trusting to consignments, will be of one opinion: merchants, who have prevailed upon arrestments, will be of another,—for every man thinks his own cause right. I would require the judgment of courts, or the opinion of writers, that such is the established practice: but nothing of this kind is offered.

KAIMES. A man's property may be affected by diligence, whatever private under-obligations he is under. Suppose the ship and cargo to have been sold to Hastie and Jamieson, apprehension then might have been good: but that is not the case here; for, even after the most complete delivery, the goods would have been still the property of Dunlop, not of the consignees.

COALSTON. This question is of the highest importance in point of precedent, if it is true that, in commercial countries, the merchants have a different conception from what my brethren have. A merchant writing that he was to send goods, does not give a right to consignees; neither does the putting goods on

board, and taking a bill of loading, so long as it remains under the power of the merchant consigner : but here there is a bill of loading actually transmitted to a correspondent. The averment made so strongly as to the ideas of the mercantile world, that I must examine their grounds. There seems a clear ground from the delivery of a bill of loading to the merchant at home : this creates a right in him. Suppose that a debtor, meaning to pay a particular debt, takes an obligation from a friend payable to a certain creditor, and transmits it to that creditor ; here is a *jus quæsitum*. Or, suppose a sum of money in the same circumstances,—the debtor puts it in the hand of a friend, and takes his obligation to pay it to a creditor, and transmits this obligation : this would be good against other creditors, and yet the money would remain the property of the debtor, and perish to him. In this case I have some difficulty as to the proof of delivery.

MONBODDO. I do not enter into mercantile considerations, of which I am no competent judge. Lord Pitfour puts the case upon too narrow a bottom of property not being transferred. It is sufficient for my argument if the consignee had a right of security. Such right was established by the contract between Dunlop on the one side, and Hastie and Jamieson on the other. He might have sent no cargo,—he might have recalled the cargo and bill of loading sent ; but, by actually sending the bill of loading, he put this out of his power.

GARDENSTON. The whole American trade is conducted in that very way which the interlocutor condemns. Here I would prefer the opinion of merchants to that of the most enlightened bench of judges : the one would judge from daily experience, the other from abstract principles. I think that a consignment by bills of loading in payment is equivalent to an assignation in security, capable of giving a right to hold, but not of conveying property. Suppose a bag of money had been sent with a bill of loading, would arrestment have intercepted it ? Suppose a different bill of loading should thereafter be granted to another creditor, the first would be still preferable ; the foreign merchant could not effectually recal it.

JUSTICE-CLERK. I am not called to give my opinion upon the abstract case, when a bill of loading is sent upon a specific debt : that is not the case here : I take the case upon the contract. Were such a contract to be effectual, it would stop the trade with America altogether, instead of supporting credit. If there had been a simple consignment, no one doubts that the arrestment would have been effectual. Here is the same thing,—no more than a consignment of goods to account, not in payment : the debt was not so much as due at the time.

ELLOCK. Here was a mutual contract for consignment, not in payment of debt, but to account. A merchant may recal a bill of loading, though the contrary has been here asserted.

AUCHINLECK. Suppose that the foreign merchant had sent over a deed recalling the consignment, would that not have been good against the consignatar ?

PRESIDENT. I take this cause upon its own circumstances, and think that the contract cannot subsist to the prejudice of the arresters.

On the 1st March 1770, “The Lords preferred the arresters ;” adhering to Lord Pitfour’s interlocutor.

*Act.* A. Lockhart. *Alt.* D. Rae, J. Montgomery.

*December 7.*—GARDENSTON. The freight was not under the view of the House of Lords, nor does it come under any of the interlocutors. The arrestment by Arthur cannot carry the freight due by the proprietor for his own goods. The freight of the other goods belonging to other parties was payable to Hastie and Jamieson.

AUCHINLECK. You can only arrest in the hands of one who is debtor; whether the freight belonged to Dunlop or not makes no difference. The shipmaster had a *jus exigendi* as to the freight, and might be considered as a creditor; but surely he was no debtor in the freight.

JUSTICE-CLERK. How can the shipmaster be made holder of the freight against his employer? If Arthur had arrested the freight in the hands of the different proprietors of the goods, the arrestment would have been good; although it might then be uncertain whether the goods would arrive safe. As to the arrestments in Hastie's hands, the moment the goods were received, the freight was as much the special property of Hastie as the goods themselves.

COALSTON. If the shipmaster had received the freight, the arrestment would have been good: but that is not the case. The shipmaster was rather creditor than debtor. Arrestments in Hastie's hands good; but only effectual after payment of what is due to Hastie.

PITFOUR. Arrestment is competent, not only against debtors, but against one having the custody of goods. It has been found by the House of Peers that the consignment gave a preferable right to the consignee; but *quousque? tanto minus* the freight. As to freight, the shipmaster is in the same situation as before the judgment. Freight is the fruit of the ship, and arrested properly by arrestment of the ship.

ELLIOCK. How can the freight due for the goods of other persons be in the custody of the shipmaster?

PRESIDENT. Suppose a man to consign a horse from the East Indies, the consignee may have a special property in the horse: the arrestment of the horse will not give a right to the freight. The shipmaster cannot say, I will detain the horse, because the freight of the horse is arrested.

JUSTICE-CLERK. Could it be said, upon an accounting, that the shipmaster was debtor in the freight, because it was in his power unlawfully to have detained the goods until the freight was paid?

PITFOUR. The shipmaster was not bound to deliver the goods till the freight was paid. On the contrary, he was bound to detain the freight. Suppose that the goods were worth £2000, and the freight 1-20th part, he was bound to deliver no more than £1900.

On the 7th December 1770, "The Lords found the freight not carried by the arrestment."

22d December 1770, refused a petition and adhered.

*Act.* R. Cullen. *Alt.* H. Dundas.

*Reporter,* Pitfour.