

No 44.

Property of goods on ship-board transferred on sale by indorsements of the bills of lading.

1787. February 2.

ROBERT BOGLE *against* DUNMORE and COMPANY.

WALTER MONTEATH sold to Robert Bogle a parcel of sugars, then on board of a ship just arrived in the harbour of Greenock, and belonging to Dunmore and Company. At the same time the bill of lading, blank indorsed, was given up to the purchaser; who thereupon granted to Dunmore and Company an obligation for the payment of the freight.

Dunmore and Company being creditors of Monteath, who in the mean time had become bankrupt, now refused to deliver up the sugars to Bogle, of which they claimed a right of retention, as being the property of their debtor, having caused the goods to be carried from ship-board into a private repository of their own.

In an action at the instance of Bogle against Dunmore and Company, for delivery of the goods,* it was

Pleaded for the defenders; If the goods of a debtor are in the lawful custody of his creditor, he may retain them for his payment. Even though they have come into the possession of the creditor under the condition of his restoring them to the debtor, still the right of retention will be competent, if the debtor be bankrupt, or *vergens ad inopiam*. An obligation, indeed, to restore was laid on the creditor; but of that the debtor cannot require fulfilment, while he is unable to perform an equal obligation incumbent on himself. This principal was strongly recognised by the judgment of the House of Peers, in the case of the Trustees of Stevenson *contra* Hewit and Brokeherst, determined by the Court on 17th February 1775. (See APPENDIX); as it had formerly been by their judgments in the cases of Lees *contra* Dinwoodie, 10th December 1707, No 4. p. 2546.; and of Creditors of Glendinning *contra* Montgomery, 8th June 1745, No 34. p. 2573. It is evident, that there is nothing in the nature of the contract between the owner of a ship and the person to whom it is freighted, which can create an exception from this equitable rule; and therefore the defender was at liberty to assume his right of retention on those goods which, as ship-owner, he had lawfully or *bona fide* in his possession.

It is true, prior to the exercise of this right, the sugars were sold to the pursuer; and if the property had been then transferred, the defender's claim would have been precluded. But, *traditionibus et usucapionibus, non nudis pactis, dominia rerum transferuntur*; and it is not pretended that of those goods any actual delivery was made. The indorsement of the bill of lading cannot be supposed to import a virtual tradition. It seems clear, that after goods are shipped, and the bills of lading transmitted, and in the hands of the purchaser, and even by him indorsed again for an onerous cause, the original owner may recal-

* The action likewise respected another and a larger quantity of sugars; but it was in a different situation, and afforded no question of importance.

the bills, and countermand the cargo, in consequence of the intervening bankruptcy of the first purchaser. If this is the case, it follows, that neither the transmission nor indorsation of bills of lading is equivalent to delivery of the *ipsa corpora*.

Answered; Goods of one person put on board of the ship of another for transportation, continue still in the civil possession of their owner, and are not construed to be in a legal sense in the possession of the master or of the proprietor of the ship. No doubt, these last may withhold delivery of the cargo till the freight be paid; but this arises from the reciprocal nature of the contract, which forbids the demand of performance on the one part when it is not given on the other. And on the same footing stands an agent as to the papers of his client, or an innkeeper, stabler, or the keeper of fields for pasture, with respect to the property committed to their charge. This continuance of the civil possession with the proprietor of the cargo, forms the distinction between the present question and those cases quoted by the pursuer. In England the same effect of civil possession has been admitted with respect to goods in the hands of an artificer for the purpose of manufacture; the claim of retention for the owner's debt being denied by the Court of King's Bench. *Green versus Farmer*, 6th May 1768, Burrow's Rep. vol. 4. p. 2214.

The right of retention in question, therefore, could not exist while the goods were on ship-board or until their landing. But before that time the property of them had been transferred from Montea to the pursuer by the indorsation of the bill of lading; nay, this transference was prior even to the making of the claim of retention; and sooner the right will not be supposed to have commenced. The freedom of commerce requires that cargoes of goods should be capable of sale and transference while yet at sea; and a more complete embargo can hardly be figured than that which the freighter's latent claims of retention would produce. But the transference of property in that situation is not more expedient than consonant to the principles of law. A ship freighted, in whole or in part, is a repository belonging *quoad hoc* to the proprietor of the cargo; and the ship owner or master is the hand which takes charge of the repository in his behalf. It is by means of this hand that he holds the possession, the civil possession, as it is called. Now, an indorsed bill of lading is no other than a declaration, that a contract has taken place, by which, in the room of the former, a new proprietor is substituted, by whom, of course, the possession is now held, through the shipmaster. He stands, therefore, now in the same situation with respect to the new proprietor in which he was before as to the former one. Here then is clearly a transference of the possession of the things sold from the seller to the purchaser; which is all that was supposed wanting to complete the pursuer's right to the goods in question. This doctrine accordingly received the sanction of the Court, in the case of *Buchanan and Cochrane contra Swan*, 13th June 1764, No 42. p. 1428.; and of the

No 44. House of Peers, in that of Arthur *contra* Hastie and Jamieson, 10th April 1770, No 43. p. 14209.

The cause was reported by the Lord Ordinary ; when

A majority of the Court were of opinion, that the proper possession of the goods was held, not by the shipmaster or owner, but through them, first by the shipper, and then by the indorsee to the bills of lading, *animi* ; delivery of possession being made in an effectual manner, and such alone as the case was capable of ; and therefore

“ THE LORDS repelled the defences pleaded for Messrs Dunmore and Company.”

Reporter, *Lord Henderland.* Act. *Wight, A. Campbell.* Alt. *Rolland, Abercromby.*
Clerk, *Orme.*

S. *Fol. Dic. v. 4. p. 250. Fac. Col. No 305. p. 470.*

S E C T. III.

Stoppages *in transitu.*

No 45. 1788. *December 4.* ALLAN and STEUART *against* CREDITORS of STEIN.

IN the case of Allan and Steuart *contra* Creditors of Stein, No 49. p. 4949, it was virtually found, both in the Court of Session and in the House of Lords, that the transmission of bills of loading to the purchaser three weeks before his bankruptcy, did not bar the seller from stopping, *in transitu*, such of the goods as were not landed and delivered.

Fol. Dic. v. 4. p. 252.

1789. *July 23.*

JOHN YOUNG *against* The TRUSTEE for JAMES STEIN'S CREDITORS.

No 46.
Altho' a bill of lading has been transmitted, it was found the goods might be stopped *in transitu*, when the consignee had become bankrupt.

SANDEMAN and Graham, merchants in London, were the consignees of James Stein, a Scotch distiller, and as such intrusted with the sale of large quantities of spirits prepared by him for the London market. They had come under acceptances for Stein to a great amount, when he shipped for London, consigned, as was usual, a cargo of aquavitæ, of which he had indorsed and transmitted to them the bill of lading.

The vessel set sale, but was, by contrary winds, obliged to put back to her port. Mean time, Sandeman and Graham became bankrupts, and their estate