

No 10.

Owners of the Katharine of Whitehaven *contra* the Freighters; so that demurrage could not be due till a protest was used; and, therefore, in anno 1716, Mason *contra* Hamilton, a protest clandestinely taken was not sustained, *voce* FRAUD. The protest taken at Annapolis, above 60 miles from the place where the supercargo was, could be of no effect; for it should have been either taken against the supercargo personally, or at least publicly at the mast of the ship.

It was *answered* for the pursuers, That though often protests were requisite, yet where the lie-days were fixed by the charter-party, in that case *dies interpellat pro homine*; and the supercargo, who came along with the ship, could not but know the day of the arrival, and consequently when the lie-days expired; demurrage was therefore due without a protest, especially when, as in this case, it was moderate, and did not exceed the true expense and tear and wear upon the ship; and the protest produced was a sufficient declaration of the master's *animus* in staying, that it was on account of the freighters, and is a presumptive evidence of the ship's being in readiness? as was found in the cases of Whiteside of Whitehaven, anno 1718, and Stenhouse in the year 1722*. As to the decisions cited for the defenders, that of Calderwood's was against them; for, in that case, there were no lie-days fixed by the charter-party; so that the *dies* could not interpel, which made a protest necessary. And in the case of Hamilton and Mason, there was fraud in the skipper; for he being obliged to have his ship ready at a certain day to receive the cargo, took a latent protest without acquainting the master, who was upon the place, and with whom he daily conversed, and yet made no mention of the protest, but allowed him to put his cargo aboard at leisure, and received it without complaint.

' THE LORDS found demurrage due.'

Reporter, *Lord Newhall. Act. Ja. Graham. Alt. Dun. Forbes. Clerk, Dalrymple or Murray. Fol. Dic. v. 3. p. 168. Edgar, p. 5.*

1760. November 18.

MARJORY STEVEN, Relict of WILLIAM JOHNSTON Maltster in Aberdeen, *against* JOHN ROBERTSON Merchant there.

No 11.

No action of damages found to lie against the seller of victual for non-implementation, where the price was referred to the seller, and the buyer himself having died

IN November 1756, William Johnston maltster in Aberdeen, and Provost Robertson, entered into a verbal agreement; whereby the Provost sold his farm-bear of Pitmillan, for crop 1756, to Johnston, deliverable as soon as the same could be got ready by the tenants, the price to be fixed by the seller.

In pursuance of this agreement, 30 bolls were delivered before Christmas; but Johnston dying soon after, the Provost sold the remainder of his bear to others, at L. 10 Scots per boll, the same price charged for 30 bolls that were delivered; having previously let Johnston's widow know, who made a demand

* See MUTUAL CONTRACT.

for the remainder, that he would deliver her none, as he knew nothing of her circumstances.

Some months after, an action of damages was brought by the widow against Robertson, upon this medium, That he had taken only L. 10 Scots for the bear delivered, and she had been obliged to pay L. 12 soon thereafter for what bear she wanted; and decret was pronounced in her favour.

Pleaded for Robertson, in a suspension of this decree, *imo*, That in point of interest he could have no temptation to resile, as it was impossible for him to get better terms; and the pursuer could have as little reason for insisting on implement, as she might at that time have purchased any quantity of bear she chose at L. 10 Scots per boll. The defender informed her why he declined the delivery of the remainder of the barley; and she tacitly acquiesced, having never made further requisition. She got that notice immediately upon her husband's death, which was before Christmas. The bear continued from that time till March to be sold currently at L. 10 Scots per boll. She had, therefore, three months to provide herself, at the same price fixed by the defender for the bear formerly delivered; and if, by her own delay, she was obliged to pay a higher price, no claim could from thence arise against the defender; *l. 21. § 3. ff. de act. empt. vend. ; Hotoman. Disp. p. 728.*

2do, There was no stipulation as to the quantity to be delivered; no penalty for failure; the price, the time of delivery, and term of payment, were all left *in arbitrio* of the seller. Had Johnston lived, the seller would have been entitled to have demanded ready money; and, if refused, to have sold his victual to whom he pleased. His answer to the pursuer plainly imported such a demand, or at least a demand for good security; but as she offered neither, and did not even make any further requisition, in common sense he was no longer bound.

3tio, Although an action for damages may be well founded; when a certain price is stipulated, and the seller refuses delivery for the sake of a higher price; yet when the price is referred to the seller himself, there can be no such motive for his failure in delivery. Neither can damage be any consequence of that failure. By the civil law, where the price is referred either to the seller or to the buyer, there can be no claim of damages against the seller for failure to deliver, or against the buyer for refusal to receive; *l. 13. C. De contr. empt.*

Lastly, By the terms of the agreement, the defender was certainly entitled to demand the highest price given for barley that year, which was L. 12. It is inconsistent, therefore, to plead, that his charging only L. 10 for what he had delivered, should be the foundation of an action of damages against him.

Answered for Marjory Steven, The defender's arguments resolve into an objection, *imo*, To the validity of the contract; *2do*, To the ascertaining damages through breach of it.

With respect to the *first*, it is in vain to have recourse to the civil law to prove its nullity; for whatever may have been the opinion of the civilians, it is

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before the whole was delivered, his representatives made a demand for the remainder, but without offering ready money, or caution for the price.

No 11. certain, that such contract is binding by the law of Scotland. In this case, there was a complete bargain for the whole farm-bear, deliverable so soon as it could be got ready. Part of it was delivered; and consequently, as matters were no longer entire, there could be no *locus pœnitentiæ* to the seller, on the death of the buyer. The only thing left to him was, to ascertain the price; and he could not arbitrarily use that power, either to avoid the contract, or commit extortion; if he had attempted either, a court of justice would have given redress.

2do, Neither is the defender's allegiance, That in point of interest he had no temptation to resile, a good defence. The law does not so much consider the benefit arising to the person who resiles, as the damage done to the other party by the breach of a mutual contract. And as to the pursuer's acquiescence in the not delivery, the contrary is manifest; for it is admitted, that she made a demand for delivery, and was refused. Besides, although she had made no requisition, it was incumbent on the defender to have made an offer of the grain, on her paying, or finding sufficient security for the price; but he does not pretend that he made any such offer; and therefore he ought to be liable for any damage she has sustained by the bargain.

Nor is it a good objection, That the pursuer might, some time after her husband's death, have bought bear at L. 10 per boll. She had then a considerable quantity on hand; and it is not pretended, that she could foresee the rise of the price that happened so soon after. Neither do the authorities from the civil law conclude against her, as they do not fix the precise length of time sufficient to bar such an action. And as to what is urged for the defender, That he might have charged the highest price of the season for his barley, and consequently there could be no loss incurred through the not delivery; that argument is fallacious. When a contract is entered into, the terms of which are indefinite, these terms must be settled upon equitable principles. In this case, as the current rate of the country was not known at the time of the bargain, the period for ascertaining the price was very properly deferred to that of delivery. Part of the barley was delivered, and the remainder in readiness for delivery, before the end of December. At that time, it is agreed, the current price was L. 10 Scots, and in equity no more could have been demanded by the defender; and therefore he ought to pay the difference between the price at that time, and what the pursuer was afterwards obliged to pay.

'THE LORDS found no damages due.'

Act. Ræc.

Alt. Garden.

I. C.

Fol. Dic. v. 3. p. 168. Fac. Col. No 247. p. 450.