

No 375.

1777. August 6. TAYLORS of EDINBURGH *against* WHITE.

THE LORDS found, That the Sheriff had no jurisdiction as a police officer in regulating the rates of tradesmen's wages. This power belongs to Justices of Peace within a county, and Magistrates in towns. See APPENDIX.

*Fol. Dic. v. 3. p. 366.*

1797. May 31.

HENRY BAND *against* JAMES CLERK, Sheriff-depute, and WILLIAM SCOTT, Procurator-fiscal of the County of Edinburgh.

No 376.

The Sheriff and Procurator-fiscal of the county of Edinburgh, found not to be liable in damages for preventing wheat sold to strangers from being delivered, it having been lodged previously to the sale, in the granaries of the Corporation of Bakers, for the consumption of the city, which was then threatened with a scarcity.

THE Corporation of Bakers in Edinburgh are proprietors of several granaries in its neighbourhood, which are chiefly occupied by the individual members, for the purpose of keeping the wheat meant for the consumption of the city. It sometimes happens, however, that wheat is lodged in these granaries which is afterwards sold to bakers in the country, and to farmers for seed ; but there has scarcely been an instance of wheat being sold out of them for exportation.

On the 5th August 1795, when there was a general scarcity of corn over the kingdom, the wheat in these granaries did not exceed 3600 bolls, a quantity not more than equal to three weeks ordinary consumption of the city ; but its high price had so much reduced the consumption, that supposing it to have continued at the diminished rate at which it had stood for some weeks, this quantity would have served the inhabitants from six to eight weeks. It also appeared, that the quantity of wheat, which at this time came weekly into the granaries, was not more than a fourth of what was usually deposited there every week at the same season.

On the 1st August, 1300 bolls of wheat from these granaries were sold by some of the bakers to corn-dealers from England. A great part of this quantity, they afterwards admitted, had been destined for the consumption of Edinburgh.

The Procurator-fiscal for the county presented a complaint against the sellers, accusing them of forestalling, and praying, that they should be ordained to find caution not to sell any part of the wheat lodged in these granaries, and that the persons having the charge of them should be prohibited from delivering what had been sold ; and further, that the offenders should be punished according to law.

The Sheriff granted warrant for citing the persons complained of ; and after examining all of them who appeared, he pronounced a judgment, prohibiting ' the masters, overseers, servants, and all others having the charge of grain or flour, or in any other respect acting at the mills of Bell's Mills, Water of Leith Mills, Stockbridge Mills, and Canonmills, from giving out any wheat therefrom to any of the said persons, or their order, until further orders.'

Henry Band, a corn-dealer, as well as a member of the Corporation of Bakers, had 100 quarters of wheat in one of these granaries, all of which he had sold, on the 1st August, to a Hull corn-merchant, at L. 6 per quarter.

More than three weeks after the date of the above interlocutor, Band (31st August) presented a petition, stating, that wheat had fallen L. 2 : 5s. per quarter, and praying the Sheriff to remove the interdict as to him, and to find the Procurator-fiscal liable in L. 337 : 10s. being the difference between the price at which he had originally sold the wheat, and what it would now bring.

The Sheriff having refused this petition, Band presented a bill of advocacy. The Lord Ordinary ordered the wheat to be sold, and afterwards refused the bill.

On this Mr Band brought an action against the Sheriff and Procurator-fiscal, concluding for L. 1000, or such other sum as he should prove that he had lost in consequence of the interdict ; and

*Pleaded*, The sale made by the pursuer does not fall under the description of forestalling ; and is not otherwise illegal. Forestalling consists in purchasing grain coming to a public market, 1592, c. 150. ; M'Kenzie's Criminal Law, T. 23. § 3. But the grain in question was in a loft hired by the pursuer ; and although it formed part of one of the granaries belonging to the Corporation of Bakers, still the inhabitants of Edinburgh have, neither by law nor custom, any *jus quæsitum* in the grain lodged in them, therefore it cannot be considered as *in transitu* to that city. The pursuer indeed is a corn-dealer as well as a baker, and he lodges wheat there for the purpose of selling it, wherever he can do so to the best advantage.

Besides, it is the buyer only who is guilty of forestalling. The annulling the sale, too, is no part of the statuable punishment ; and the Sheriff, by the act 1592, has no jurisdiction in the matter.

As the pursuer, therefore, was guilty of no crime, the defenders were not entitled to interfere with him in the exercise of his trade. The danger of a scarcity was not so imminent as to suspend the ordinary rules of law ; and, admitting that it had, it would be unjust that the public should reap benefit at the expense of an individual. But as the public is not a *nomen juris*, the pursuer's action can lie against the defenders only, the immediate instruments of the injury. Nor is it to be regretted that they should suffer personally, the measures which they followed being suggested by a narrow policy ; the way to prevent a scarcity of grain being, to promote, in place of checking, its free circulation.

It is not enough that the Sheriff acted according to the best of his judgment. If his proceedings be directly contrary to law, when acting even in his judicial capacity, he will be subjected in damages ; 3d June 1750, Anderson against Ormiston, *voce* REPARATION ; and, *a fortiori*, must he be so when action ministerially as an officer of police. In the former case he must decide ; here he is left to act or not as he chooses.

No 376.

*Answered*; The wheat in question having been lodged in the granaries of the Corporation, affords *prima facie* evidence that it was intended for the supply of the city. It was therefore *in transitu*, and consequently the pursuer, by selling it to a stranger, was guilty of the crime of forestalling, which is committed by the seller as well as the purchaser of the commodity. Nor will it avail the pursuer that he is a corn-dealer as well as a baker; for he sold his whole stock, part of which, at least, he must have originally intended to use in his latter capacity. Besides, it has very rarely happened, that bakers, who are also corn-dealers, have lodged wheat in these granaries which they intend for sale.

It is a mistake in the pursuer to suppose, that the steps taken by the Procurator-fiscal were to punish him for forestalling; they were taken to prevent him from committing that crime; and therefore, as a matter of police, fell under the Sheriff's jurisdiction.

Supposing, however, that the pursuer had not been guilty of forestalling, the emergency was sufficient to justify the interference of the Procurator-fiscal. The granaries contained no more than what was required for three weeks ordinary supply of the town; and although for a month or two preceding the consumption had diminished, the defenders were not entitled to found on a temporary circumstance of that sort, in a question which involved the immediate subsistence and tranquility of a great city.

I was separately *pleaded* for the Sheriff, That even if his conduct had been improper, he could not have been subjected in damages. He acted judicially in the whole matter. A formal application had been made to him by the Procurator-fiscal; he was obliged to decide upon it, and having done so to the best of his judgment, he could not be answerable for the consequences.

THE LORD ORDINARY 'assoilzied the defenders.'

A reclaiming petition was appointed to be answered. On advising the cause, the Court thought the interlocutor right. Most of the Judges were of opinion, that the wheat, from being lodged in the granaries of the Corporation, was as much *in transitu* to the Edinburgh market, and set apart for the use of the inhabitants, as if it had been in an Edinburgh bakehouse. Some, however, thought that the wheat being lodged in these granaries, afforded only *prima facie* evidence of its being destined for the consumption of the city; but even that, it was said, was sufficient to justify the conduct of the Procurator-fiscal.

THE COURT were also unanimously of opinion, that although the action had been well founded against the Procurator-fiscal, it must have been dismissed as to the Sheriff; because, after the petition had been presented to him by the Procurator-fiscal, he was necessarily called upon to decide upon it; and no Judge is responsible for the effect of his sentences, unless oppressive intention be charged against him.

THE COURT 'Adhered.'

Lord Ordinary, *Gleuelc.*

Act. *H. Erskine, W. Robertson, James Fergusson, jun.*

Alt. Lord Advocate *Dundas, et alii.*

Clerk, *Home.*

R. D.

*Fac. Col. No 31. p. 70.*