

The earl also offered to prove that the adjudications of the respondent Dunbar, were satisfied and extinguished by payment, and made several objections to the regulation of the securities. As this seemed only a pretence to retain possession, the Court justly refused a commission to make proof of such general allegations, but reserved an opportunity to the appellant if he thought fit to bring a proper action for that purpose, and the respondent gave security to be answerable for whatever should appear to have been over paid.

The appellant Ross who had a tack from the appellant the earl stated that he was turned out of possession without being made a party to the action. But the tack in question is dated in April 1722, more than a year after this action commenced, and several months after the first judgment pronounced in favour of the respondent; and as he, therefore, could not be originally made a party, so there was no occasion for making him a party afterwards, the question being as to the right of the lessor, and that being determined against him, his lease made after the suit commenced was of no consequence.

Judgment,
19 April
1725.

After hearing counsel, *It is ordered and adjudged that the petition and appeal be dismissed, and that the several interlocutory sentences and decrees therein complained of be affirmed.*

For Appellants, *C. Wearg. Ch. Areskine.*

For Respondents, *Dun. Forbes. C. Talbot. Will. Hamilton.*

Case 123. Volrath Tham, Merchant in Gottenburgh *Appellant;*
Edgar, 23
Dec. 1724. Charles Sheriff, and Richard Sheriff *Respondents.*

23d April 1725.

Factor.—A foreign factor advises his correspondents, that he has disposed of a cargo, and shipped returns for it, on both which he charges commission; he afterwards brings an action against the correspondents, alleging that he had sent his own goods, and had not received proceeds for theirs; but he is not allowed to prove facts contrary to his correspondence.

The knowledge of the ship-master, though Supercargo, and part owner, not relevant against the correspondence.

Proof.—The factor having refused to allow a proof of the ship-master's knowledge by his own oath, a proof by witnesses is refused him.

IN the year 1717, the merchants who sent goods to Sweden, suffered great losses, by an ordinance of the then king, by which a small piece of coined copper, of the size of a farthing, called a *Minttoken*, was made current for the value of a dollar Swedish: having been paid in this specie, the homeward cargoes could not be purchased but at a great discount.

In 1718, the respondents and several others, who had purchased, on their own separate accounts, parcels of herrings, loaded them
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for the Baltick, on board a ship of which James Sheriff, brother of the respondents was master; each adventurer having taken a separate bill of lading for his own parcel, marked with his own mark, and each being to stand the risk of his own adventure. A commission in writing, signed by the adventurers, dated the 1st of September 1718, was given to James Sheriff the master, by which he was empowered to call at Gottenburgh, in his outward voyage, and to sell and dispose of the cargo of herrings if the market was good, and if iron and deals were to be got for the proceeds; but if these were not to be got for net proceeds, he was prohibited at any rate to sell, but to take advice from Stockholm, how markets ruled there; and in case they did not answer he was to proceed to Dantzick, and there to sell and reload an inward cargo.

About the middle of September 1718, James Sheriff arrived with his vessel at Gottenburgh, and immediately applied to the appellant for his assistance in disposing of his cargo, and delivered to the appellant a letter from the respondent Richard, in which were these words: "my brother James is now loaded with herrings; you'll be assistant in disposing of all to the best advantage; and what further I have to say, I refer you to my brother who has orders to manage my affairs."

The appellant having undertaken the management of this business, on the 19th of September 1718, advised the respondent Richard of his having made application to the Swedish ministers, Count Morner, and Baron Gortz, to have a bargain made with his Swedish Majesty, for iron in exchange for herrings: and by a letter on the 20th of October, to the respondent Richard, the appellant wrote as follows: "concerning Mr. James Sheriff's loading, have I sold to His Majesty, to wit; every barrel of herrings, accounted to 20 dollars, and every ship pound of iron free on board to sixteen, and shall in fourteen days time, or thereabouts, be ready to go from hence. I can assure you that I have had incomparable much trouble to get so far, because iron is incomparably scarce, and so much disposed of, and much more as can come down this year." On the 17th of November the appellant again wrote to the respondent Richard, in these words: "now goes by your brother Captain James Sheriff, who hath had iron for the proceeds of his herrings, and 195 barrels pitch, and 5 barrels tar in discount of the old account: I can assure you, that he is so well expedite, as these times ever can be possible. I send you sale account of the herrings, amounting to 7004 dollars, and the invoice upon the iron amounting to 8215 dollars, which you will please after finding right to note conform with me."

On the 20th of November, James Sheriff, the master, wrote to his brother Charles as follows: "when I came first to the river, I anchored at the new castle, and immediately wrote to Stockholm, to know how the price of iron and herrings ruled there; after shewing Volrath Tham my commission, and he finding me positively resolved not to sell at any rate, except I got iron

“ and deals for value of herrings, we at last concluded a bargain,
 “ and I have received for my loading iron and deals, as per bill
 “ of loading inclosed, which I have sent for the behoof of the
 “ concerned, in which my share, as part freighter, is also in-
 “ cluded.”

After James Sheriff was thus loaded, and ready to sail, he was detained for some time by the frosts, and after the death of the then King of Sweden, on the 30th of November 1718, an embargo was laid upon all shipping in the river. On the 3d of January 1719, the appellant wrote another letter to the respondent Charles, advising of this event.

James Sheriff arrived in Scotland in February 1719, and by him the respondents received the account sales of the herrings, and the invoice of the iron and deals, as the proceeds of the outward cargo. By this account sales and receipt thereon, the appellant acknowledged receipt of the herrings making up $667\frac{1}{2}$ barrels at the prices there stated, amounting to a certain sum, and charges, *inter alia*, 2 per cent., for his commission, mentioning that the same were sold for account of the respondent Richard; and by the invoice, the appellant acknowledges that 75 dozen of deals, and 475 ship pounds of iron were likewise bought for account of the said Richard Sheriff, and he charges 2 per cent. commission for buying the same, the deals and 400 ship pounds of the iron being sent for proceeds of the herrings, and 75 ship pounds of iron in payment of a former balance. And upon the footing of these vouchers and the letters of correspondence, the several freighters, cleared accounts with James Sheriff the master, paid him his freight, and divided the homeward cargo.

Afterwards in December 1719, the respondent Richard received a letter from the appellant, informing him that 442 barrels of the herrings had been sold by him to the king of Sweden, with the knowledge and advice of James Sheriff the master, for iron, which was not delivered, not being come down from the mines; and as a favour to James Sheriff, who had lain a considerable time at the port, he had taken the liberty to ship on board his vessel 280 ship pounds of iron, purchased in return of herrings sent by Messieurs Hogs, on board a ship of which James Young was master, from one Klaas Habecht: that upon the King of Sweden's death, a stop was put to the delivery of iron on the king's contract, and the appellant was obliged to purchase iron at a much greater price, to put it on board the said James Young's ship, on account of Messieurs Hogs; and that the iron due for the respondents herrings was still a debt upon the Crown of Sweden: and the appellant inclosed an account current, charging the respondents with the difference of price between the 280 ship pounds of iron, at the former price of 38 copper dollars, and the new price at 54 copper dollars per ship pound; for which he also drew bills upon them.

Upon their refusal to pay he brought an action against them before the Court of Session, for the price of the said 280 ship pounds of iron, and likewise for the price of 58 pounds more, at the rate of 54 dollars per ship pound, and the appellant craved that the Court would allow him to prove the matters and facts alleged by him. After defences for the respondents, the Court on the 25th of July 1724, “ found that the appellant having advised by his letter of the date the 17th of November 1718, that iron was loaded for the proceeds of the herrings, conform to James Sheriff’s commission as super-cargo, and his letter of the 20th of November aforesaid, the appellant could not now be allowed to prove contradictory facts to his former correspondence; and found the allegiance that James Sheriff’s knowledge, (the party concerned in the outward voyage) that part of the appellant’s iron and Young’s was on ship-board in return for the outward cargo, was not relevant against the respondents, and found no presumption that James Sheriff did advise the freightors of the true fact.”

The appellant reclaimed, insisting, that James Sheriff *the brother, trustee, and super-cargo was privy to the real transaction and ought to have informed the others of it*: and therefore the appellant again prayed to have a proof of his allegations: to this petition the respondents put in answers, and the Court on the 26th of December 1724, “ adhered to that part of the former interlocutor, of the 25th of July last, finding that the appellant having advised by his letter of the 17th of November 1718, that iron was loaded for the proceeds of the herrings conform to James Sheriff’s commission as super-cargo by the freightors, and his letter of the 20th of November aforesaid, the appellant could not now be allowed to prove contradictory facts to his former correspondence; and in regard the appellant did not offer to prove James Sheriff’s knowledge of the facts founded on by his oath, refused to allow any proof thereof by witnesses.”

The appeal was brought from “ two interlocutors of the Lords of Session made the 25th of July, and 26th of December 1724.”

Entered,
14 Jan.
1724-5.

Heads of the Appellant’s Argument.

If the facts insisted upon by the appellant should be made out upon proof, it is extremely reasonable that he should have relief. It were very hard, if a merchant or factor, out of favour or friendship to his correspondents, load his own goods aboard their ship, before the goods that properly belong to them come to hand, in order that the ship may sail more speedily, and omits to give notice that the goods so shipped were his, and not theirs; but in general informs them, that they have such goods on board for the proceeds of their outward cargo; and afterwards upon discovering his correspondent’s goods are lost or incumbered, should not be able to repair his mistake, and upon proof of the fact recover the value of his goods; for the *bona fides* that prevails in

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in all mercantile dealings, forbids that advantage should be taken of casual mistakes or omissions for which probable causes may be assigned, and common justice will not allow that one man should profit by this innocent mistake of another.

The correspondence itself does not so fully express this matter, as to deprive the appellant of a liberty of making proof of these facts. Nothing therefore could be more reasonable than to allow the appellant to make proof of these facts, especially when he charged that they might have had notice of the real fact by James Sheriff who was privy thereto.

The appellant had no reason to prove James Sheriff's knowledge of these facts by his own oath, because that would, by the law of Scotland, have been conclusive against him, and he could not have been at liberty to falsify that oath. It was therefore just, that the appellant should be at liberty to prove that fact, as well as the others, and in the same manner.

Heads of the Respondents' Argument.

To prevent a prejudice, which one of the respondents had formerly suffered, a limited commission was given to James Sheriff, and accepted of by him, wherein he was expressly required not to sell the herrings except he could load iron and deals for the net proceeds: James Sheriff shewed this commission to the appellant, and both of them acted in pursuance of it, as appeared by the appellant's and James Sheriff's letters; therefore the appellant could not be allowed to prove facts, at such an interval of time, inconsistent with his own accounts and advices sent to the respondents.

If correspondents are allowed to vary in their advices of facts admitted to consist with their knowledge, commerce would become impracticable, neither could accounts be ever concluded; and the appellant, when he pretended to rectify a mistake in the correspondence by his letter of the 10th of July 1719, and 3d. of February 1720, claimed only the difference money to conclude all accounts; whereas, as if he had fallen into a second mistake, in his action he insisted further, for the value of 338 ship pounds of iron, a plain evidence of what dangerous consequence to trade it must be to allow correspondents to vary in point of fact.

As to the pretence, that this transaction consisted with the knowledge of James Sheriff, the respondents contend, that though he was part freighter, as well as master of the ship, yet the adventurers having severally purchased their parcels of herrings, taken separate bills of lading each for his own particular parcel, marked with his own mark, and James Sheriff having but a commission expressly limited, and shewn to the appellant, his knowledge, or even consent, could not found an action against the respondents.

Though the appellant could possibly bring parole evidence to disprove the matters affirmed by him in his correspondence so long after the negotiation was finished, and the respondents
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had cleared with one another, and the other parties concerned, he ought to have no advantage from it; and, further the circumstances of the case, and the vouchers founded on by the respondents must find greater credit, than any evidence that could arise from the oaths of persons whose characters are unknown, and who were not particularly acquainted with the whole facts in question.

If the appellant really sold such parcel of herrings to the royal deputation, it was upon his own risk, having acted only in pursuance of the limited commission given to James Sheriff, who neither lawfully could, nor did consent to the disposing of the herrings but upon the condition of being reloaded with iron and deals: he had 4 per cent. upon the whole cargo, for procuring the said iron in exchange for the herrings; and if the iron had really afterwards been delivered by the royal deputation, when the price advanced, the appellant neither would have accounted, nor could he have been compelled to pay the difference to the respondents of the advanced price upon the iron; so that the sale, if any such there was to the royal deputation, was at his own peril.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed.*

Judgment,
23 April
1725.

For Appellant, *Dun. Forbes. C. Talbot. Will. Hamilton.*
For Respondents, *C. Wearg. C. Arskine.*

Sir Alexander Maxwell of Monreith, Bart. *Appellant;* Case 124.
Andrew Houston, Esq. *Respondent.* Dalrymple,
28 Jan.
Et e contra. 1725.

30th April 1725.

Vitiation.—An objection to a deed that it was erased in *substantialibus* is repelled.
Vicious Intromission and Gestio pro Hærede.—A person grants an entail of his estate to his son, and his heirs male whatsoever; with the burden of his debts; the son grants a back bond, in consideration of said entail to pay the father's debts: after the death of the father and son, the daughters convey the estate real and personal of their father to a creditor, without making up titles by inventory or confirmation; and the creditor grants bond to protect them against what they had done, and from the debts of their father; the heir male of entail having got back the estate sues the said creditor for debts of the father as a vicious intrometter, in which he obtains decree; and the Court also find the moveable debts due to such intrometter to be extinguished: but the judgment is reversed; and the creditor is ordered to account for actual intromissions only.

WILLIAM HOUSTON of Cultreoch on the 17th of January 1691, made a settlement and entail of his estate to himself in life-rent, and to William his son, and his heirs male whatsoever,