1796.

SMART
v.
OGILVY.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed, with £100 costs.

For Appellant, *Sir John Scott, Wm. Tait.*
For Respondent, *R. Dundas, W. Grant, Wm Dundas.*

NOTE.—Unreported in Court of Session.

JOHN SMART, ... *Appellant;*
The Hon. WALTER OGILVY, . . . *Respondent.*

House of Lords, 26th October 1796.

SALE BY SAMPLE IN OPEN MARKET—LANDLORD'S HYPOTHEC.—The appellant, a corn merchant, purchased from the respondent's tenant, a farmer, a quantity of grain by sample, in public market. Part of the grain was delivered, and bill granted for the price, and was paid. On failure of the tenant, Held, in an action raised by the landlord *against* the purchaser of the grain, that the latter was liable to pay the value of what was delivered, the landlord having a right of hypothec over the same for the rent of which it was the crop; and this, although the claim was not made *de recente*, but *ex intervallo* of two years.

The respondent was landlord of a farm, rented by James Inverarity as tenant, from whom the appellant, a farmer and grain and corn factor, purchased, on 25th July 1789, a quantity of grain by sample, in public market. A bill for £60 (part of the price) was given on the occasion. But only part of the grain was delivered, not amounting in value to the £60 bill, when embarrassed circumstances prevented Inverarity from delivering the remainder.

In February 1791, a year and seven months after the sale and delivery of part of the grain, the respondent (Inverarity's landlord) raised an action against the appellant, setting forth that his tenant was owing him £125, as the half year's rent of the farm, for crop 1788, payable at Martinmas 1789, and, as by law, the corns growing on the farm are hypothecated for the rent of that crop of which they are the product, the intromitters and purchasers from the tenant of such

corn, are liable to the landlord for the value or purchases, and that the appellant having purchased bear and oats from the tenant, he was liable for the value of what had been delivered to him under that sale, and concluding for £55 as the value thereof; accordingly, decree in absence (by default) having been pronounced, a suspension was brought by the appellant, in which he pleaded that the grain was fairly purchased in open market, on Friday, the market day, and that he had granted his bill for £60, which had been duly paid, and the sale thus effected, was sufficient to exclude the landlord's hypothec, as a sale in public market. And even if the landlord had right by his hypothec to question the sale of the grain of his tenant in public market, yet this must be done *de recente*, and the *mora* of nearly two years was sufficient of itself to defeat the right, if it existed. Answered, That the purchaser here was a neighbour farmer of the tenant, and was acquainted with him and his circumstances, and had bought the grain under circumstances which inferred collusion between them.

The Lord Ordinary, without allowing a proof, dealt with the case on the abstract question of law, and "Found the "letters orderly proceeded, and decerns (against the ap- "pellant). But, in respect of the delay in claiming upon "the hypothec, finds no expenses due, but that for extract, "for which decerns." On reclaiming petition, the Court adhered. On second petition they also adhered.

May 14, 1793.

Dec. 10, —— Jan. 14, 1794.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The grain having been purchased in public market by sample, it became the property of the appellant, free of all questions as at the instance of the landlord, and this on the faith due to sales in public market; and unless the respondent can prove what he alleges, namely, collusion between these two parties as neighbours, full effect must be given to the sale. There is no evidence offered of any such fraud or collusion, and no evidence that the grain, as alleged, was bought at Inverrarity's farm in March preceding. The appellant admits that he looked at the grain in March preceding, but no sale took place until the one in July in public market, as above. But even supposing it were proved that the sale took place at the farm in March preceding, as is alleged, yet, that sale being fair and *bona fide*, must be held to be unimpeachable in law, after the *mora* of the landlord not timeously claiming under his right of hypothec. The corn was delivered a

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few days after the sale. It was publicly and openly carted away, and yet he took no steps for nearly two years; the fact being, that at the time there was grain left on the farm more than sufficient to satisfy the present claim, which of itself ought to bar this action.

Pleaded for the Respondent.—The landlord's hypothec is a *jus in re* in the crop, for security of the rent of the year which produces it, and this being the established law in regard to his hypothec, every purchaser from the tenant must know, that this right continues until payment of the rent, as is laid down by Erskine; and no delay in availing himself of this right, can in any degree defeat it, for action will lie even at the distance of years. Besides, the reason which gives all faith and effect to sales in public market, being a probability that at a public market purchasers do not know the condition of those with whom they deal, that reason totally fails here; because, in point of fact, the parties to this sale were neighbouring farmers, and Inverarity's embarrassed circumstances were well known to the appellant. In point of fact, the sale appears to have been got up collusively, for the purpose of defeating the landlord's hypothec, because it actually took place in March preceding, on Inverarity's own farm, instead of being a sale in public market by sample, which latter was a mere pretence, resorted to by way of giving a form to the transaction, and, therefore, no sale in public market took place. But, assuming that it is established that this was a sale in public market, it is by no means clear, that such a sale by *sample only*, would be effectual to defeat the landlord's hypothec, because the same reason does not hold for giving it any privilege; for after a sale by sample, there is a delivery *post intervallum*, and opportunity to inquire into the circumstances of the seller, and the situation in which he stands with his landlord. But, independently of the strong presumption that a sale by sample, after having inspected the heap, can be nothing but an artifice, it stands admitted by the appellant's own showing, that there had been an investigation at Balbegno, and the bargain had at least begun there; so that the Court below were certainly well entitled to hold, that in that case the appellant was bound to have satisfied himself as to the condition of the seller, agreeably to the general rule of law. Quicunque scire debet conditionem ejus, cum quo contrahit. And there can be no doubt that the situation of In-

Ersk. 2, tit. 6 § 60.

verarity was sufficiently known to the public, to render the appellant inexcusable, if he did not inquire into it. The fact that he had left sufficient grain to satisfy this arrear of rent, never having been relevantly averred, so as to go to proof, was rightly disregarded. 1796. JAMIESON, &c. v. LAURIE.

After hearing counsel, it was
Ordered and adjudged, that the interlocutors complained of be affirmed, with £100 costs.

For Appellant, *J. Anstruther, W. Adam.*
For Respondent, *Sir J. Scott, R. Dundas.*

JOHN JAMIESON & Co. Merchants, Leith, *Appellants;*
JOHN LAURIE, Shipowner, . . . *Respondent.*

House of Lords, 10th November 1796.

DEMURRAGE OR DAMAGE.—A claim was made by the owner of a vessel, against the freighters thereof, for demurrage, on account of the detention of the vessel beyond the time stipulated. Held, that the claim of demurrage ceases on the day of her sailing from her loading port; and though the vessel was obliged to put back after being two days at sea, and finally, frozen in for the winter, that this was a *casus fortuitus*, falling on the owners and not on the freighters of the vessel, and for which the latter could not be held liable, reversing the judgment of the Court of Session.

A hundred tons of Siberian tallow were purchased by the appellants from Atkins E. Regail & Co. of St. Petersburgh, who, in answering their communication, stated:—"We shall expect shipping for it next August." In the month of July, the appellant chartered the respondent's vessel, the "Bell of Leith," Captain Anderson, to proceed to St. Petersburgh for the tallow, with written instructions to the captain to deliver the enclosed letter to Atkins E. Regail & Co., who were immediately to ship the tallow, and give him what deals and battens they have to fill up the ship. Also a provisional order for forty tons of iron, "If they can