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whereby the buyer becoming bankrupt, he may recover his wines against the bankrupt or his creditors. 3th, There was here no sale but a mandate; for it is notour that Pallat is a factor, and furnishes wines *ex mandato*. 4th, Though there had been sale and delivery, yet that contract is annulable, if it proceeded upon fraud *dante causam contractus*; but here there was most palpable fraud, that a bankrupt *in meditatione fugæ* should call for wines to be furnished to him, which he knew he could never pay. It was answered, That here there was a proper sale by Pallat to Udny, perfected by delivery of the wines to the skipper, for the behoof of Udny; and there would have been no more delivery, though Udny had been at Bourdeaux; neither did Pallat order the skipper to consign the wines to Wilson his correspondent; but simply obeyed Udny's order to loaden aboard Gillespie's ship the wines in question; so that if the wines had perished, they would have been lost to Udny, and not to Pallat, seeing *res quæque perit suo domino*; neither did Pallat send the wines as factor, but sold them as merchant. Nor is there any pretence that Pallat craves factorage; and demands only the price he gave for the wines; but his letter bears, 'that the price of the wines should be as he got from others;' and though the furnishing had been *ex mandato*, and that he might have retained till he were satisfied; yet having delivered, he hath only a personal action, and no real right to the wine. And as to the custom of neighbouring nations, and the citations of several lawyers for that effect; it imports nothing, all these opinions being founded upon the Roman law, by which the seller had a hypothec in the ware for the price. And as to the 4th point, Udny broke not for three months after he gave order for the wines; nor does it appear there was fraud, or that he knew himself insolvent when he called for the wines.

THE LORDS found, That the wines being delivered to the skipper upon Udny's order, the property was stated in Udny; and that there is no hypothec in ware, for the price by the law of Scotland; and found it not relevant that within three months after Udny's order, he withdrew *et cessit foro*, unless it were proven by his oath or his books, that his debts exceeded his estate the time he gave the order; which they found relevant to annul the contract of vendition, and in consequence Prince's decret to make forthcoming; and if by way of commerce, the wines had been bought from Udny, the parties would have been secure, being no way partakers of the fraud.

Stair, v. 2. p. 823.

1715. January 18.

THOMAS MAIN *against* The KEEPER of the Weigh-house of Glasgow, and
JAMES MAXWELL.

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Found in conformity with the above.

JAMES MAXWEL sold ten hogsheads of tobacco to Robert Simpson's wife, which were weighed at the weigh-house of Glasgow, and marked as sold to her

on the 11th of February 1709; but not being satisfied with the security of the price, did cellar the said tobacco for his own account upon the 12th of the said month and year, and sometime thereafter removed the tobacco for his own account.

Thomas Main, a creditor to Robert Simpson, arrests in the hands of the keepers of the weigh-house; and pursues a forthcoming; in which the Lords found, that the weighing over the tobacco in the name of Robert Simpson's wife, did transfer the property, and that therefore the keepers of the weigh-house were liable to make the tobacco forthcoming, and that they could not warrantably have suffered James Maxwell to remove the same.

James Maxwell raised reduction of the bargain of sale, *alleging*, that *dolus dedit causam contractui*, in as far as Robert Simpson knew himself to be altogether insolvent at the time of the bargain, and very soon thereafter broke, viz. in April, about two months thereafter; and for instructing that he was truly insolvent at the time, produced a disposition *omnium bonorum* granted by him to his creditors in the beginning of May, within three months, narrating several debts, amounting to above L. 500 Sterling due by bond, all of dates anterior to the bargain; and that it was just and reasonable, that he should dispoise to them all his means and estate so far as it would go towards the payment of these debts; and the said Robert Simpson being but a small dealer by retail, his effects were but very inconsiderable; and he lived ever since by his handy-labour as a servant; whereby it plainly appeared, that Maxwell was circumvented.

It was *answered*; That whatever might be alleged against Robert Simpson, yet the pursuer, a just and lawful creditor, cannot be reached upon any pretended fraud of his debtor, wherein he was noways partaker; and there is a clear difference laid down in the act of Parl. 1621, betwixt the persons guilty of fraudulent deeds, and third parties transacting *bona fide*; who, for the favour of commerce, cannot be prejudged by any personal objections against their debtors or authors. *2do*, Neither is the probation relevant to instruct the fraud; because the disposition produced is after Simpson was become notourly bankrupt and imprisoned, whose assertion or declaration can prove nothing.

It was *replied*; The fraud is undoubtedly relevant to reduce the bargain, and restore the seller to the property, not only against the seller personally, but likewise against the pursuer his creditor an arrester; who is not in the case of a third party mentioned in the act of Parl. 1621, because he is not a purchaser *bona fide* paying a price to Robert Simpson for the tobacco; nor did he receive that tobacco from Simpson in payment and satisfaction of his former debt, and discharge the sum to Simpson; in which case, for the favour of commerce, he would be secured; because it were more just that he who paid his money, and had given up the instruction of his security, should be safe, and have the benefit of his bargain, than Maxwell who trusted Simpson; but being only an arrester, *utitur jure auctoris*; and the tobacco being still *in medio*, it was more for the advantage of commerce, that the seller should be restored to the pro-

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perty of his goods, which he was fraudulently induced to sell upon trust, than an arrester who advanced nothing, and the effect of whose diligence depended upon the property of his debtor. And as to the probation, there could not be any other document afforded of Simpson's insolvency at the time; for he did not keep a regular book; and it is not alleged that he had any effects towards the value of the debts he owed, nor that he had any loss in the course of his small trade, from the date of the bargain of tobacco, to his becoming notour bankrupt. And, in a parallel case, determined in December 1680, Prince *contra* Pallat, No 39. p. 4932., the Lords reduced a bargain in circumstances which quadrate perfectly with the present case; for there Arthur Udney having commissioned three tun of wine, the same were loaded aboard a ship at Bourdeaux, bound for Leith; but Peter Pallat, suspecting Udney's credit, wrote to his correspondent not to suffer the wine to be delivered; and Prince having arrested, and obtained a furthcoming, which was suspended, the LORDS found the property was transferred to Udney; but found it relevant to be proven by his book or oath, that his debts exceeded his estate the time he gave the order, to annul the contract of vendition.' In which case Udney broke, and fled within three months; from whence it was inferred, he was *meditatione fugæ* the time of the order; which quadrates with this case in every circumstance, both as to the relevancy and probation. And albeit that be a single decision, yet the reason of it is good, and it is much safer to follow a rule that has been deliberately determined, than to render the like case uncertain by varying the decision on the same grounds.

' THE LORDS found the fraud relevant against the arrester, and proven.'

Fol. Dic. v. 1. p. 335. Dalrymple, No 130. p. 181.

* * * This case is reported by Bruce, No 69. p. 945.

1736. June 16. SIR JOHN INGLIS of Cramond *against* ROYAL BANK.

No 41.

All transactions of a bankrupt within three days of bankruptcy were presumed to be fraudulent.

IN October 1734, a bargain was made betwixt Sir John Inglis of Cramond and Joseph Cave, for Sir John's barley of that crop; in pursuance of which bargain, Sir John sent his barley to Mr Cave by parcels, in the months of November and December, and beginning of January thereafter. Mr Cave's circumstances going into disorder, he made a disposition of his effects to his creditors, upon the 21st January 1735; whereupon Sir John insisted in a process, claiming the subject upon this medium, That the contract was fraudulent upon the part of the purchaser, who was at the time insolvent, and incapable to pay the price, and therefore was null *quia dolus dedit causam contractui*, and the property was never transferred. Appearance being made for the creditors, it was *answered* for them, Fraud is not to be presumed; and a merchant, though