

is just that *dolus dans causam*, &c.; but it must be *nox* that the *dolus* appears. Let me suppose goods bought, *e. g.* bullocks; they graze for ten months; the buyer breaks, and it appears that at the time he bought, he was *lapsus*; *an ergo*, will the seller be preferred on the extant bullocks to the buyer's creditors pointing?"

The pursuers petitioned against this interlocutor; and, in addition to their former argument, they maintained *separatim*, that supposing the circumstance of Cave being insolvent at the date of the sale in October, were not sufficient to annul the bargain, yet, as this was a sale *ad mensuram*, the contract should not be considered as complete till the delivery and measurement; and if, at the time of the delivery of any part of the grain, Cave was thinking *cedere foro*, the contract should still be annulled; and they contended that this should affect the whole quantity delivered, and not merely what was delivered after Cave knew that he could not continue his trade.

The Court were of opinion, that the date of the delivery was to be considered as the date of the bargain; and that if the bankrupt did, soon before his bankruptcy, receive any part of the grain, the contract was so far void. But upon the question *how far* this was to be drawn back from the bankruptcy, they held that it must be confined to *three days*. They, at the same time, adhered to the interlocutor reclaimed against, in so far as it found that the circumstance of Cave knowing himself to be insolvent at the time of the sale in October, should not annul the contract.

The interlocutor was, "the Lords having heard, &c. they adhere to their last interlocutor, with respect to the barley delivered before the 18th of January, 1735, but find the bargain void as to any barley delivered that day, and afterwards."

Lord KILKERRAN has the following note on this part of the procedure.

"The decision in the case of Prince and Pallat receded from; indeed I always thought that decision was imperfect in reciting the fact, for when it is said that his circumstances grew suspicious at Bourdeaux, which occasioned the writing the letter which came to Scotland before the ship arrived, it shows that some circumstances which may have moved the Lords, are omitted in stating the fact."

"The interlocutor adhered to, as to all the barley delivered before the 18th of January, but altered as to what was delivered after,—the ground was, that *dolus dedit causam traditioni*. That *dolus dedit causam* is the ground of reduction, whether that be *contractui* or *traditioni*: Whether this was to be carried only to the 18th of January, or farther back, was the state of the vote, and carried the 18th, as said is, being *triduo* from the bankruptcy."

N. B. This case is reported by KAMES, (Fol. Dict. 1.—335. Mor. 4936.) and by ELCHIES, (*voce* Bankrupt, No. 9.) who states, in regard to the question of *specification*, that it was held that the specification by malting did not bar the reduction.

1737. February 18. CUNNINGHAM against LIVINGSTON.

THIS case is reported by C. Home, (see *Morrison*, p. 11660.) by whom the circumstances are stated at length. It is also noticed by Elchies (*Legacy*, No. 4.) Lord Kilkerran's note upon it is as follows:—

*February 10, 1737.* “The Lords adhered to the interlocutor refusing the bill of advocacy, being of opinion that however bonds and lying money are moveables, yet here the only question is, what was the intention of the defunct by these words “*moveables and furniture lying in such a house,*” which was thought could only be understood household plenishing; and I cannot but mention one thing which occurred on this occasion. One of the judges having declared his opinion, that the above clause comprehended bonds, another asked in what place a *jus crediti* could be said to lie in this house, or elsewhere. The lying money was not subject to that ridicule; but still the intention was not found to comprehend it; and as to the decision, July 15, 1673, *Robson v. Robson*, where a clause of conquest of lands and annualrents, goods and gear, was found to comprehend bonds, suggested from the bench, it was not found to meet, for there, so appeared to be the intention. The only question was as to the medal, and I cannot say that any thing was spoke to as to that; it rather passed *in cumulo.*”

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1737. *June 7.* BROWN of Mollans *against* THE CREDITORS of MAXWELL of Newlaw.

IN the ranking of the creditors of Newlaw, it appeared that Brown of Mollans had right to two adjudications against the estate, the one of which had been led by one Robert Bowis, and the other by Maxwell of Munchies. Brown having made a claim to be ranked under these adjudications, objections were stated to both of them on the part of the other creditors.

To the adjudication by Bowis, it was *objected*, that the decret of constitution had been obtained against a minor, without proof of the passive titles, neither libelling on, nor bearing production of letters of general charge; and that though some others of the passive titles are libelled, none of them were proved, and therefore, that the decret of constitution is *funditus* void, as being without proof.

In support of this adjudication, it was

PLEADED by Brown, *Imo*, That there was now produced the letters and execution of general charge, of date prior to the decree of constitution, so that there was sufficient reason to conclude that the omission to mark the production of them, arose from a neglect of the extractors. *2do*, Supposing the passive titles were not proven in the decret of constitution, this ought not, in the circumstances of the case, to import a total nullity of the diligence.—The fact was said to be, that when the adjudication was led, other adjudications had gone out some months before; and that Bowis, the creditor by whom the suit in question was led, being in danger of being cut out of the *pari passu* preference, applied to the Court, representing the hazard he was in, whereupon their Lordships authorized the Ordinary to decern in the constitution. Supposing, therefore, no proof to have been brought of the passive titles, previous to the decree of constitution, it was still competent to support the decret by such proof.

ANSWERED by the creditors,—As to the *first* argument, it is impossible to say that the decret of constitution could be founded on the general charge now pro-