

No 38. though the date of their bond was posterior ; but here, David M'Christian had no trade nor dealing with Monteith for several years after his disposition to his uncle ; and so the deed could never be reputed to be done in defraud of Monteith, whose debt was not then in being. THE LORDS preferred the disposition to the adjudication, though perfected after the same.

Fol. Dic. v. 1. p. 334. Fountainball, v. 2. p. 490.

SECT. VI.

Effect of purchasing Goods by Persons who know themselves to be Insolvent.

1680. February 24.

PRINCE against PALLAT.

No 39.
Found, that if a person, knowing himself to be insolvent, buy goods, which shall afterwards be arrested by his creditors, the contract will be reducible as fraudulent, and the seller will be preferable to the arresters.

In the competition betwixt Peter Pallat and Thomas Wilson his factor, and Magnus Prince, which of them had best right to some wines Peter Pallat had consigned and sent home to Arthur Udney, and which Arthur had assigned to Magnus Prince for onerous causes ; it was debated, and taken to the Lords answer, if a factor loading wine at Bourdeaux for a merchant, merely following his credit and faith, without having any effects in his hands, and the merchant breaks before tradition of the wines, whether the factor may revoke his mandate, or if the property of the wines be so fully transmitted, (though they are not as yet delivered,) that the same is irrevokable ; or if the seller and furnisher hath a tacit hypothec in the goods where the merchant-buyer breaks before the delivery, so as he may countermand the delivery. It seems upon the one hand that such a revokable dominion were against the liberty of commerce, and with us the seller hath no pledge in the thing sold for the price of it ; and here the factor had a remedy, if he had used it, viz. to arrest the wines until the price should be paid him. Yet on the other side, it appears very hard to hinder factors wanting effects, before tradition to alter their bills, and ordain the said wine to be delivered to a third person at their own disposal ; and there is difference betwixt *mandatum et emptio venditio*, and even *non est perfectus contractus donec de pretio convenerit, pr. instit. de emptione*, M'Gill's Practiques, 11th January 1650, Scott. See APPENDIX.

December 24.—IN Peter Pallat and Thomas Wilson his factor's competition with Magnus Prince, (24th Feb. 1680,) the LORDS found, that so soon as Pallat the factor had delivered the wines at Bourdeaux to the skipper, upon Arthur Udney's account, the *dominium* of the wines became Udney's, the factor

having followed his faith, unless they can make appear that Pallat the factor was *animo doloso* induced to trust Udny and answer his bills; and that either by Udny's oath, or by his compt-books, he was then bankrupt and *lapsus bonis, et quod debita excedebant bona*. For the Lords from thence would gather *animum fraudulentum* to cheat the factor, there being *dolus in re*. The words were, "the LORDS find that there is no hypothec by the law of Scotland in the ware or goods for the price thereof; and repelled that allegiance of Udny's turning bankrupt within three months thereafter. But find it relevant either by Arthur Udny's oath, or his compt-books, that he was then insolvent, and that his debts exceeded his estate. And find that if the wines had been bought from Udny by way of commerce, and the price paid for them, before the arrestment, in that case there could have been no vindication of the wines, unless the buyer had been *particeps fraudis*." This was for the freedom of commerce. Then Thomas Wilson offered to prove that he was bankrupt at the time; but his surest method had been to have laid on the first arrestment on the wines for the price, ere they had come ashore. I think a bankrupt's oath should not prove. He must be proven to have been bankrupt, because every one is presumed solvent and responsible till the contrary be proven.

1682. November 7.—THE competition betwixt Thomas Wilson and Bailie Prince, (mentioned 24th December 1680.) being this day advised, "THE LORDS found it not proven that Arthur Udny was, the time of the commission, bankrupt; and therefore preferred Bailie Prince."—Arthur, on his own oath, denied that he was then insolvent; and the Lords had recommended to Bailie Baird to examine his accompt-books, and to consider his condition of debt and credit; and he had reported, that he was not for some months thereafter bankrupt, and upon these grounds the Lords went.

Fol. Dic. v. 1. p. 335. Fountainhall, v. 1. p. 87, 123, & 192.

* * * Stair reports the same case :

ARTHUR UDNY having ordered Peter Pallat, merchant in Bourdeaux, to send him three tunns of wine in one Gillespie's ship, he did inload the same accordingly; but shortly thereafter, hearing that Udny was like to break, he wrote to Thomas Wilson, his correspondent, 'to receive the wines from the skipper, and not to deliver them to Udny;' which letter came before the wines were delivered; but Magnus Prince, Udny's creditor, arrested them in the ship, and obtained decret for making forthcoming. Wilson, for Pallat, having given in a bill of suspension, and the cause ordained to be discussed upon the bill, it was *alleged* for Pallat, *imo*, That the wines never became Udny's, not being delivered to him, and therefore could not be forthcoming for his debt. *2do*, Though they had been delivered, yet were not bought by a third party *bona fide*, according to the custom of most nations and the custom of merchants,

No 39.

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 annullable, 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.

No 40.

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