

THE LORDS found that John Drummond now attainted of high treason, was, upon the 11th day of May 1746, when James Drummond his elder brother died, capable to take by descent from his said elder brother; and that the estate of Drummond in question, did then descend by James's death to John Drummond now attainted, and was forfeitable and forfeited by the treason and attainder of the said John Drummond; and found that the trust disposition to Thomas Drummond of Logie-almund claimed upon, was not sufficient to exclude the forfeiture of the said John Drummond; and therefore found the estate acclaimed, forfeited by his attainder, and dismissed the claim.

Act. *R. Craigie, Ferguson, & alii.* Akt. *The King's Counsel.* Clerk, *Gibson.*

D. Falconer, v. 2. No 87. p. 93. & No 169. p. 199.

* * * This judgment affirmed on appeal. See No 74. p. 4766. See APPENDIX--

1752. *January 18.* DUNLOP against CROOKSHANKS, JOP and FORBES..

THERE are frauds of different kinds, whereby one is induced to contract: The most ordinary kind among merchants is, where a person insolvent imposes upon another, ignorant of his condition, to deal with him, of which more hereafter. Another is, where a merchant is induced to sell his goods as to two in company, when in reality the correspondent alone was concerned in the commission; and an instance of both kinds occurred in the present case.

William Forbes and William Crookshanks in company had lately commissioned certain goods from John Dunlop merchant in Rotterdam; thereafter Forbes wrote to John Dunlop for another cargo, and he made his letter run in the plural, *We, &c.* by which Dunlop was led to think that he and Crookshanks were also in company in this commission.

Forbes recently thereafter failing in his circumstances and absconding, Dunlop brought an action against Crookshanks before the Admiral, for payment of the price of this last commission, and obtained decree against him as in company with Forbes; but Crookshanks having brought the case before the Lords by suspension, the LORDS, upon advising the proof which had been allowed to either party of their condescendences of facts, 'found it not proved that William Crookshanks was partner with William Forbes in the commission of the said goods, and suspended the letters.'

With this suspension, there was conjoined a process of multiple poinding pursued by Crookshanks, Jop, and several others, who had bought the goods from Forbes, and in whose hands Dunlop had arrested; and in this it was argued for Dunlop, that as he had complied with the commission upon the faith of Crookshanks being bound, which he had, by Forbes' letter, been misled to believe; now that the Lords had found Crookshanks not bound, there was no bargain, nor any transference of his property; and that therefore, so far as his goods were

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A merchant who was in use to commission goods along with another who was his partner, wrote for a cargo, and made his letter run in the plural *we, &c.* by which his correspondent was induced to believe, that both partners were concerned in the transaction, and on the faith of that delivered the goods. The person who had commissioned the goods having become bankrupt, and his partner proving that he had no concern in the purchase, the Lords found, that the property of the goods had not been transferred from the furnisher, and preferred

No 14.
him for the
price.

extant, in whose hands soever they might be, he was entitled to recover them, or so far as they may have been sold and the price due, he was preferable for the price to all arresters.

And accordingly the LORDS ' found it proved, that John Dunlop furnished the goods mentioned in Forbes' letter of the 20th April, not to William Forbes alone, but to William Forbes and William Crookshanks in Company; and found it proved, that William Crookshanks refused to accept of the said goods in company with William Forbes; and therefore found that the property of the goods mentioned in the said letter was not transferred from, but remained with the said John Dunlop, and preferred him to the price of the said goods to all the arresters as creditors of the said William Forbes; and found the said William Crookshanks liable to John Dunlop for the sum of L. 67 : 0 : 9 Sterling as the price of that parcel of the said goods bought by him from Jop as William Forbes's agent, notwithstanding his payment thereof upon the 2d September 1749, in respect of John Dunlop's arrestment as creditor to William Forbes used against him the said William Crookshanks upon the 30th August preceding; reserving action of relief to Crookshanks against Jop as accords.' And in this interlocutor parties acquiesced without reclaiming.

Another question at the same time occurred between the same John Dunlop and the said William Forbes and his Creditors, on occasion of another cargo of goods, which Forbes about the time had commissioned for himself personally, and which was also arrested by Dunlop.

The fact with respect to this parcel of goods appeared to be, that Forbes recommended to Jop, that, upon their arrival, he should put them into the hands of one Spark, who was a common porter in Aberdeen, to be by him disposed of, and who accordingly sold them to James Napier merchant, who gave his bill for the same payable to Spark, and which Spark on oath acknowledged himself still to have in his hands ready to be delivered up to any having right to it, as he had no pretence of any right to it himself; and upon Forbes' elopement, which happened recently thereafter, Jop and the creditors of Forbes severally arrested the same in the hands of Spark, others in the hands of Napier, and Dunlop was the first arrester in the hands of Napier.

In this same multiple-poining, so far as concerned this separate parcel of goods, a preference was also insisted on for Dunlop, upon the grounds following, *imo*, That as Forbes was at the time he commissioned these goods absolutely insolvent, known to himself to be such, and that he had commissioned these goods with a manifest intention to deceive (for proof of which a variety of circumstances were referred to), *dolus dedit causam contractui*, which therefore must dissolve the bargain between him and Forbes; and he fell to have the like preference upon the price as in the former case.

That he did not by this mean, that every bargain made by a person who eventually proves insolvent, or who even at the time the bargain is made is insolvent, should upon that account be annulled; as many traders are not so ex-

act as to know the real state of their funds; but that what he intended was this, that where, by concurring circumstances, it appeared, that the bankrupt had intended a fraud when he commissioned the goods, the bargain was void as *dolus dederat causam contractui*; and that there lay no objection to this doctrine from the decision in the case of Inglis against The Royal Bank, Sect. 6. *b. t.* whereby a presumptive fraud was found to be inferred from a merchant's giving way within three days after he had made the bargain, and that only such bargains as are made within that space were on that ground to be reduced; because, where actual fraud appeared to have been intended, and was here said to appear from concurring circumstances, there was no need to recur to a presumption.

But *2do*, Should there lye any doubt in this, he pleaded his preference upon his first arrestment in the hands of Napier.

It is unnecessary to state the particular circumstances that were insisted upon on the first point, to prove the intended fraud, nor the answers made thereto, as no judgment happened to be given on that point. It may not however be amiss to observe what passed upon the Bench on the occasion of it; and for this end, it is fit to know, that when the Lords came to reason upon the circumstances condescended on by Dunlop, they generally agreed that there was satisfying evidence of Forbes' intended fraud; and all the question was, What should be the effect of it?

And in the *first* place, It was agreed that the property would nevertheless be transferred, in respect of the clear bargain between Forbes and Dunlop, in which *fides habita erat de pretio*, and that a purchaser from Forbes would be safe, which he would not be if the property were not transferred, and which was the case of the former cargo. At the same time, the Lords agreed in this, that were the goods extant in the hands of Forbes, Dunlop would have direct access to them without the aid of diligence; but as in fact the goods were not extant, but had been sold to Napier, the question remained, Whether Dunlop should have the same access to the price yet in Napier's hand, without the aid of diligence, and on that ground be preferable to the arresters; and on this point the Lords were of different opinions.

Some thought that the price came in place of the goods as *surrogatum*; but the more general opinion seemed to be, that Dunlop could have no preference upon the price, as the same never was his; and that were once that doctrine laid down, there was no saying how far it might go after the goods may have gone through many different hands.

But after all this was said, some new facts having been thrown out from the bar in justification of Forbes' intention, which might require an enquiry, the Lords gave no judgment on this point; but, taking up the cause upon the second, 'preferred Dunlop upon his arrestment.'

Nota, Had the person possess of Napier's bill been a person intrusted with it, in order to do diligence, it might have been a question, Whether the debt was not properly affected by the arrestment in his hand? *Vide* the case of the Creditors

No 14. of Ludovick Gordon *contra* Sir Harry Innes, No 51. p. 715, *voce* ARRESTMENT; but as he was a poor porter, whose name was put into the bill without any trust undertaken by him, the Lords justly considered Napier to be the person in whose hands arrestment was to be used.

Fol. Dic. v. 3. p. 242. Kilkerran, (FRAUD.) No 6. p. 220.

1758. August 3.

JAMES ANGUS Writer in Dunse *against* The REPRESENTATIVES of JAMES WEMYSS, late Clerk of the Post-office at Edinburgh.

No 15.

In implement of a contract of marriage, the father of the wife paid to the husband a part of the tocher, but the husband dying, and likewise the wife without issue, the rest remained unpaid. In an action at the instance of a creditor of the husband, against the wife's father's representatives, for payment of the balance, the defence, that the husband, at the time of his marriage, was bankrupt, and so had it not in his power to implement his part of the contract, was repelled.

By contract of marriage between Patrick Lindsay tenant in Wester Deans-houses, and deputy wardrobe-keeper of the palace of Holyroodhouse, and Margaret Wemyss, dated 22d February 1742, James Wemyss, her father, became bound to pay to Patrick Lindsay, his heirs or assignees, the sum of L. 300 Sterling, in name of tocher. Of that sum, L. 50 was made payable at Whitsunday 1742, L. 50 at Martinmas thereafter, L. 50 at Whitsunday, and L. 50 at Martinmas 1743, and the remaining L. 100 at the first term after Mr Wemyss's decease. On the other part, Lindsay became bound to provide the like sum of L. 300, and to secure the same, with the said portion, to himself and his future spouse, in liferent, and the children of the marriage in fee; and in case of no children, he obliged himself, and his heirs, to pay L. 100 Sterling, being the last moiety of the tocher, to his wife, or any person to whom she should assign the same; under a proviso, That in case she should not execute that power of disposal, the obligation upon him as to this last L. 100 should determine.

In pursuance of this contract, the two first moieties of the portion, making L. 100 Sterling, were paid by Mr Wemyss to Mr Lindsay. James Angus being creditor to Lindsay in a small debt, used arrestment in Wemyss's hands, before any more payments were made; and soon after, Lindsay granted an assignation to Angus of the L. 50 Sterling due at Whitsunday, and the other L. 50 of the portion due at Martinmas 1743, which was acknowledged to be in security of Angus's own debt, and of some other debts due by Lindsay, in which Angus was trustee.

In July 1743, James Angus charged Mr Wemyss with horning for payment of the sums assigned; upon which Wemyss obtained a suspension, which for several years lay over undiscussed.—In the mean time, Patrick Lindsay joined in the rebellion, and was convicted and executed at Carlisle in the 1746. His wife survived him for some years, as did also the only child of the marriage; but both died before the suspension was wakened; and Mr Wemyss having also died, an action was at length insisted in against his representatives.