

chant dealing with him be permitted to reclaim the property of goods already sold and delivered.

No 42.

*Answered* for Messrs Main; *imo*, They were ignorant of Rolland's circumstances; and dealt with her upon no other recommendation, but that they had dealt with her deceased husband. A *cessio bonorum* made by so mean a trader, in the obscure town of Anstruther, could be little known even in Scotland, and not so much as reported at Lisbon. In fact, Messrs Main never heard of her *cessio bonorum* till after the arresting of the wine by Forbes. The truth of this assertion appears, from their having sent her three parcels of wine, and always taken the bills of loading in her name; which, if they had suspected her bankruptcy, they would never have done.

*2do*, The distinction between a person who *cedet foro* immediately after contracting, and one who *cesserat foro* before contracting, can have no influence in determining the point in law; for a person who is already bankrupt, and induces another to deliver goods to him, by concealing his circumstances, is guilty of even greater fraud than he is, who, being in credit, contracts, and immediately after becomes bankrupt; since the latter may entertain some expectation of retrieving his affairs, the former none. In the present case, Rolland must have been guilty of fraud, as she knew she could not pay the price of the goods she had commissioned, and that they were liable to be attached by her creditors.

*3tio*, As to the argument in favour of commerce, it does not appear how a bankrupt can ever, as the law of Scotland now stands, trade to any advantage, without having previously made some sort of composition with his creditors; and, be that as it will, he cannot, without injustice, trade upon the risk of those who are ignorant of his real condition.

“THE LORDS repelled the reasons of reduction.”

Reporter, *Kames*.Act. *And. Pringle*.Alt. *Ja. Philip*.*Fac. Col. No 6. p. 9.*

1757. July 27.

CREDITORS of JOHN ROBERTSON *against* GEORGE and ROBERT UDNIES, and HENRY PATULLO.

JOHN ROBERTSON merchant in Forres went to London in November 1752. In May 1753, he brought with him a loading of goods from Holland, which he landed at Tarbatness in Rosshire. At this time there were several captions issued against him at the instance of his creditors. He did not come to his own house at Forres, but went from Tarbatness to Gottenburgh, where he took in a cargo, and sailed to Hull.

No 43.

Found in conformity with Prince against Pallet, No 39. p. 4932. that the seller of goods to an insolvent person was preferable on the price, to other creditors arresting it.

No. 43.

At Hull he wrote a letter, dated 28th July 1753, to Henry Patullo at Dunkirk, ordering certain goods to be sent by the William and Mary sloop. But this letter was falsely dated, as from London.

Henry Patullo sent the goods, and drew bills for L. 601 : 1 : 6, as the value, payable to George and Robert Udnies at London. John Robertson came to London, and accepted these bills; but of the same date he drew bills payable to John Robertson junior, his son, for the precise same sum, upon Robert Mackie, his son-in-law, to whom he sent the cargo; and since that time he has never been heard of, but is supposed to have gone to the West Indies.

Several creditors of John Robertson used arrestments in the hands of Robert Mackie; who brought a process of multiplepoinding.

George and Robert Udnies, and Henry Patullo, appeared in this process, and *insisted*, That as Robertson was insolvent before he commissioned these goods, and had left his own country to avoid the attachment of diligence, the commissioning the goods was fraudulent; and therefore the sale reducible; and that as they would have been preferable to the arresting creditors if the goods were *in medio*, they were, for the same reason, entitled to a preference as to the price due by Robert Mackie, as come in place of the goods.

It appeared by the proof, that Robertson owed, at the time he commissioned these goods, above L. 1800 Sterling; and had no subject to pay this debt, except a house in the town of Forres, and some goods he carried along with him; that a caption had been taken out against him in 1752, for L. 237 : 12s.; but the messenger had no particular orders to execute it. Another caption was taken out in July 1753, for L. 200 : 6 : 6.

It was *contended* for the Creditors of Robertson, That though diligence had been taken out against him some time before he retired; yet that diligence was never executed, and he continued to appear openly; and though he had not been heard of since he accepted the bills, yet there was reason to believe he had gone out upon an adventure in trade; and his insolvency could not alone reduce the sale, which was made long before he retired.

It was *answered*, That the bankruptcy in this case amounted to the requisites of the act 1696; insolvency, caption, and absconding; but that it was not necessary to prove all the requisites of that statute. The fraud of Robertson, when he knew himself to be insolvent, and was preparing to leave the country, in commissioning goods which he had no intention to pay, must be sufficient to reduce the sale. And this case does not come under the rule followed in the case of Cave, No 41. p. 4936.; for here there is convincing evidence of actual fraud intended by the bankrupt.

The Creditors of Robertson *insisted*, 2dly, That supposing the claim would have been well founded for recovering the goods, yet it is not equally well founded for recovering the price. In the civil Law, a *rei vindicatio* was neither competent for the price of goods stolen, nor for goods bought by money stolen, *Voet No 10 §. 11. De rei vindicatione*. And, agreeable to the same

principles, the COURT found; 24th Jan. 1672, Boilstoun *contra* Robertson *voce* SURROGATUM, that a merchant having employed a woman to buy linen cloth with his money, which she gave to her servant; who bought the cloth, and left it with a third party, in whose hands it was arrested for her debt; the merchant who furnished the money had no preferable right to the cloth, but only a personal claim against the woman to whom he had given his money.

*Answered*, It is in some measure true, that a real action, or *rei vindicatio*, affects only the goods themselves, not the price of the goods, after they are sold and transferred to another. This rule, however, applies only to the case of *bona fide* possessors. If a man buys a horse that was stolen from me, I can recover the horse while in his possession; but after he has sold him, I have no action for the price, but must claim the horse from the present possessor. But the reverse holds with respect to the party who fraudulently deprives the proprietor of his goods, or with respect to those who are any-wise accessory to the fraud against them; the proprietor has the same action for the price after they are sold, that he had for the goods when they were in their possession. This distinction is explained by Voet, in the passage referred to, No 10. The expediency and favour of commerce may require, that the second purchaser should be safe; but these considerations cannot operate in favour of creditors, who can be in no better case than their debtor. It is an established rule, That a proprietor is always preferable to the price of his own goods, while *in medio*, exclusive of the creditors of the party who sold them, and took the documents in his own name; 9th June 1669, Street *contra* Hume, *voce* SURROGATUM; 5th March 1707, Hay *contra* Hay, *IBIDEM*; December 1751, Lord Strathnaver *contra* Macbeath. See APPENDIX.

The decision 24th January 1672, Boilstoun, does not contradict this. In that case, a person had acquired the property of goods in her own name, with money belonging to another. This property, it was thought, could not be overturned by personal latent claims at the instance of third parties. But the same reason does not hold with regard to sums of money and personal rights, in which every claim against the debtor may be found effectual against his creditors arresting, without any prejudice to commerce. This distinction is explained by Lord Stair, lib. 1. tit. 12. § 17.; and confirmed by two late decisions; 17th December 1748, Christie *contra* Fairholms, No 24. p. 4896; 6th March 1755, Insurers of the ship Martin and Louisa *contra* John George Osterbie, No 26. p. 1715.

THE LORDS found, That Henry Patallo is preferable on the price of the goods sold by him to John Robertson, still in the hands of Robert Mackie, to the other Creditors-arresters of the said John Robertson.

For the Arresters, *Montgomery*.

*Alt. Ferguson*.

*W. J.*

*Fol. Dic. v. 3. p. 242. Fac. Col. No 47. p. 77.*