

“ The PRESIDENT—That in all societies, there is no bringing partners into Court, without calling either the managers or the whole partners. *2dly*, M’Nair had sold out before the action was brought. *3dly*, The pursuers own they had three shares themselves; must they not at least discount their own shares? *4thly*, Suppose the company insolvent, how can any subscriber be liable but for his subscription? *unusquisque debet scire conditionem ejus cum quo contrahit.*”

*N.B.* There is a material discrepancy between Lord Kames’ report of this case, and that given in the *Fac. Col.* The latter represents the judgment as having proceeded solely on the ground “that all parties having interest were not called into the field;” while the former represents it to have proceeded on the opinion of the Court, that the several partners were not liable beyond the amount of their subscriptions. Lord Kilkerran’s notes confirm this last account.

1757. *December 20.* ELIZABETH BRODIE and OTHERS *against* ARCHIBALD STEWART.

THIS case is reported in *Fac. Col.* (*Mor.* 3912.) Lord KILKERRAN has the following note of the opinions of the Judges:—

“ *Colston* said, that a decree dative vests the right before confirmation. The person decerned has right to intromit, and from that time he was accountable to his brothers and sisters, and upon that he put his opinion. *Kames et alii* put it upon the obligation.”

“ *December 20, 1757.*—The Lords found the pursuer entitled to her share of the debts as well as of the moveables.”

1758. *January 13.* M’KAY of Bighouse *against* GILBERT BARCLAY, Merchant in Cromarty, and WILLIAM FORSYTH, Merchant there.

MR. MACKAY raised an action against the above defenders, setting forth that the said Gilbert Barclay, by his missive letter, addressed to the pursuer, dated the 17th August, 1752, proposed to buy from the pursuer a certain quantity of salmon, at the same price, and upon the same condition as he, Barclay, had bought a quantity of salmon from the Earl of Sutherland’s commissioners; that the pursuer, by his letter, dated the 19th of the said month, addressed to Barclay, agreed to sell his salmon upon the same terms that the Earl of Sutherland’s commissioners had sold theirs, as to the price and security, without mentioning further particulars, or fixing any term of payment; and that Barclay, by his agreement with the Earl of Sutherland’s commissioners, was to pay for his Lordship’s salmon, at the rate of 50 shillings per barrel, deliverable at Cromarty on the risk and expense of the sellers; and that by a bill on Messrs. Coutts and Company, merchants in Edinburgh, and not upon James Stewart, merchant there, upon whom Barclay, contrary to pac-

tion, drew for the sum agreed on as the price of his Lordship's salmon; and that the same not being considered sufficient security by the foresaid Commissioners, their bargain was given up, and they disposed of the salmon elsewhere: that Barclay having sent a vessel, with a proper quantity of salt and some casks, to the port most commodious for receiving the pursuer's salmon, which, in the same manner as the Earl of Sutherland, was to have been delivered at Cromarty, on the risk and expense of the pursuer, in whose absence, in October 1752, the foresaid vessel arrived for the above purpose, and 59½ barrels of his salmon were delivered on board of her; the pursuer's factor, upon the simple receipt of the skipper, owning he had received the fish on board to be delivered at Cromarty, sea hazard excepted; and that neither at receiving the said fish on board, nor at delivering the same to him at Cromarty, in the latter end of November 1752, did Barclay give bill for the value to the pursuer upon Messrs. Coutts and Company, conform to paction; nor did he then, or ever after, give any manner of security, or make payment in whole or in part to the pursuer of the price agreed for the said fish; which he immediately, or some very short time after, recovering the same, made a pretended sale of to the other defender, William Forsyth, who was *in dolo* to accept thereof in prejudice of the pursuer, being then in the full knowledge of Barclay's insolvency; which, in a few days after this transaction, appeared notorious by a multiplicity of diligences, affecting his person and estate, obliging him to abscond for sanctuary to the Abbey of Holyroodhouse. And therefore the libel concludes, That it ought to be found and declared that it was grossly fraudulent in Barclay to contract for the said purchase of the salmon from the pursuer, knowing himself to be utterly insolvent, and incapable to pay the price; and that therefore the foresaid bargain betwixt the pursuer and him is void and null, and the property of the salmon not thereby transferred to the said Gilbert Barclay, who, under such legal incapacity, could not validly convey the right thereof to Forsyth; and that the same do still remain in the right of the pursuer; and that he ought to be ordained to deliver up to the pursuer the foresaid fifty-nine barrels of salmon in as good case and condition as when he received the same, and to pay to the pursuer what charges and expenses he has been put to through the illegal detention thereof, &c.

This action having come before Lord Woodhall, Ordinary, it was pleaded on behalf of the defenders,—That the letter founded on gave no colour to this action. The letter from Barclay to the pursuer, of the 17th August, 1752, informed him, that Barclay, the Saturday before, had bought the Earl of Sutherland's salmon at L.30 Scots per barrel, deliverable at Cromarty; and that he was willing to purchase the pursuer's salmon on the same condition. The pursuer's answer, of the 19th of August, is in these words:—"I am satisfied you should have my fish at the same terms as you buy Lord Sutherland's, which shall be my rule in this. And from the little acquaintance I have of yourself I am willing to begin a dealing with you." This answer, from the pursuer to Barclay, clearly imports a concluding a sale with him of his salmon for the same price, and deliverable at the same place as had been agreed by Barclay with Lord Sutherland's commissioners; but can never imply a condition of finding the same security, as is said to have been promised by Barclay to my Lord Sutherland. No such condition is expressed in Barclay's letter to the pursuer, nor in the pursuer's answer: and it is impossible that the pursuer could have any such

condition in his view, because Barclay had concluded his bargain with Lord Sutherland's commissioners two or three days before, and it is not pretended that the pursuer knew any thing of the terms of the bargain which he could be supposed to have in view, at the date of his answer to Barclay. And it appears that he was so far from having distrust of Barclay's circumstances, which alone could give occasion for his insisting for security for the price, that, on the contrary, he expresses his willingness to begin a dealing with him in that trade; and indeed it cannot be denied by the pursuer, that for three or four months after the date of his letter, Barclay's credit in the country was unquestionable; and though Lord Sutherland's commissioners, as acting for a minor, thought it proper to demand security from Barclay for the price of my Lord's salmon, yet no gentleman in the country would have thought of refusing their salmon to Barclay upon his own proper security.

*Secondly*, It cannot be denied by the pursuer, That Barclay's bargain with my Lords Commissioners was given up in a few days, upon account of his refusing to give bills for the price upon Messrs. Coutts of Edinburgh, as they insisted for; and that this was known over the whole country before the end of August. And therefore, if the pursuer, in his bargain with Barclay, had meant to insist upon his giving bills on Coutts, or any other security for the price, it was incumbent on him to have given notice to Barclay to that purpose. And if he truly meant to have insisted upon this condition, it is not imaginable that he would have proceeded in the months of September and October thereafter, to have cured the salmon with the salt, and in the barrels sent by Barclay for that purpose; and far less would he have sent the salmon to Cromarty, and delivered the same to Barclay, in implement of the sale in the month of November thereafter, which is instructed by Barclay's receipt to the Ship-master, dated the \_\_\_\_\_ day of that month. And it is absurd to pretend that the pursuer was from home when the salmon were sent off. It will not be presumed that his servants would have sent off the salmon without his orders; and it does not appear that ever he made any challenge against the delivery, till the 21st of December, 1752, after the salmon was sold by Barclay to Mr. Forsyth, the defender, and Barclay had become absolutely bankrupt. But farther, the defender was informed that the bargain was so far completed upon the part of Barclay, that he made partial payments of the price to the pursuer; and the pursuer will not refuse, that in the month of November 1752, the pursuer told Mr. Forsyth, the defender, in the house of Mr. Baillie of Rosehall, his own son-in-law, and in presence of Mr. Baillie and others, that he had sold the salmon to Barclay, and inquired at the defender if they were then arrived at Cromarty. After all which the defender apprehended he was in *bona fide* to purchase the salmon from Barclay as his property; and supposing there was any thing doubtful in the point of law, how far the property was transferred to Barclay, the pursuer ought to be barred *personali exceptione* from any challenge of the after sale by Barclay to this defender. As to the letter from the defender, founded on by the pursuer, as importing the defender's knowledge of Barclay's insolvency at the time of the defender's purchase of the salmon, it can no way affect the present question. The letter is dated the 19th December, 1752, addressed to Mr. Baillie, the pursuer's son-in-law. The words founded on are "It is some weeks ago since I knew and foresaw that this storm of diligence

would break out on Gilbert Barclay, and advised him to go over to you and consult about the proper method for him to take in such a situation, &c." But surely the defender's suspicion or knowledge of the bad circumstances of his debtor could be no legal impediment to his acquiring the property of his effects in payment of his debt. It is upon such suppositions as these that creditors proceed to diligence against their debtors' effects, and the defender could see no difference in this respect betwixt legal diligence against a debtor, or a voluntary conveyance from him in payment of his debt.

The Court, by their first interlocutor, assoilyied the defenders; but afterwards, on advising a reclaiming petition for the pursuer with answers, they altered this interlocutor, 18th Nov. 1757, and found "That by the terms of the bargain between the pursuer and Gilbert Barclay, the pursuer ought to have got the same security for the price of his salmon that was required by the Earl of Sutherland's commissioners, and that he never got such security: And also found, That supposing there had been no such condition in the bargain, yet the supervenient bankruptcy of the said Gilbert Barclay, and other circumstances, are sufficient to annul the bargain."

Lord Kilkerran states, that upon this occasion the *President*, who was against the interlocutor, said, "If there were any circumstances to show, that when Barclay bought the salmon, he had no intention to pay the price, but to give them away to his creditors, I should be for altering, but none such appears, and that was the case of Pittillo against the creditors of Robertson, lately determined, where Robertson had, the moment he got bills for the effects, transferred those bills to his son-in-law, on which circumstance alone it was that the Court varied an interlocutor, whereby the defender had been assoilyied."

A petition was presented by the defender, Forsyth, against the last mentioned interlocutor, but the Court adhered. Lord Kilkerran says—

"*January 13, 1758.*—The Lords adhered as to the second point, and in respect of the circumstances of the case, declared the bargain between M'Kay and Barclay void.

"Nothing can be more delicate than the point which was this day determined, which by the *President* and some others of the Lords was thought to carry that matter of *dolus dans causam contractui* rather too far. The notion which they had entertained was, that as many a merchant carries on business, who at bottom is insolvent, it was not enough to infer a *dolus*—that it is not enough to infer fraud, that the merchant is, when he buys, and proves thereafter to be insolvent, unless it be either *intra triduum*, that he proves so, as in *Caves' case*, or where it is at a greater distance of time that it appears from circumstances, that he bought without an intention to pay, or to carry on his trade, which could not be said in this case, where Barclay, after the salmon came to Cromarty, he repacked them, and therefore could not at that time have it in his view to give them to Forsyth, which afterwards he was obliged to do, on Forsyth's threatening to poind them. Notwithstanding, the Lords found as above.

This case is reported by Kames. (*Sel. Dec. No. 142, Mor. 4944.*)