

what hinders a creditor, when he begins to suspect his debtor's condition *sibi vigilare*, and to get a security? THE LORDS did not find private knowledge sufficient in this case.

No 37.

*Fountainball, v. 1. p. 652. & 659.*

1709. February 10.

ROBERT M'CHRISTIAN *against* WALTER MONTEITH, Merchant in London, and WILLIAM CUNINGHAM his Factor.

DAVID M'CHRISTIAN, apparent heir in a piece of land called Monkhill, disposes the same to Robert M'Christian his uncle in 1699, and turns a merchant-chapman in England; and taking ware to the value of L. 40 or L. 50 Sterling from William Monteith factor in London, he takes bond for the same; whereupon he causes charge him to enter heir special to his grand-father, who died last vest and seized in these lands of Monkhill; and thereon obtains a decret of adjudication against him in February 1707. This awakens Robert, who, in July thereafter, compleats his disposition, and infests David his author by hasp and staple, and himself on the procuratory of resignation; whereupon Monteith, the adjudger, and he competing about the mails and duties of the said lands; it was *objected* by Monteith, that Robert M'Christian's right was *inter conjunctos*, uncle and nephew; and so did not prove its own narrative to be onerous, till it were otherwise instructed; and was a latent right kept up *animo decipiendi creditores*; and was never compleated till I had fully denuded him by my adjudication, which is some months prior to your infestment; and so intervening betwixt your disposition and sasine, it was a *medium impedimentum* to hinder the retroracting of your sasine to the date of your disposition; and the Lords, on the 21st January 1669, Pollock's Creditors *contra* Pollock, No 31. p. 4909., found the latency a great presumption of fraud; and, although the act of Parl. 1621, against the alienations of bankrupts, mentions only anterior creditors, yet the Lords, from the common law, have allowed posterior creditors to quarrel the same, as was found in the case of Street and Jackson *contra* Mason, 2d July 1673, No 32. p. 4911.; where the Lords reduced a disposition he had made to his son, though their debt was contracted thereafter, and declared him infamous. *Answered*, You Monteith was not so much as creditor at the time of my disposition, nor for several years after; and though you have inhibited and adjudged, yet this is all but personal, because you neglected to infest yourself thereupon; so I having the first compleat real right, must be preferred; and Street and Mason's case *toto celo* differs from this; for there a long tract of correspondence in trade preceded his infesting his son, an infant, of the same name with himself, which ensnared his creditors; and the current trade continued after, which made them upon the matter creditors *ab ante*,

No 38.

A reduction of a disposition of lands granted by a nephew to his uncle, was raised at the instance of a creditor of the granter, whose debt was contracted after the disposition, upon presumed fraud, that the disposition being betwixt conjunct persons, did not prove its onerous cause, but must be presumed to have been granted to protect the subject from the disponent's debts, and to have been kept latent to ensnare creditors. The Lords assoilzied the defender.

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.*

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### 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