

1715. January 18.

THOMAS MAIN Merchant in Linlithgow *against* JAMES MAXWELL Merchant in Glasgow, and OTHERS.

THOMAS MAIN, as creditor to Robert Simpson merchant in Stirling, having arrested, in the hands of the keeper of the weigh-house of Glasgow, ten hogsheds of tobacco, as sold by James Maxwell to Simpson's wife: In a process of forthcoming, the proof of the sale was the weigh-house book, wherein it was set down, that James Maxwell weighed to Simpson's wife ten hogsheds; but in the same book it is marked the next day, that James Maxwell cellared the said ten hogsheds upon his own account. And also it stands marked in the same book, that thereafter Maxwell removed the said ten hogsheds, and paid the cellarage.

THE LORDS having found this was a sale, whereby the property was transferred to Simpson: This obliged Maxwell to have recourse to another topic, viz. That Simpson at the time was insolvent, broke very soon thereafter, and that it was fraudulent in him to induce Maxwell to this sale, and trust him the price; and thereby gave access to his creditors to arrest, which was sufficient to rescind the vendition; and for proving Simpson's insolvency, Maxwell produces a disposition *omnium bonorum* granted by him to his creditors, the debts being all contracted before the sale of the tobacco.

The debate having resolved in these two questions, *1mo*, Whether Maxwell's being induced by fraud to sell the tobacco be relevant to rescind the sale? *2do*, Whether the above disposition, and other adminicles do prove the fraud?

It was *alleged* for Main, the arrester, *1mo*, That he having duly affected the goods, the property whereof the LORDS found was conveyed to Simpson, any allegiance of fraud, arising from Simpson's insolvency, was but personal, and could not affect Main, who was not partaker of it, knew nothing of Simpson's circumstances, and duly affected the goods by his diligence: That this was consonant to the *actio pauliana*, which was only personal; and to our statute 1621, whereby purchasers, nowise partakers of the fraud, are secure. *2do*, There was no sufficient proof that Simpson was bankrupt, he was a trading merchant at the time, and continuing to trade thereafter; and that this would be a bad preparative to unsecure purchasers, or creditors using lawful diligence for affecting their debtors means, if such latent circumstances should cut off their property.

Answered for Maxwell, to the *1st*, That this precise case is already solemnly determined by the Lords, 22d December 1680, Prince *contra* Pallat, Stair, v. 2. p. 823. *voce* FRAUD; where Arthur Udney having ordered Pallat merchant in Bourdeaux to send him three tons of wine, he accordingly loaded it; but hearing thereafter that Udney was like to break, he wrote to his correspondent to receive the wines from the skipper, and not to deliver them to Udney; Magnus Prince, Udney's creditor, arrested the wines in the ship. In the competition between Prince and Pallat, the LORDS found, That the wines being delivered to the skipper upon Udney's order, the

No 69.

Fraud practiced by a party insolvent, to induce a person to sell him commodities, found relevant to rescind the sale; so that the goods could not be arrested for a debt of the purchaser, due to a person in no degree *particeps fraudis*.

No 69.

property became his, but found it relevant by his books or oath, that his debts exceeded his estate the time he gave the order, to annul the contract of vendition: By which decision fraud is expressly found a sufficient ground to annul the sale: Nor is there any decision since altering it. 2dly, There are also good grounds in law for this; for when a person is *dolose* induced to contract, which is termed *dolus dans causam contractui*, this renders the contract void, (the fraud impeding the consent), and consequently the property could not be conveyed by a void title. And as to what was *alleged* anent a third party, who is not *particeps fraudis*, it is as certain that what exception is competent against the author, is likewise competent against the assignee or successor: for though fraud be personal as to the penal effects of damage thence arising, or (for the benefit of commerce) when one purchases moveables *bona fide* for a true price; yet it is another thing where there is no purchaser, but a prior creditor, who did not lend his money upon the prospect of these goods being in his debtor's possession; only arrests for his debt, for he cannot be in a better case than his debtor. So the favour of commerce does not come in here, to make an exception from the common rule.

To the *second*, it was *answered*, That the disposition by itself was more than enough to prove the fraud, since therein he disponeth his whole effects in so far as they would go, for payment of his debts.

THE LORDS found the defence, viz. that Maxwell was induced by fraud to sell the tobacco, relevant to reduce and annul the sale. And found the fraud proven by Simpson's assignation to the said Maxwell and his other creditors; and therefore preferred Maxwell to Main the arrester.

In this case marked above, January 18. 1715, Main the arrester having given in a reclaiming petition, representing, that the action, *quæ in fraudem creditorum*, is not *in rem* but *in personam*; and therefore not competent against a third party, who is not *particeps fraudis*, with several other things before proponed and repelled: To which answers were given in, viz. that what exceptions are competent against the author, are likewise against the assignee or successor; and the fraud is only personal, as to its penal effects, when one purchases moveables; yet that it is otherways, where there is no purchaser but a prior creditor, who did not lend his money upon the prospect of these goods being in his debtor's possession, only arrests for his debt; for he cannot be in a better case than his debtor, since the favour of commerce does not come in here to make an exception from the common rule.

THE LORDS adhered to their former interlocutor of the 18th of January 1715, and found the fraud not only relevant against Simpson the common debtor, but also against Main his creditor arresting, whom they found not to be in the case of a third party, purchasing on payment of a price. See FRAUD.

For Main, Graham.

Alt. Sir Walt. Pringle.

Clerk, Robertson.

2

Bruce, p. 35. & 71.