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On the first report, the LORDS inclined to think the security ought to be reduced as *contra bonos mores*, but that it might be sustained to the extent of the sum really advanced, and interest; and some thought an allowance ought also to be given on account of the chance of the Lord Peterborough's surviving his grandson, which might be calculated; but as the contract was executed in England, they desired to be informed of the practice there; and, seeing by the above precedents it was ordinary to restrict such bonds to the sum advanced with interest;

They repelled the objection of usury, but found that the bond in question should only subsist for the principal sum and interest; and that upon payment thereof, against the term of Whitsunday then next, the same behoved to be discharged; but in case payment was not then made, they decreed for the whole sums in the bond, the same being redeemable at any time by the defender, upon payment of the principal sum and interest, and expenses incurred by the pursuer after this judgment.

Reporter, *Lord Murkle.* Act. *Lockhart.* Alt. *A. Pringle.* Clerk, *Kilpatrick.*

D. Falconer, v. I. p. 120.

* * * This case is reported by Kilkerran, *voce* USURY.

1748. December 17.

CHRYSTIES *againts* FAIRHOLMS.

No 24.

A person, induced to sell his goods upon the security of a bill, which afterwards turned out to be forged, was preferred on the price to the other creditors of the purchaser.

ROBERT CHRYSTIE and Company, merchants in Glasgow, agreed to sell to George Anderson, merchant in Alloa, a quantity of tobacco, upon his procuring Robert Drysdale, merchant there, to accept a bill with him for the price: Whereupon he transmitted a bill to them with the name Robert Drysdale adhibited thereto, and desired them, as they had obtained the security they had chosen, to forward the tobacco; which was accordingly delivered, and put on board a ship for exportation, where it was arrested by Anderson's creditors.

Anderson and his creditors agreed that the tobacco should be consigned to John Dunlop in Rotterdam, which was done, and the bills of loading taken in name of the creditors; and, on its arrival at the port of delivery, Anderson, by his missive to Thomas Fairholm and Company, Dunlop's correspondents in Edinburgh, consented that the proceeds should be divided amongst the arresters.

Messrs Fairholms raised a multiplepounding; and Messrs Chrysties having discovered that the subscription to the bill sent them was not Robert Drysdale's, compeared and craved to be preferred on the price.

Pleaded for the Chrysties; There was here no transfer of the property: *Dolus dedit causam contractui*, which is therefore null; and the delivery can have no effect, seeing *fides non erat habita, de pretio*: The Chrysties could vindicate the tobacco, if it were *in medio*, and must be preferred on the price, as coming in its place.

Pleaded for the creditors arresters; *Fides erat habita*, the delivery was made, and the property transferred; for it cannot be pretended that *bona fide* purchasers of the tobacco from Anderson would not have been safe, which they could not be, if the property were still the Chrysties; and the creditors who have arrested it are in the same case.

Replied, Supposing purchasers would have had right to the subject, arresters must be liable to every claim that could have been made upon it in the person of their debtor.

Duplied, Abstracting from the creditors arrestments, the tobacco was made over to them, and the bills of loading taken in their name; so that they are in the case of purchasers.

THE LORDS, 7th December, preferred Robert Chrystie and Company to the defenders, for the price of the tobacco in question: And refused a bill, and adhered; without prejudice to Thomas Fairholm and Company, their retaining the surplus of the price of the tobacco, over what was to have been paid as the price thereof by Anderson to the pursuers.

Reporter, *Elchies*. Act. *Lockhart*. Alt. *Hay*. Clerk, *Kirkpatrick*.
Fol. Dic. v. 3. p. 243. D. Falconer, v. 2. No 24. p. 30.

* * * Kilkerran reports the same case :

CHRISTIE and Company sold a parcel of tobaccos to George Anderson of Alloa; but, not relying on his credit, it was a condition of the bargain, that his father-in-law, Robert Drysdale, should join in the bill for the price. Accordingly, a bill being transmitted to Chrystie, signed George Anderson, Robert Drysdale, the tobaccos were sent off for Alloa, where they were shipped for exportation.

Thomas and Adam Fairholms, creditors of Anderson, having got intelligence of this, they, and after them others of his creditors, caused arrest the tobaccos; which produced a concert between the creditors, arresters, and Anderson, that as the arrestments were for sums exceeding the value of the tobaccos, Anderson should deliver over the tobaccos to Messrs Fairholms, to be by them consigned to Dunlop in Rotterdam, in order to a sale thereof, and that the price might be divided among the arresters.

In pursuance of this concert, Anderson delivered back to the master the bill of loading, which was in his name; and a fresh bill of loading was taken in name of the said Fairholms, and delivered to them. The ship having proceeded in her voyage, the tobaccos were delivered to Dunlop, by whom they were sold; and after the sales, Anderson being at Rotterdam, gave Mr Dunlop amissive, addressed to Thomas and Adam Fairholms, wherein, after acknowledging his having received from Dunlop a copy of his account of sales of the tobaccos, he desires Messrs Fairholms to divide said proceeds at Exchange, *f. 2* 1 two-thirds,

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being L. 285 : 12 : 0 Sterling, towards payment of their own and the other arrestments.

Upon this footing matters stood, the price of the tobaccos being still so far *in medio* as that it was not paid by Dunlop to the arresters, when Chrystie and Company got notice of a trick that had been put upon them by Anderson, in having got the son of Robert Drysdale, and of the same name with his father, to adhibit his subscription to the bill which he had transmitted to them, and upon the faith whereof, as the acceptance of Robert Drysdale, they had parted with their tobaccos. Upon discovery of this fraud, and that the price of the tobaccos was still in the hands of John Dunlop as aforesaid, Chrystie and Company brought an action against John Dunlop, and Thomas and Adam Fairholms, for making furthcoming to them the price of the tobaccos.

And, upon report, the Lords preferred Chrystie and Company to the price; notwithstanding its being argued for Fairholms, &c. *imo*, That, by the sale and delivery, the property of the tobaccos was effectually transferred to Anderson, and to which his fraud was no better objection than it would have been, had he laid down the price to them in false coin. And if the property was once transmitted, his creditors, who had affected it by their arrestments, were not concerned what personal action might lie to the pursuers against Anderson. *2do*, Admitting, that had the defenders nothing to plead, but in the character of arresters, and that as such they may be thought subject to any personal exception competent against Anderson himself, were the tobaccos *in medio*, and he claiming them; yet they here plead in another character, viz. As transferees of the property, by the voluntary deed of Anderson, in taking the bill of loading in their name, and the subsequent order to divide the price among the arresters, which they argued to be sufficient for their purpose, though no arrestment had ever been used.

But the Lords having considered those proceedings as only a prosecution of their arrestments, and that they did not put the defenders in the character of *bona fide* purchasers, found as above; the reporter and some others dissenting, who considered the property to be transferred by the voluntary acts of Anderson; and that the defenders were not to be looked on as in a worse case for having also used arrestments.

Kilkerran, (FRAUD) No 3. p. 216.

1749. January 18.

BLACKWOOD *against* The other CREDITORS of SIR GEORGE HAMILTON.

No 25.

How far fraudulent to take a second right when in the knowledge of a former.

IN the reduction of the decree of ranking of the Creditors of Sir George Hamilton, upon the estate of Dudhope, the ground whereof *vide* 4th instant, *voce* PROCESS, this point *inter alia* occurred to be reasoned among the Lords; in what case the knowledge of a prior right did infer fraud in the acquirer of a