

at many periods his debts may exceed his effects, yet his continuing to trade is not *eo ipso* fraudulent, because he may entertain reasonable hopes by carrying on a profitable business, to emerge out of his difficulties, and to do justice to every one of his creditors. THE LORDS found it not relevant to reduce the bargain for the purchase of the barley in October 1734; that it appeared by the common debtor's books, that, at the time of the bargain he was insolvent, since he continued his trade till the 21st January, and his bankruptcy was not discovered till that time.

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1736. December 8.—THE pursuer thereafter insisted, That the date of the delivery is the only period that is to be considered as to this question; for, supposing the contract fair, yet if, at the time of the delivery by which the property is transferred, the bankrupt is thinking *cedere foro*, and of giving up his effects to his creditors, it is fraudulent in him to receive the subject sold when he has no prospect of doing justice by paying the price. THE LORDS found the time of delivery must be the rule.

The question next occurred, What period ought to be fixed before the *cessio*, at which it may be presumed the bankrupt was meditating *cedere foro*, after which all purchases made, or delivery accepted by him, must be understood fraudulent? The pursuer insisted, That it ought to be sixty days by analogy of the act 1696. The defender insisted, that it could not go beyond the bounds of three days, building upon the authority of several foreign lawyers, particularly Simon Van Lewen in the following words: *E contra tamen nec fides de prætio habita venditori obstat, quo minus rei suæ dominus maneat, et adhuc rei suæ vindicationem instituire possit; si scilicet emptor dolose, biduo aut triduo antequam foro cedat, emendo merces, cum venditore contraxit, ut eum fallat.* THE LORDS found, that the presumptive fraud must be confined to three days before the *cessio bonorum*, and therefore found the pursuer preferable as to any barley delivered during that period. See APPENDIX. See BANKRUPT.

Fol. Dic. v. I. p. 335.

1752. February 25. ANDREW FORBES against MAINS and Co.

MRS ROLLAND, relict of William Rolland, shipmaster in Anstruther, in the course of trade, run in debt to Andrew Forbes, merchant in Leith, a considerable sum; partly constituted by bills, and partly by decret. In the year 1743, Mrs Rolland, failing in her circumstances, was thrown into prison by some of her creditors, and obtained her liberty upon a *cessio bonorum*. After this period, she began again to deal in trade. In the year 1749, she got two parcels of wine from the Mains at Lisbon, and punctually paid the price. In May 1750, she commissioned another cargo from them, being four pipes of white wine, which arriving at Leith, were arrested by the said Andrew Forbes; and the

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A merchant, after becoming bankrupt, and obtaining a *cessio bonorum*, had been in use to commission wine from merchants in Lisbon, which she paid regularly. One cargo was

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Mains appearing in the furthcoming before the Judge-Admiral, were preferred for the price of the cargo, which was not paid; upon this ground, that Mrs Rolland acted fraudulently in concealing her circumstances from her Lisbon correspondents.

The cause being brought before the Court of Session by reduction, the pursuer insisted that there was no fraud in the case; for, *1mo*, The Mains must be presumed to know her circumstances; *2do*, It is no fraud in persons insolvent to continue trade, unless they purchase with a view to run away with the goods; and particularly that a *cessio bonorum* is no bar to continue trade, which, in that case, rather becomes a duty in order to do justice to creditors.

To the *1st*, answered, That strangers are not presumed to know the circumstances of those they contract with in this country. To the *2d*, That it is fraudulent for insolvent persons to continue trade, at least after obtaining a *cessio bonorum*, which deprives them of all credit; and it is gross fraud to contract and take goods when there is little prospect of payment.

THE LORDS repelled the reason of reduction, upon this medium, that, in fair dealing, Mrs Rolland was bound to unfold her circumstances to her correspondents; and that it was fraudulent in her to commission goods from them, when she must have been conscious that they would not have trusted her, had they been made acquainted with her circumstances.

Fol. Dic. v. 3. p. 242. Sel. Dec. No 3. p. 4.

* * * Kilkerran reports the same case :

IN 1748, Elizabeth Crawford *alias* Rolland, relict of William Rolland, shipmaster in Anstruther, obtained a *cessio bonorum*.

In 1749, she commissioned two several adventures of wine from Main and Company in Lisbon, who had been in use to deal with her husband, both which she paid and disposed of for her own behoof.

In May 1750, she commissioned a third adventure, which was four pipes Lisbon white wine, from the said Main and Company; and on the arrival of this ship, Andrew Forbes, who was creditor to her by decree obtained in 1747, for L. 51 Sterling, did, upon an Admiral precept, arrest the same in the hands of the shipmaster, and pursue a furthcoming; in which there ensued a competition between the arrester, and an indorsee to the bill of loading; in which the Judge preferred the arrester, in respect his arrestment was prior to the intimation of the indorsation of the bill of loading. Mean while compearance was made for Main and Company, who, by this time, had got notice of the state of Mrs Rolland's affairs, and for them preference was craved to the said four pipes of wine, upon this ground, that they had contracted with her, a bankrupt, who had obtained a *cessio bonorum*, when they were ignorant of her condition; and therefore, as *fraus dederat causam contractui*, the bargain was void, and for which a variety of decisions were referred to.

To this the following *answers* were made for the arrester, That none of the decisions in former cases do any ways apply to the present case, as in all of them there was still a change of circumstances, or emergencies that were unknown to the seller when he made the bargain, whereas here, there was no change in the buyer's circumstances, from what they had been when the wine was commissioned. *2do*, That her circumstances were no secret, but were publicly known, and must be presumed to have been known to the sellers, though in a distant country, by intelligence from their correspondents; as no man is supposed to contract with another in a distant country, without being in some degree informed of the circumstances of the person with whom he contracts. *3tio*, That as Mrs Rolland had twice before commissioned wines from the same person, and honestly paid them, the presumption was, that she had the same honest intention in this third commission, and that the little trade she was carrying on was with a view in time to retrieve her circumstances. *4to*, If this bargain should be on this ground reduced, it would put an end to all honest endeavours to retrieve a person's circumstances.

The Judge found, 'That it is to be presumed, that the said Main and Company did not know at or preceding the time of shipping the said wines, that the said Elizabeth Rolland had made a *cessio bonorum*, or was bankrupt, and therefore found, that they had been fraudulently induced, by her concealing from them her circumstances, to sell to her, and ship for her, the said four pipes of wine for her account; and that the said fraud did impede the transmission of the property thereof from the said Main and Company; but in respect their only equitable interest is to be secured in the price, found the arrester entitled to the wines on his paying the price.'

Of this decree, Forbes the arrester pursued reduction, and the debate thereon being reported by Lord Kames probationer, as a part of his trial, the LORDS 'repelled the reasons of reduction.'

N. B. It was an impropriety in the Admiral-decree, to find the property not transferred; but there was no occasion to take notice of it.

The points chiefly urged by such of the Lords as inclined to favour the reduction, were the presumption for the woman's honest intention, and the access Main and Company had to know her circumstances from their correspondents, into which if they did not enquire they had themselves to blame. They were further of opinion, that her concealing her having obtained a *cessio* could not be called a fraud, as was argued from the case of the Lady Aberlady, No 2. p. 4838., who sold her jointure when she had a cancer in her breast, which she concealed, on which ground a reduction of the bargain was pursued, and the reason of reduction repelled.

Nevertheless, the Lords, by a great plurality, gave judgment as above. They considered her concealing her circumstances to be a fraud, especially when dealing with a merchant in a distant country; and it was further said not to be a clear point, that even a dealer at a distance in this same country would be

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presumed to know that the person with whom he contracted had obtained a *cessio*; for that no man alive, in the knowledge that a person had got a *cessio bonorum*, would deal with him without taking care to be paid upon delivery. The case of the cancer was thought to differ in this, that one may recover of such a disease.

Kilkerran, (FRAUD) No 7. p. 223.

. This case is also reported in the Faculty Collection :

IN the year 1747, Andrew Forbes, merchant in Leith, obtained decret against Elizabeth Rolland, merchant in Anstruther, for payment of a sum she owed him by bill; but, before he could recover his money, Rolland was cast into prison by her other creditors. She remained there for some months, and then obtained a decree of *cessio bonorum*. Being thus set at liberty, she began trade as formerly; and, at two several times, commissioned wines from Messrs Mains and Company, merchants in Lisbon, (with whom her deceased husband had been accustomed to deal), and paid the price. In the year 1750, near a year and a half after the *cessio bonorum*, she commisssoned a third parcel of wine from Mains and Company; which, upon its arrival at Leith, was arrested by Forbes upon his former diligence. Mains and Company appeared before the Judge-Admiral by their factor, and pleaded their preference to the wine; for that Rolland had concealed from them the condition of her affairs, and therefore, as *dolus dedit causam contractui*, delivery could not transmit the property. The Judge-Admiral preferred Mains and Company. Forbes raised a reduction, and the case was reported by Henry Home of Kames, Lord Probationer.

Pleaded for Forbes; 1mo. In this case, the sale was completed by delivery, and there was no fraud which could found a reduction of it; for Rolland had been declared a bankrupt, in the most public and solemn manner known in our law, and her correspondents either knew or might have known her situation.

2do. A contract of sale cannot be reduced upon the insolvency of the buyer at the time of contracting, unless he *cessit foro* immediately after the purchase; for, from the *cessio* alone, it is presumed, that the buyer had a fraudulent intention of diverting the goods to his own use, or to that of some favourite creditor, without satisfying the seller; 8th December 1736, Sir John Inglis of Cramond against the Royal Bank, No 41. p. 4936. Now these principles cannot be applied to the present case; Rolland made no *cessio fori* immediately after the purchase; her circumstances are, at this day, no worse than when she commissioned the wine from Messrs Main, and paid the price; as she would have done also in this case had not the wine been arrested.

3tio. If the decree of the Judge-Admiral is sustained, the consequences must be fatal to trade; for a person who has become bankrupt, and made a *cessio bonorum*, can never have a possibility of bettering his condition, if every mer-

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

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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.

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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.