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[M. App. "Fraud," No. 3.]

<p>CAMPBELL, ROBERTSON & Co., Merchants, Glasgow, - - - - -</p> <p>WILLIAM SHEPHERD of London, Merchant; and ALEXR. and SAMUEL PATERSON, his Mandatories, - - - - -</p>	<p>}) }</p>	<p><i>Appellants</i>; CAMPBELL, &C. v. SHEPHERD, &C. <i>Respondents</i>.</p>
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House of Lords, 8th Nov. 1776.

SALE—INSOLVENCY—ARRESTING CREDITORS.—A party absconded from Glasgow, came to London, purchased cotton from merchants there, to whom he was a stranger, representing himself as a merchant in Glasgow in good credit, and giving references to certain parties in London, who, by previous arrangement with the buyer, spoke favourably of his credit, and induced the seller to give the cottons. Held, on proof of his insolvency, that the sale was void, and the seller entitled to reclaim his goods while *in medio*, and to be preferred to the creditors of the buyer arresting.

Vallance, a merchant in Glasgow, came to London and purchased cotton from the respondent, Shepherd. He was a stranger to the latter, but, from the assurances from two of his countrymen, and the captain of the vessel in which he had come to London, who, it afterwards turned out, he had previously engaged to speak favourably as to his good credit and responsibility, 35 bales of cotton were sold to him, amounting in value to £504. 18s. 3d., which, by Vallance's desire, was shipped, not to Glasgow, but to Leith. The respondent at sametime wrote to a gentleman in Glasgow enquiring into his circumstances—he, in the meantime, drawing the bill of lading in his own name, but indorsing it to Vallance. When the goods arrived in Leith, they were, with the exception of 6 bales, allowed to lie in Leith, and afterwards removed to the house of Scott, near Edinburgh.

The answer to the respondent's letter of enquiry from Glasgow was, that Vallance was a bankrupt, and had absconded some weeks ago, none knew where, whereupon Shepherd reclaimed the goods as his, and applied to the sheriff of Edinburgh for warrant to have them removed out of the hands of Scott, and put under the orders and custody of the sheriff. The sheriff granted warrant accordingly, and ordered them to be taken to the city Weigh-house, under the charge of Falconer. In removing under this warrant, the cotton was arrested in Scott's hands, and also in Falconer's, by the appellants, creditors of Vallance, for a debt of

1776. £17, who brought a furthcoming, and contended that the property of the goods having been transferred to Vallance, their arrestment was preferable. To this it was answered, that the cottons were fraudulently obtained,—that Vallance had induced people in London to come forward to speak to his credit, while he well knew he had absconded, and was insolvent; that the property had been reclaimed, and was now the respondent's. The sheriff held the cotton for them, and Falconer for the sheriff. Falconer was, therefore, not an arrestee—nor were the goods in his possession at the time of the arrestment.

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On proof, the imposition on the respondent in London was clearly established, and it was also proved that he had left Glasgow in secrecy, and without telling any one where he had gone, while diligence was out against him; and the common report was, he had absconded.

June 28, 1775. The Lords pronounced this interlocutor: “Prefer William Shepherd to the price of the cotton still *in medio*; but, in respect the same was sold by authority of this Court, not reclaimed against by Shepherd, find it not now competent to him to claim any damage on that account, and remit to the Ordinary to proceed accordingly: Find Campbell, Robertson and Co. liable to Shepherd in the expense of process incurred after the date of the condescence given in for them in February, on which the proof proceeded.”

July 14, 1775. On reclaiming petition the Court adhered.

Against these interlocutors an appeal was brought to the House of Lords; and a cross appeal, in so far as it did not allow damage for the loss in price attending the public auction of the cotton by order of the sheriff, at a disadvantageous time and place, and also in so far as it did not find the respondents entitled to the full costs.

Pleaded for the Appellants.—There is no law for rescinding sales, merely because the seller has thought his customer in better credit than he actually turns out to be. And any alarm spreading among his creditors, at the moment of sale, cannot affect the rights of parties in that sale. The law is, that if the goods be not paid, and insolvency intervene, the seller may stop *in transitu*. But if the goods be delivered, the property is then passed, and the seller becomes one among the buyer's creditors, and shares the common fate. In this case, the transit was at an end—delivery was complete; they were received into the buyer's warehouse, part of the

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bales of cotton were resold by him, and the property therefore passed. Besides, from the proof, there was no fraud practised on Shepherd. The mere fact of his buying, even in difficult and doubtful circumstances, does not prove such; and he made no false promises or statements in regard to these to him. As, therefore, Vallance was not incapacitated from buying, even supposing his circumstances doubtful, Shepherd's confidence in him, in delivering these goods before writing to Glasgow, could, and ought not to affect that completed delivery and sale. If the sale is completed by delivery, then the appellants' arrestment must take effect as against the property of their debtor.

Pleaded for the Respondents.—The rule in the law of Scotland, “*Dolus dans causam contractui reddit contractum nullum,*” must govern this case. Fraud was apparent in the whole transaction. As is laid down by Ersk. B. 3. T. 3. § 8.; “*Delivery in sale ubi debis dedit causam contractui ex gra.* where the buyer knew himself insolvent, has not the effect to transfer the property, it remains with the seller who was ensnared into the bargain, and the contract becomes void.” In the present case, Vallance bought the goods under a false representation as to his credit. He got persons in London to speak to his good credit, and passed himself off as such, while he knew well he was insolvent, and concealed the fact, that he had clandestinely absconded from Glasgow in order to avoid diligence. These facts being established by proof, are sufficient in law to void the sale. In law, insolvency may not *per se* be sufficient to annul a sale; but, if added to that insolvency, there be fraud and imposition practised in effecting it, inducing the vendor to sell as to a person of undoubted and substantial credit, while the vendee fraudulently conceals his real circumstances, and resorts to fraudulent means, as in this case, to induce others to speak well of his credit, in order to obtain the goods from the vendor, the contract of sale is resolved, and the goods, though delivered, remain the property of the buyer. As they were sold at a great sacrifice of price, by public auction, and when the market was low and no demand, the respondents are clearly entitled to damage for the loss so sustained.

After hearing counsel:

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LORD MANSFIELD stated :—

CAMPBELL, & C. v. SHEPHERD, & C. “ The difference between attachments in Scotland, and the *legal* operation of the bankrupt laws in England is this,—In the former, the creditor, who by his diligence, was able to seize first, was invested with the property so seized exclusively, to the amount of his demand; while the bankrupt laws of England, framed upon a more equitable construction, let in all the creditors to an equal portion of the bankrupt's effects; and, to prevent the possibility of fraud or collusion, by giving an undue preference of one creditor to another, in the distribution of the effects, strict regard was had to the date of the first act of bankruptcy. Thus, for instance, if a man had committed some private act, which in law would make him a bankrupt, and was willing to favour a particular friend, and accordingly paid him his whole debt, and then publicly became a bankrupt, yet if the previous private act should be afterwards discovered, the favoured creditor would be obliged to refund for the benefit of the estate, and be compelled to come in for no more than an equal share. In like manner, when a bankrupt makes a purchase after bankruptcy, in circumstances which prove not only concealment, but fraud, the seller, who is ignorant of such bankruptcy, ought not to be deprived from vindicating these goods against the claim of the bankrupt's creditors, so as to prevent them from becoming a part of the estate for general distribution. In such case, the arrestment of the bankrupt's creditors could not attach.” Moved to affirm.

Ordered and adjudged that the interlocutor complained of be affirmed, and that the appellants in the original appeal do pay the respondent, William Shepherd, £100 costs.

For Appellants, *Ja. Wallace, Ar. Macdonald.*

For respondents, *E. Thurlow, Henry Dundas, Al. Wedderburn.*