

1758. *January 20.*

M'KAY of Bighouse *against* WILLIAM FORSYTH Merchant in Cromarty.

No 44.
Found in
conformity
with the a-
bove.

To purchase goods *in actu proximo* of becoming bankrupt, without prospect or purpose to pay the price, is a gross cheat; which the court of equity in every country repairs by ordering restitution of the goods to the vender. The only thorny point is to ascertain the *animus* of the purchaser, and his intention to defraud the vender. In the case of Joseph Cave, No 41. p. 4936, the presumptive fraud was confined to three days before the *cessio bonorum*; but in that case Cave the purchaser was in good credit, till he called a meeting of his creditors in order to surrender his effects to them. There may, however, be other circumstances concurring with insolvency to enlarge this period. Gilbert Barclay merchant in Cromarty, was in labouring circumstances, and owed much more than he was worth, when he made a purchase of salmon from M'Kay of Bighouse; and, before the delivery, several of his creditors proceeded to diligence against him. A few days after delivery, he made over the salmon to William Forsyth, another merchant of the same town, in part payment of a debt due to Forsyth, who was in the knowledge that Barclay was in labouring circumstances, and that the price of the salmon was not paid. Diligence thickened more and more upon him, and he broke in ten days or a fortnight after the salmon were delivered to Forsyth. From these circumstances, the COURT presumed an intention in Barclay to defraud Bighouse; and considering that Forsyth's purchase was not made *bona fide*, they found him liable to pay to Bighouse the value of the salmon.

Fol. Dic. v. 3. p. 242. Sel. Dec. No 142. p. 198.

1765. *February 27.*

ADAM CRAWFURD NEWALL *against* HUGH MITCHELL, and Others.

No 45.
The property
of the subject
sold found not
to be transfer-
red, the pur-
chase appear-
ing to have
been made
with a frau-
dulent inten-
tion.

THE pursuer, Adam Crawford, upon the 17th of May 1763, sold to James Mitchell younger of Rigg, twenty-one black cattle, at the price of L. 57 Sterling; for which sum Mitchell granted his bill, payable against the term of Lammas thereafter. James Mitchell, upon the same day, also purchased from John Tenant in Coreton, fifty-one black cattle, for L. 147 Sterling, which were instantly delivered to him. Mitchell upon the 18th, the day after these purchases, was proceeding with the same to England, when Hugh Mitchell, and two other of his creditors, did, in virtue of letters of horning against him, at their instance, poind and carry off the cattle. The pursuer having got information of what had happened; upon the 19th of the said month, before the cattle had reached Cumnock, where the poinding was to be completed, came

with a notary and witnesses, and having separated the cattle sold by him from the rest that were poinded, and represented to the messenger that the cattle had been purchased from him only the day before the poinding; and, upon the messenger's refusing to return them, protested, that they should be found liable in the price, and for all damages that might occur in recovering the same; and this requisition and protest was renewed by the pursuer at the market-cross. A petition was afterwards presented by him to the Sheriff of Ayr, praying a sequestration of the cattle during the competition; and an application was afterwards made by the poinders for a removal of the embargo. Upon advising of which, warrant was granted to dispose of the cattle by public roup; which having been done, bills were taken payable to the Sheriff-clerk of Ayr, for the behoof of all concerned. The pursuer, in his own name, and as assignee to John Tennant, brought an action against the poinders for the price of the cattle, and concluding, that the Sheriff-clerk of Ayr should be ordained to deliver up to him the bills, or to pay him the contents of the same. This action having come in course before the Lord Ordinary, his Lordship found, that as Mitchell was not denied to have been insolvent at the date of the sale, and that he fled the country the day after the purchase of the cattle, and that it appeared from a letter, dated the 19th of May, the second day after the purchase, he had intimated a meeting of his creditors, and acknowledged his insolvency, found the bargain fraudulent, and that the property of the cattle was not transferred to Mitchell, so as to be attachable by his creditors in prejudice of the pursuer.

The defenders having reclaimed to the Inner-House, and insisted, That as Mitchell was a drover by profession, and in use to set out for markets in England immediately after he made purchases of cattle, and having also left a considerable number of cattle upon his farms when he went away, it could not be presumed that the bargain was fraudulent on his part, or that he had any intention to defraud his creditors by making it. But the pursuer contended, That, from the facts before mentioned, there was sufficient evidence of a *cessio fori intra biduum vel triduum* of the purchase and delivery, not only by the letter of the 19th of May, but likewise, by his taking sanctuary within a few days of the sale; and that the Court had uniformly, in such cases, found a *præsumptio juris et de jure* of a fraudulent intention, and that the property of the subject sold could not, in such instances, be transferred. The case of *Cave's Creditors*, No 41. p. 4936, was precisely in point, and had never been deviated from since that judgment was pronounced.

'THE COURT refused the desire of the petition, and adhered to the Lord Ordinary's interlocutor.'

A. C.

Fol. Dic. v. 3. p. 243. Fac. Col. No 13. p. 22.