bill became due; but it is dangerous to rest the cause on that ground, for this would lead to arbitrary decisions. There is a particular circumstance pointed out, which will take this case out of the general case; namely, the acknowledgment that this precise sum was due. The general clause, reserving all objections, hurts not this; it is merely a clause of style.

MONBODDO. What if the man proceeded upon a mistake in law?

ELLIOCK. I have no doubt as to the general point. There are circumstances sufficient to take this out of the general case. Martin acknowledged the debt; which presumes notification. This is not a mistake in law.

On the 21st June 1775, "The Lords found that, from the circumstances of this case, and particularly from the tenor of the disposition whereby Martin acknowledged himself debtor, there was sufficient presumptive evidence of notification;" altering Lord Monboddo's interlocutor.

Act. R. Cullen. *Alt.* B. W. M'Leod.

1775. *June* 21. WILLIAM SHEPHERD, Merchant, London, *against* CAMPBELL, ROBERTSON, and COMPANY.

SALE.

The seller preferred to the price of the goods while *in medio* to the arresting creditors of the buyer, become bankrupt.

[*Fac. Coll., VII.* 91.]

THE first question here was, Whether Vallance had purchased the cotton from Shepherd in a fraudulent manner? The second, Whether Shepherd could reclaim the cotton, being *in medio*, from the creditors of Vallance, who had arrested it?

As to the question in fact, the Lords, after a full and accurate examination of the circumstances, came to be of opinion that there was fraud in the purchase. Covington alone dissented, from a notion that Vallance had actually in his possession a sum of money sufficient to pay for 15 bags of cotton, which was the quantity he at first demanded, although the bargain was at length concluded for 35 bags on credit, which, in the event, Vallance was unable to pay.

MONBODDO. The question in law is, Whether Shepherd can recover the cotton from the creditors of Vallance? There is a difference between *bona fide* purchasers and arresters. As to *bona fide* purchasers, the case is clear: Shepherd could not recur against them. An arrester is in a different situation; he seeks to take advantage of the fraud of his debtor. This is against the civil law, and our law also. In the case of an assignee of a debt, the oath of the cedent is not good, but it is good against an arrester. This shows the difference. A distinction has been attempted between *nomina debitorum* and the

ipsa corpora of moveables. I consider the arresters as standing in the place of Vallance. What I have said was taken for granted to be law in the case of *Neilson, 28th January* 1775.

KAIMES. As to the point of law, originally assignees were obliged to pursue in the name of the cedent: afterwards this was departed from, and it was held that the assignation divested the cedent, and invested the assignee: Still compensation is sustained, which seems contradictory. I take myself to the real case of moveables arrested. I dare not apply the maxim, *dolus dans causam, &c.* No fraud renders a contract null by the law of Scotland; force and fear will, for then there is understood to be no bargain. Fraud is rather an argument that a man has consented, and it points out *why* he consented. There may be a good ground of reduction against the party deceiving, but that will not go against the party who purchases *bona fide;* the property is in him and cannot be taken from him. As to arrestment, that is on a different footing. Arrestment and inhibition are so far similar, that they bar voluntary but not necessary deeds. Thus an inhibition will not hinder a man from granting a disposition, in consequence of an antecedent minute of sale; neither will an arrestment hinder him from fulfilling an antecedent obligation. I sell my victual; before delivery arrestment is used: this will hinder delivery. Vallance is still bound to make good the bargain with Shepherd: arrestment will not render this obligation ineffectual.

COVINGTON. The property of the goods was transferred to Vallance. There is evidence of this from the circumstance that Shepherd, by his attorney, Patterson, actually repurchased the cotton from Vallance. Insolvency is not sufficient to void a bargain of sale. English merchants sell upon credit: this implies that they expect payment not out of the actual funds of the purchaser, but out of the proceeds of the retail. If the goods had perished by sea, they would have perished to Vallance. I do not dispute that circumstances might occur sufficient to entitle Shepherd to reduce the bargain. I would consider the case as with Vallance himself. Whenever *fides habita est de pretio,* the brrgain is good,—so it was lately determined, in a very hard case, *Scrymgeour* against *Mitchell.* I admit that Vallance was insolvent; but I see no symptom of a *cessio fori*: his purpose was to make a profitable bargain in wholesale. Shepherd was not *dolo inductus* to sell.

COALSTON. I am clear as to the point of law. If the pursuer was fraudulently induced to sell, he is entitled to reduce. The creditor-arrester is in no better situation than the debtor himself. The favour of commerce presumes property from possession in moveables. The difficulty is from the facts. Insolvency is not sufficient to reduce sale; but the whole circumstances taken together infer fraud. From considering the circumstances of the case, I doubt how far Shepherd is obliged to prove fraud. The arrestment is of the 4th April: Vallance's credit was totally at an end before that time, and Shepherd had obtained a sequestration of the goods. Suppose the question to have been between Shepherd and Vallance, I think that Vallance would have been obliged to find caution to deliver up the goods, or pay. The case of a purchaser is stronger than that of an arrester.

GARDENSTON. It is agreed that fraud is equally competent to be pleaded

against an arresting creditor as against the debtor. Insolvency, even known to the person purchasing, is not sufficient to void the bargain.

JUSTICE-CLERK. In this case, as in most others, any difference of opinion among the judges is rather as to evidence than as to law. Vallance, in the sense of all writers on trade, *cessit foro* when he left Glasgow in a clandestine manner. *There* the principle, *infra biduum vel triduum*, prevails; which was established in *Cave's* case. There was fraud in making so large a purchase under false pretences. The goods are still to be considered as in the hands of the purchaser. Mr Shepherd has them sequestrated: this is agreeable to law. Favour is due to this principle, that a seller shall have a *retractus* on his own goods when the price is not paid. It is the duty of the Court to protect the *generous trader* from the frauds of little designing purchasers.

KENNET. Insolvency, knowledge of insolvency, and also a certainty in the purchaser's own opinion, that he could not proceed in business, all concurred here. In the case of *Scrymgeour* against *Mitchell*, it was not proved that Scrymgeour could not proceed in business.

On the 21st June 1775, "the Lords preferred Shepherd the seller."

Act. Ilay Campbell, G. Wallace. *Alt.* A. Abercrombie, H. Dundas.

Reporter, Alva.

1775. *June 27.* SUSANNA JACK *against* WILLIAM COPLAND of Collieston.

PRESUMPTION—PROOF.

An admission of intercourse with a woman upwards of eleven lunar months previous to her being delivered of a child, found not sufficient proof that the party making the admission was the father of the child.

THE pursuer, a domestic servant of the defender, was delivered of a child on 21st November 1773. The defender acknowledged that, during the time she was in his service, he had carnal intercourse with her several times; but he stated that the last of these occasions was on the 28th of November 1772. The pursuer, on the other hand, asserted that the intercourse had continued down till the end of December 1772. In an action for the aliment of the child, the Lord Ordinary "found that there is sufficient evidence, upon the whole, to support the pursuer's claim."

In a petition the defender PLEADED,—That ten months being the longest period during which it was supposed, in law, to be possible that a woman should go with child, there was here no proof of his being the father. *L.* 3, § 11, ff. *De suis et legitim. Hæred.*; Stair, 3. 3. 42. Ersk., p. 108.

ANSWERED,—There is sufficient proof of intercourse about ten months and three weeks before the birth of the child; and that is not so long a period as to render it impossible that the defender should be the father. *Sande Decisiones Frisicæ, lib.* 4, *tit.* 8, *decis.* 10. *Causes Celebres*, 1769.