

1786. June 24.

WILLIAM SANDIEMAN and Company *against* The CREDITORS of GAVIN KEMPT.

GAVIN KEMPT for some time carried on a considerable trade in the town of Leith. In 1785 his situation became embarrassed, and in the month of September of that year, his debts exceeded his funds, beyond every expectation of retrieval.

About this period he devised, with two other persons, the following scheme of fraud. A contract of copartnery was made out, which, however on account of the notorious insolvency of his confederates, was industriously concealed from the public. Gavin Kempt himself commissioned from every quarter goods fit for a foreign market; and, in particular, he procured on 25th October, from William Sandieman and Company, a quantity of linen, declaring to them an intention of paying the price on delivery.

In order to prevent an attachment of these goods, a mock sale was executed, as soon as they arrived in Leith, in favour of one Robertson, a clerk of Kempt's, who accepted bills of exchange for their value. After this, the goods were secretly conveyed to different towns on the coast of Fife; and a ship was prepared at Alloa to carry them abroad. Care was at the same time taken, that no trace of these proceedings should appear in the books kept by Kempt. Kempt was not rendered bankrupt, in terms of the act 1696, till 15th December, forty-nine days posterior to the delivery of the goods belonging to Sandieman and Company, which were afterwards discovered, and brought from the different places in which they had been concealed. A sequestration of his effects was awarded; when Sandieman and Company petitioned the Court of Session, that the articles they furnished might be restored. In this they were opposed by the creditors in general, who

Pleaded; It is not enough to invalidate a sale of goods, that the purchaser was not at the time possessed of sufficient funds to discharge his prior obligations. The investigation which this would occasion into the gradual progress of insolvency in every particular case, would in the end be more pernicious to society than the evil it is calculated to remedy. All the length, therefore, the practice of Scotland has gone is, to annul those transactions which have been executed within three days of the public bankruptcy. This was determined forty years ago, and has been recognised in several late instances. The agreement therefore in question, which was completed by delivery seven weeks before the bankruptcy, is thus placed beyond the reach of challenge. 8th December 1736, Sir John Inglis *contra* the Royal Bank, No 41. p. 4936; 27th February 1765, Crawford Newall *contra* Mitchell, No 45. p. 4944.

Answered for Sandieman and Company; It is true, that the presumption of fraud which arises from insolvency alone, has been by our customs, and those of other nations, confined to such proceedings as have taken place within three days of the *cessio fori*; because a person, though knowing himself to be at the

No 47.

A person knowing himself to be insolvent made a large purchase of goods, of which, to prevent attachment by his creditors he made a fictitious sale to his clerk, and did not become notour bankrupt till 49 days after delivery of the goods. They having been sequestrated on the application of his creditors, the sellers claimed them as their property, on the ground of *dolus dans causam contractui*. The Lords preferred the sellers.

No 47. time unable to pay all his debts, may yet with the fairest intention continue his trade, in the hopes of retrieving his affairs.

But by introducing such a criterion of presumptive fraud, it surely never could be intended to preclude the interference of the Court in cases like the present, where fraud is proved to have given rise to the transaction. This must render all contracts invalid, agreeably to the rule, *quod dolus dans causam contractui, reddit contractum ipso jure nullum*. Nor can the silence of the injured party, unless continued during the period marked out by the long prescription, or explained into an homologation by the circumstances of the case, prevent the equity of restitution.

THE LORDS unanimously found, 'That the sale of the goods in question, by the petitioners to Gavin Kempt was brought about by fraud on the part of Gavin Kempt; and therefore found the same void and null; and that the petitioners were entitled to restitution of their goods.'

For the Petitioners, *Claud Boswell*. For the Creditors in general, *Dean of Faculty*.
C. *Fol. Dic. v. 3. p. 243. Fac. Col. No 278. p. 428.*

No 48.

Found in conformity with the above.

1786. June 24. JOHN LOVE *against* THE CREDITORS OF GAVIN KEMPT.

ON the eve of Gavin Kempt's bankruptcy, Mr Love was desired to furnish goods to him; which, however, he refused to do, unless Kempt's father joined in the security.

Afterwards Gavin Kempt produced, though without any authority from his father, a letter of warranty, under the signature of 'James Kempt and Son, military agents, Leith;' and the goods were forwarded.

A petition having been preferred for Mr Love, of the same purport with that occurring in the preceding case, the LORDS were unanimously of opinion, That the circumstance of the letter of warranty alone was sufficient to annul the bargain, which had thus been made under a condition which could not be fulfilled.

THE LORDS 'preferred John Love to the goods in question.'

For the petitioner, *Ro. Cullen*. For the creditors in general, *Dean of Faculty*.

N. B. Three other applications of a like nature were made at the same time, and attended with the same effect.

C. *Fol. Dic. v. 3. p. 243. Fac. Col. No 279. p. 430.*

* * * In the same manner was decided the case *Shepherd against Campbell Robertson and Company*, 28th June 1795. See APPENDIX.