

1784. December 15. CHARLES GORDON *against* HARRY GARDENER.

No 46.

A sale made to and on the credit of a merchant insolvent, and against whom ultimate diligence, from which he had formerly sought protection in a sanctuary, was still standing undischarged, found not reducible on the head of fraud.

ROBERT DALZELL, a merchant, purchased from Gordon two copper stills of considerable value, and for the price of them, which were delivered to him, granted bills. But within three months after the transaction, and before the bills were payable, Dalzell was imprisoned, in consequence of ultimate diligence, which had been raised several years before, and obliged him, more than one year preceding, to betake himself to the sanctuary of the Abbey of Holyroodhouse. An action of reduction of this sale having been instituted by Gordon on the head of fraud and circumvention, Gardener, as factor for the Creditors of Dalzell, of whose effects a sequestration had been awarded,

*Pleaded*, in defence; Dalzell, though perhaps insolvent at the time of the bargain, did not become bankrupt until three months after that period. As he was then proceeding in business, he might, like any other merchant in such circumstances, indulge a reasonable expectation of retrieving his affairs, and the law will therefore presume that he transacted *bona fide*. In the case of Cave's Creditors, No 41. p. 4936. it was found, that the presumptive fraud ought to be limited to the space of three days preceding bankruptcy. As little reason is there, on the other hand, to presume deception suffered by the pursuer, who, from the place of his residence, had access to learn the situation of the defender.

*Answered* for the pursuer; That which distinguishes this case, is the circumstance of Dalzell, at the date of the transaction, lying under ultimate diligence undischarged, which before had obliged him to commit an act of bankruptcy, by retiring to a sanctuary, and was ready every moment to be put again in execution, as it actually happened within three months afterwards. In such a precarious situation, he had nothing to hope from pursuing the profession of a merchant, which must depend for success on exerting a regular and uninterrupted train of industry, the prospect of which was thus removed from him. He was therefore guilty of fraud; and *dolus dans causam contractui, reddit contractum nullum*. Nor is the circumvention of the pursuer to be questioned, unless by supposing him desirous of the loss of his property.

THE LORD ORDINARY found, 'That the circumstances of the case did not qualify a deception or fraud sufficient to set aside said sale, upon which delivery had followed, and assolized the defender.' And a reclaiming petition having been preferred by the pursuer,

THE COURT, on advising it with answers, 'adhered to the interlocutor of the Lord Ordinary.'

Lord Ordinary, *Henderland*. Act. *W. Stewart*. Alt. *Rolland*. Clerk, *Menzies*.  
S. *Fol. Dic. v. 3. p. 243. Fac. Col. No 183. p. 288.*