1788. *December* 4.

ALLAN, STEUART, and COMPANY *against* CREDITORS of JAMES STEIN.

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An insolvent person having purchased goods on credit, within three days preceding his bankruptcy, such purchase was *presumed* in law to be fraudulent; but with respect to goods purchased before the *triduum*, the Lords judged it incumbent on the party desiring restitution to prove actual fraud. On an appeal, the first part of this judgment was reversed.

ON 31st October 1787, Allan, Steuart, and Company, corn-dealers, entered into an agreement with Stein, a distiller, by which they engaged to purchase for, and furnish to him, as much grain as he should have occasion to consume in his distillery, for the price of which, on the other hand, he was to grant bills. Stein then, though reputed as in good credit, was in reality insolvent; and on 23d February following he stopped payment. During the intervening period, continually, down to the day of the bankruptcy, quantities of grain, to the value of L. 20,000, had been furnished according to the contract, but none of the bills of lading were transmitted later than 4th February.

Immediately after Stein's failure, Allan, Steuart, and Company, preferred a petition to the Court, stating, That by concealment of his insolvency he had fraudulently got possession of their property, and therefore craving restitution, so far as the grain was still extant in Stein's custody. To this claim Stein's other Creditors objected, and (the Court having appointed the matter to be argued in informations),

Pleaded; If the claimants, by the bankruptcy of the debtor, have suffered loss, their fate is the same as that of all his other creditors. whose misfortune any interval of time between the credit given and the subsequent bankruptcy can never alleviate. Their pretended preference then has not equity for its basis; nor does the circumstance of the goods being still in existence, found this restitution in law.

By the sale and delivery the property was completely transferred; the sellers' right of *rei vindicatio* ceasing, and they in lieu of it becoming personal creditors for the price. The maxim of law no doubt is, that *dolus dans causam contractui, reddit contractum nullum;* and there was a time when the insolvency of a purchaser was held by the Court to constitute such *dolus* as to annul the sale; as in the case of Prince *contra* Pallet, No 39. p. 4932. But that idea is truly inadmissible in a commercial country, where it must often happen, that the fairest traders owe their prosperity and opulence to perseverance in maintaining their credit at particular periods, when, by some emergency, they may have become actually insolvent. It was therefore rejected in the case of Sir John Inglis *contra* the Creditors of Cave, No 41. p. 4936. And from that time downwards it was never understood that the buyer's insolvency alone could void a bargain.

By a subsequent judgment in the same case, indeed, the Court annulled the sale with respect to goods furnished within 'three days' preceding the bankruptcy; but the ground of this distinction may be questioned. It is the supposition, that the determination to stop payment must have been made 'three 'days' before that event. No precise time, however, it is plain can *a priori*

No 49. be justly alloted for such an interval, the length of which must ever vary according to circumstances, and these frequently the most unforeseen and casual. A general regulation of that kind might no doubt be expedient for saving the expense of legal discussion, in the same manner as that with respect to the sixty days antecedent to bankruptcy, during which period no valid deed can be done in favour of any particular creditor. But such regulations are the province of the legislature, not of courts of law; and hence arose the necessity of the statute of 1696. Among the numerous instances in which the Court has decreed restitution of goods sold and delivered to persons who had afterwards become bankrupt, this judgment respecting the *triduum* has not been regarded as a precedent. Nor is any similar rule known in the practice of other countries, as, of England, for example, or of Holland.

At the same time it is to be observed, that as bills of lading of the whole goods were indorsed and transmitted to Stein, 19 days before his failure, there was thus a virtual and legal delivery of the goods prior to the *triduum*. For by the indorsation of bills of lading, an effectual tradition of goods on shipboard is in law understood to be made; Select Decis. 13th June 1764, Buchanan and Cochrane *contra* Swan, *voce* Sale. Judgment of House of Peers in Hastie and Jamieson *contra* Arthur, 10th April 1770, Ibidem; Fac. Col. 2d February 1787, Bogle *contra* Dunmore and Company, Ibidem.

Answered; This claim is founded not only on the fraud of the bankrupt, but on the practicability of restoring goods still extant; an advantage of which the claimants are not to be deprived, because it is not possessed by every other creditor. Nevertheless, as their goods were delivered more on the eve of the bankruptcy than the rest, the fraud with respect to them is more glaring. It has been admitted, that fraud is a legal ground for decreeing restitution after sale and delivery; a proposition which both in general, and likewise as relative to the particular case of insolvency in the buyer, is established by numerous authorities; Stair, b. 1. tit. 9. § 14; Bankton, b. 1. tit. 10. § 6. 117; Erskine, b. 3. tit. 3. § 8; Principles of Equity, p. 222; Mackay *contra* Forsyth, No 44. p. 4944.; Crawford Newal *contra* Mitchell, No 45. p. 4944.; Sandeman and Company *contra* Kempt's Creditors, No 47. p. 4947.

If however it be granted, on the other hand, that mere temporary insolvency is not a legal indication of fraud, the concession will not afford an apology to an insolvent man, purchasing on credit, at a crisis when he can entertain no reasonable expectation of retrieving his affairs. It is possible, no doubt, that supervening bankruptcy may result on a sudden from some accidental or unforeseen occurrence; but as, in the nature of things, that will comparatively but seldom happen, it is a just presumption, when this event closely follows the purchase, that it has been fraudulently in the purchaser's view. In the case of Cave's Creditors, the Court held it as a *præsumptio juris*, that fraud was committed with respect to goods delivered *intra triduum* of the bankruptcy; a rule

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which ever since has been considered as established, and in particular, contrary to what is said on the other side, was recognised in the above cited cause of Crawford Newal *contra* Mitchell.

The claimants argue, that thus the Court, by making a regulation not authorised by law, would assume powers of legislation similar to those exercised in the statute of 1696. But it is perfectly agreeable to law, to judge by presumption in default of more complete proof, and here is only one instance, among the many legal presumptions which are still subject to be overthrown by superior evidence. The presumption of the statute referred to, is one, *juris et de jure*, and such as warranting a judgment in opposition to complete evidence, could not but require for its sanction an act of the legislature.

Neither do the cases that have been quoted establish a legal delivery of goods by indorsation of the bills of lading. The judgment of the House of Peers, in that of Hastie and Jamieson, was only to find 'a special property' vested in the indorsee, as distinguished from a full transference of the right; and the other instances respect merely grounds of preference among competing creditors.

The opinion of the Court, agreeably to the decision in the case of Cave's Creditors, which was considered as an established precedent, was, that a legal presumption of fraud, such as to annul the transaction, takes place with respect to purchases made within three days of the purchaser's bankruptcy, on whom therefore, or on those in his right, the *onus probandi* of fair dealing lies; while prior to that *triduum*, it is incumbent on the sellers to support a relevant charge of fraud.

The idea of transferenee by indorsation of the bills of lading seemed not to be admitted.

'THE LORDS found the claimants entitled to restitution of the grain delivered by them into the granaries of James Stein, within *three days* of 23d February 1788, when he stopped payment, and which then remained in his possession unmanufactured.'

A reclaiming petition was presented, but being advised with answers, was refused. *See* SALE.

For the claimants, *Ross et alii.* Alt. *Blair, Maconochie.* Clerk, *Home.*

S. *Fol. Dic. v.* 3. *p.* 243. *Fac. Col. No* 48. *p.* 84.

*** 1790. *December* 23.—In this cause, in which there were cross appeals, The HOUSE of LORDS 'ORDERED, That the interlocutors of the 11th December 1788, the 4th March 1789, and 5th March 1789, complained of in the 'original appeal, be reversed, without prejudice to the respondents in the said 'appeal, producing evidence to shew, that they were entitled to stop and retain 'the grain consigned to them by James Stein the bankrupt: ORDERED, That 'the cause be remitted back to the Court of Session, to take such evidence, 'and hear the parties: ORDERED, That the interlocutor of 5th March 1789, 'complained of by the cross-appeal, be affirmed.'