M'Lean *v.* Creditors of Cheesly, Feb. 8, 1810. Forbes' Dec. Moses, Feb. 4, 1773, Fac. Coll. et Mor 12352.

Pleaded for the Respondent.—1. Although by the act 1696, c. 25, it is provided that an allegation of trust cannot be proved by parole evidence, yet it is a fixed and established point, as proved by various authorities, that a trust may be proved by facts and circumstances, and particularly by the terms of a correspondence between the alleged truster and trustee. 2. The facts and circumstances appearing in this case, and the correspondence between the late William Gordon and sister, the appellant, afford the most convincing and complete evidence that the appellant held the sublease of part of the farm of Arduthy for behoof of her brother, William Gordon.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Erskine, Henry Brougham.*
For the Respondent, *Wm. Alexander.*

NOTE.—Unreported in the Court of Session.

[Mor. 14226].

JOHN SPENCE, Merchant in Greenock, Trustee on the Sequestrated Estate of WILLIAM MATHIE, Merchant in Greenock, } *Appellant;*

Messrs. AUCHIE, URE, and Co. Merchants in Glasgow. . . . . } *Respondents.*

House of Lords, 16th March 1810.

SALE—STOPPING IN TRANSITU—CONSTRUCTIVE OR ACTUAL DELIVERY.—Thirty-two puncheons of rum, belonging to the respondents, were lodged and bonded in the King's warehouses, kept by Messrs. Sandeman. While in this situation, the respondents sold the rum by auction, Mathie becoming the purchaser, giving bill for the price at four months, and receiving a delivery order from the sellers, which was duly intimated to the warehousemen, and the sale marked by them in their books, with the name of Mathie as the purchaser. Mathie thereafter sold eighteen puncheons, which were delivered, and the duties paid. But fourteen puncheons still remained in the King's cellar, when he became bankrupt, with the bill for the price still unpaid to the respondents. In an action brought by them to recover the fourteen puncheons, as still undelivered and in *transitu*, Held them entitled to stop in *transitu*.

1810.

SPENCE
v.
AUCHIE, &c.

Reversed in the House of Lords, and held, That the fourteen puncheons were to be considered as being completely in possession of Mathie at the time of his bankruptcy, as in a question between vendors and vendee.

The respondents, Messrs. Auchie, Ure, and Co. imported a considerable quantity of rum into the port of Greenock. It was deposited, on its arrival, in the cellars or warehouses of Messrs. Sandeman, general agents in Greenock, who granted bond, with cautioners, to the proper officers, for the King's duties. One key of the warehouse, according to the bonding statutory regulations being kept by them, and another by the revenue officers, for security of the duties, without payment of which the rum could not be removed.

In this situation of matters, Messrs. Auchie, Ure, and Co. exposed the rum to auction and sale on 15th December 1802; and William Mathie purchased at the sale thirty-two puncheons of this rum, at the price of £792. 12s., gave bill for the price, at four months date, and received a delivery order for the rum from Auchie, Ure, and Co., which being duly intimated to Messrs. Sandeman, they marked, opposite to the entry in their books, of each puncheon, the name of William Mathie, as the purchaser thereof.

Soon thereafter, eighteen puncheons were taken out of the warehouse on payment of the duties, and sold by William Mathie. The other fourteen puncheons remained still in the cellars, when William Mathie became bankrupt, which was before the bill for the price to the respondents fell due.

In these circumstances, the respondents presented a petition to the Water Bailie, concluding, "That as the bill "granted for the price was not paid, Messrs. Sandeman "ought to be ordained to deliver the said rum to them, or "their order, and that the said Water Bailie ought to grant "warrant for selling the same, and for applying the pro-"ceeds, after deducting the expenses, towards payment of "the said bill." The appellant, as Mathie's trustee, oppo-"sed the application." But the Water Bailie pronounced

Aug. 26, 1803. this interlocutor:—"Having considered the petition, an-"swers, &c., invoice therewith produced, and replies: Finds "the complaint relevant: Finds that the pursuers are entitled "by law to reclaim the fourteen puncheons of the rum sold "by them to the defender, William Mathie, still remaining "in the King's cellars, in respect the price thereof has not "been paid, therefore prefers them to the said rum as still

" being their property; authorizes them to receive the same " from Messrs. Sandeman and the revenue officers, in whose " joint custody it is now stated to be, upon payment of the " duties, and to sell the same by public roup," as craved.

A reclaiming petition against this judgment was refused by the Water Bailie. An advocation was then brought to the Court of Session, which was also refused. A second bill was also refused. And, on reclaiming petition to the Court, the Lords adhered to the interlocutor of the Lord Ordinary.* On second reclaiming petition, the Lords again adhered.

Sept. 26, 1803.

Dec. 15, ——

Nov. 23, 1804.

Dec. 18, ——

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded by the Appellant.—1. The possession of these thirty-two puncheons of rum was effectually given to Mathie, three months previous to his bankruptcy. The *jus proprietatis* was therefore complete in him long antecedent to the period when the fourteen puncheons, that continued unsold in Messrs. Sandeman's custody, were reclaimed by the respondents. This appears from all the facts of the case, none of which are, or can be disputed. Messrs. Auchie, Ure, and Co., gave an order to Messrs. Sandeman, the custodiers, to deliver up the rum, *marked with specific* marks, to Mathie, the buyer. Messrs. Sandeman, immediately upon that intimation, altered the entries in their books, which was their usual manner of notifying a change of the

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* Opinions of the Judges.

LORD PRESIDENT CAMPBELL.—" This is a question about stopping *in transitu*. In my opinion, the interlocutor reclaimed against is right. The result of the authorities quoted is in favour of that interlocutor. Sandeman and Co. were still acting as interposed persons, and as general agents for all concerned. Mathie had no complete hold of the goods, but only a mere constructive possession. The case of an indorsed bill of lading is different from a transfer of this kind by an order of future delivery.

LORD MEADOWBANK.—" There was not merely a constructive but an actual delivery. The King had merely a pledge, but the property was in Mathie. At this rate, goods in the King's cellar become not saleable, except for ready money. These goods have been a kind of credit to Mathie."

LORD HERMAND.—" I think the interlocutor right, on the ground that there was here an ambiguous custody."

Lord President Campbell's Session Papers, vol. 115.

1810.

SPENCE
v.
AITCHIE, &c.

property and possession of goods when under their keeping. By this means, they acknowledge that they held the goods from that instant for and on account of the vendee; and, accordingly, as his agents and custodiers, they gave up to him the key of the cellar when required, delivered eighteen puncheons of the rum to his order, and permitted him to guage the remainder. These acts *not only* constitute an acknowledgment that their possession of the goods was constructively that of Mathie, being retained for him and on his account; but they amount to an actual admission of Mathie himself into direct and personal possession, by permitting him to deal with the property as his own, disposing of part, and exercising a direct *dominion* and control over the remainder. The circumstances of this case, therefore, are a much more direct and unequivocal proof of an admission into possession than many which have been considered as decisive of that fact. Thus, if goods had been deposited in a distinct cellar belonging to the vendors, a delivery of the key of that cellar to the vendee would have tranferred the possession.

Harper *v.* Faulds, Bell's Cases, 474, per Lord Kenyon; Ellis *v.* Hunt, 3 Durnf. and East, p. 464. Ellis *v.* Hunt, ut supra. Leeds and Others *v.* Wright, v. iii. Bos. and Pull, 320.

So, marking a case in which goods were packed, while in the custody of a warehouseman, was held to be a taking possession, and to constitute the custodier of the goods the warehouseman of the vendee. Also, packing and repacking, by a general agent of the vendees, without his knowledge, have been adjudged conclusive of the question of actual delivery, and an alteration of possession. If, therefore, possession of the rums was delivered to the purchaser, prior to his bankruptcy, the right of the sellers to reclaim them was, *ipso facto*, gone, whether the law of stoppage of goods *in transitu* was previously applicable to the case or not.

2. Besides, the right which a vendor has to stop goods, in case of the vendee's insolvency, whilst in their passage or transit to him, has no place here. There was no *transitus* or journey of the goods from the place of sale to that of final delivery, during which they could be stopped or arrested. There was no middleman or carrier intrusted with them for the purpose of conveyance from out of whose custody they could be taken. These things are essential, by the law of England, to raise the question of arrestment *in transitu*. There can be no right to stop goods in their passage from one place to another, where the transit is already complete, and where the goods have no passage to perform from one place to another. In the present case, there was no other place of final delivery in the view of the buyer and

sellers, than the spot in which the goods lay. It was a sale of the rum in the warehouse of Messrs. Sandeman, to be delivered there. The transfer, in the books of the warehouseman, from the names of Auchie, Ure, and Co. to that of William Mathie, was complete delivery. The question, therefore, as to what shall be considered such a constructive delivery to a carrier as to render the vendee liable for the price of the carriage, and subject to the loss of the goods, without divesting the vendor's right to arrest them in their passage to the place of delivery, does not arise. The true point is, Whether the buyer or sellers are to be considered in possession of the goods by the intervention of Messrs. Sandeman, as agents, and to which of them the possession in *their cellars* is to be referred? This point cannot admit of dispute. After intimation of the order to deliver the rums to *Mathie*, they lay in the cellars at his risk, and subject to his disposal. From that moment he became liable for the duties, and also for payment of the warehouse rent, while the respondents were entirely discharged of all liability on these accounts. When the order was intimated, and the puncheons marked in Sandemans' books, as sold to Mathie, all privity of contract ceased between Messrs. Auchie, Ure, and Co. and Messrs. Sandeman. After this, Sandemans held the rums for Mathie, in whose possession they now were, through these gentlemen, as custodiers. After this possession, there could be no right to reclaim. But even supposing the Sandemans were held in law to be the custodiers for Auchie, Ure, and Co. of the rum, up to the time when the eighteen puncheons, out of the thirty-two, were delivered to Mathie, still there appears no intention, either previous to, or at the time of delivery, to give possession of part and withhold the rest; the delivery of the eighteen puncheons must be taken to be *quatenus* a delivery of the whole, so as to vest the entire property in Mathie, exempt from any right of the seller to reclaim.

Slubey and Others *v.* Heyward and Others, 2 Hen. Black. 504.

Pleaded for the Respondents.—The present being a question between the vendors, who have received no value for the rum, and the creditors of the vendee, who wish to apply it to their own payment, the point is, What, as between the vendors and vendee, is sufficient to complete the transference of the goods and prevent stoppage; where the price has not been paid? In all continental states, the vendor is entitled to demand his goods back, or to claim a privilege, in competition with other creditors, where the vendee fails without paying the price, and where the goods are still dis-

1810.

SPENCE
v.
AUCHIE, &c.

tinguishable from the other property of the bankrupt. A different rule has been established in England, and is now adopted in Scotland, viz. That wherever the goods have come into the actual possession and custody of the vendee, the property is to be held as finally transferred beyond the reach of restitution, although the price should be still unpaid. It was not without difficulty that this rule was established; it was not without regret that, in some late cases, it has been acceded to as a settled point. Lord Hardwicke, in delivering his opinion on this subject, more than half a century ago, said, "Although goods were delivered to the "principal, I could never see any substantial reason why "the original proprietor, who never received a farthing, "should be obliged to quit all claim to them, and come in "as a creditor, only for a shilling perhaps in the pound, "unless the law goes upon the general credit the bankrupt "has gained by having them in his custody." In a later case, all the judges in the Court of King's Bench, in comparing the English law with that of Russia, (which, like that of other continental states, allows restitution on bankruptcy wherever the goods can be identified), expressed regret that a law so equitable was not adopted in England. And, again, in a still later case, Lord Kenyon said, "If, in those cases, where "goods continue in bulk, and discernible from the general "mass of the trader's property at the time of bankruptcy, "they could be returned to the original owners, who have "received no compensation for them, without injury to the "claims of others, it would be much to be wished." Although, therefore, the rule be too firmly fixed to allow goods to be reclaimed after actual delivery, this is a rule which is not to be farther extended. There are cases in which actual delivery at the moment of sale is impossible; as, for example, goods sold or ships sold at sea, goods in a foreign country, or commodities in the hands of a manufacturer unfinished. In such cases, the rule of law that requires actual delivery has been relaxed, on considerations of equity, that *where the price is paid*, the best delivery that the circumstances admit of is received as constructively sufficient to pass the property. But, in no other circumstances whatever, is any thing less than actual and real delivery held to complete the transference, and divest the vendor of his right to resume the goods on failure of the vendee. This is now completely settled as the law in both parts of the island; and the cases by which, in England, it has been established are thus summed up by Judge Buller, in speaking

Snee v. Prescot, 1 Atk. 249.

Inglis v. Usherwood, 1 East, 515.

Neale v. Ball, 2 East, p. 117.

of the doctrines of stopping *in transitu* :—"In former cases, "the line has been precisely drawn, and they all turn on "the question, Whether or not there has been an *actual* "*delivery* to the bankrupt? It is of the utmost importance "to adhere to that line, for if we break through it, we shall "endanger the authority of the cases which have been al- Ellis *v.* Hunt, 4 Term. Rep. 464. "ready decided, and shall fritter away the rule entirely." Was there here, then, an actual, or only a constructive delivery? If the former, it signifies nothing whether the price was paid or not? If the latter, the admission that the price was not paid, offers to us the privilege of stopping *in transitu*, and leads directly to a confirmation of the judgment of the Court below. Now, it seems to be indisputable, that under the definition of actual delivery, none can be included, in which there is not, on the part of the vendee, either an absolute and corporal apprehension, or, at least, a direct and exclusive possession, custody and control, without the intervention of any third party or middleman. Applying this rule to the goods in question, they cannot be said to have been actually delivered. They were not given up to the exclusive control and possession of the vendee, without the intervention of any middleman. And no act of delivery took place but the intimation of an order to this middleman, and his acceptance of that order, as one he should be bound to obey when due requisition should be made, and when those duties should be paid, for which the goods were kept in bondage under his key and that of the revenue officer.

Stokes *v.* La Riviere, 3 Term, Rep. p. 466.

Hunter *v.* Beal, Ibid. p. 467.

After hearing counsel,

The Lords find, that the pursuers, in the application to the Water Bailie, are not entitled in law, in respect that the price thereof was not paid, to retain the puncheons of rum in question, sold by them to William Mathie, which were remaining in the King's cellars. Find, That in the circumstances of this case, these goods ought, (in a question as between the vendor and vendee thereof, in whose possession the same were), to be considered as being in the possession of William Mathie the vendee, before he became bankrupt, inasmuch as Messrs. Sandieman ought, in such a question, between such parties, in the circumstances of this case, to be considered as holding them prior to the bankruptcy, as the agents and servants of the vendee only. And it is therefore ordered and adjudged, That all parts of the several interlocutors complained of, so

1810.

MASTERTON, &c. *v.* MEIKLEJOHN, &c.

far as they are inconsistent with this finding, be, and the same are hereby reversed. And it is further ordered, that, with this finding, the cause be remitted to the Court of Session in Scotland to do therein, and as to the several interlocutors complained of, as this finding requires, and is consistent therewith.

For Appellant, *William Adam, M. Nolan.*
For Respondents, *Sir Sam. Romilly, Geo. Jos. Bell, Henry Brougham.*

NOTE.—Before this reversal was pronounced in the House of Lords, it had been decided in the Court of Session, in another case, (Tod and Co. *v.* Rattray, 1st Feb. 1809,) upon a strongly urged opinion delivered by Lord President Hope, that their judgment in Spence *v.* Auchie, Ure, and Co., was erroneously decided. Lord President Blair and Lord Meadowbank concurring in this.

ALEXANDER MASTERTON, ROBERT BALD, WILLIAM FULTON, Bailies of the Burgh of Culross; JAMES BENNET, Merchant-Councillor and Dean of Guild, elected at the Meeting at Michaelmas 1803; GEORGE ROLLAND, SIR ROBERT PRESTON, and Others, Councillors of the said Burgh, } *Appellants;*

DAVID MEIKLEJOHN, elected Second Merchant-Bailie at Michaelmas 1802, and Others, Councillors and Office-Bearers of the said Burgh of Culross, . . } *Respondents.*

House of Lords, 22d March 1810.

BURGH ELECTION OF MAGISTRATES AND COUNCILLORS.—Circumstances in which it was held, that as there was not a majority of councillors present to constitute a legal meeting of council, an objection stated to the legality of the meeting, on that ground, was sustained. Affirmed in the House of Lords.

This was a dispute about the election of the Magistrates and Councillors of the burgh, under the old system of election, wherein the respondents complained of that election, and prayed the Court to declare the election void, on the following grounds:—1. That due premonition was not given, and no premonition regularly served. 2. That there was not a quorum of council present. 3. That the election was the act of a minority of councillors, in opposition to the act of the majority. 4. That it was only the act of a certain