

sioning such goods, unless the factor gives advice or notice that such goods have been purchased on his account, in terms of the order. In the present case, no such advice was given, and therefore the flax lay at his own risk, and, when consumed, was a loss to the factor, and not to the appellants. Had advice been given, they might have insured against fire.

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*Pleaded for the Respondent.*—Having received a letter from the appellants commissioning him to purchase 60 lasts of flax, the respondent Porter purchased part, consisting of 1071 poods, from Leverikoff, which part, though burned while in the warehouse waiting the arrival of vessels for shipment, was the property of the appellants, and the loss fell on them, and not on the respondent Porter. The latter acted in compliance with the letter of instructions,—he paid the price with his own money for the flax ; and it must be shown that he has been guilty of gross negligence, in following out the orders, or has occasioned the fire, before the loss can fall on him. The property being the appellants, the loss is also theirs. And the want of advice is not that neglect, for which law holds a party responsible. Besides, it was clearly established by the proof, that it was not the custom of merchants at St. Petersburg, to give advice of the partial execution of orders. No request as to advice was made, no intimation given of an intention to insure in any shape, otherwise intimation would at once have been given.

After hearing counsel, it was

Ordered and adjudged the interlocutors be affirmed.

For Appellants, *R. Mackintosh, Alex. Wight.*

For Respondents, *Ilay Campbell, Edw. Bearcroft.*

NOTE.—Unreported in Court of Session.

[M. 14,200.]

JAMES HILL, Trustee on the Bankrupt Estate of Wilson and Brown,	} <i>Appellant ;</i>
GEORGE and JOHN BUCHANAN, Merchants in Glasgow,	
	} <i>Respondents.</i>

House of Lords, 11th April 1786.

SALE—BANKRUPTCY.—30 hogsheads of tobacco were bought on the eve of bankruptcy, and 8 hogsheads delivered the day before

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the failure was known, but the 22 hogsheads not delivered; the bills stipulated for the price were not granted; and the seller insisted for return of the 8 hogsheads. The bankrupts voluntarily returned them. Held, in a question with the creditors, that the seller was entitled to retain possession of the whole, on emerging bankruptcy.

The question in this case was, Whether a sale of tobacco, made by the respondents to Wilson and Brown, had been completed so as to pass the property before bankruptcy.

Mar. 5, 1783. Of this date, the respondents wrote to Wilson and Brown:—

“GENTLEMEN,—We make you an offer of thirty hogsheads of tobacco, imported from New York in the Ruby, *to be delivered* to you or order at Greenock, as it lies at the king’s cellars, and at the weight passed at the king’s scales; one of which 30 hogsheads is still on board the ship, and shall be delivered to you when landed, at the price of 23½d. per pound, you granting us bills for the same, payable at six or seven months from this date.” Of the same date, this offer was accepted of by letter, signed by Wilson and Brown, and samples of the tobacco of each hogshead sent.

The tobacco lay in the cellars of the respondents, and Wilson and Brown having applied for delivery in terms of the sale, of eight hogsheads, obtained these through their doer in Greenock, who shipped them along with other four hogsheads to Liverpool, in name of Wilson and Brown on Aug. 13. the 13th August. On the same day, Wilson and Brown had informed many of their friends in Glasgow, that they were Aug. 14. obliged to stop payment, and next day their failure was public over all Glasgow. On its reaching the respondents’ ears, George Buchanan, one of their number, called on that day at the counting house of Wilson and Brown, and demanded back the missive letter of sale, and also the bill of lading, as to the eight hogsheads, which being done, the bill of lading being in Wilson and Brown’s name, was got altered, Aug. 15. and a new bill of lading in the respondents’ name was procured for the eight hogsheads, which by this time were on board of the ship for Liverpool. Mr. Brown, at same time, promised to return the samples of tobacco. On the 15th August, the whole 30 hogsheads were thus completely in their possession undelivered. The bills for the price had Aug. 17. not been granted, and the sequestration did not take place until two days thereafter.

The appellant Hill, being appointed trustee on Wilson

and Brown's estate raised action for £4780, as the value of the 30 hogsheads of tobacco.

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The Lord Ordinary ordered informations, and reported the case to the whole Court, the leading arguments against the action of the trustee being, 1. That the sale of the tobacco was not complete, nor the property thereof transferred, because the tobacco was not delivered, nor the bills stipulated to be given for payment of the price granted. 2. That Wilson and Brown were insolvent at the time of the sale; and, 3. Conscientious of this, they had voluntarily quitted their right as purchasers, and had given up their right to the whole tobacco to the respondents, before Wilson and Brown were rendered bankrupts in terms of law.

The Court, of this date, pronounced this interlocutor, Jan. 25, 1785. "Sustain the defence and assoilzie: Find the pursuer liable to the defenders in expenses; and appoint an account thereof to be given into Court." Their Lordships modified Feb. 26, — the expenses to £50.

Against these interlocutors, the present appeal was brought.

*Pleaded for the Appellant.*—The sale was complete, and the transference of the tobacco in question, under that sale, to the bankrupts, was beyond all question. The exchange of missives was evidence of the one, and the delivery of the samples clearly demonstrated the other. Nay, further, the bankrupts had every control over it. They had got actual delivery of eight hogsheads, which they shipped on their own account to Liverpool as their undoubted property. The twenty-two remaining hogsheads only lay in the warehouse to suit their convenience in paying the duties to which they were subject; but they say they were delivered to them. And the whole delivery of the tobacco was rendered complete by delivery of the samples, which was evidence that the whole was at their unlimited disposal. The transference being thus complete, it was not in the power of the bankrupts to undo the transaction, and to give back the tobacco after they had stopped payment; and for to allow the sellers to resume the property, would only be conferring on them a preference to the manifest injustice of the other creditors.

*Pleaded for the Respondents.*—The contract was not complete at the time of the bankruptcy of Wilson and Brown, because the bills stipulated for the price were never granted. Until these bills were granted, they had no right to the tobacco, and no control over it whatever; and if they had no right, as little can their creditors pretend any right to

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the same. The property of the tobacco at the time of the bankruptcy was in the person of the respondents. It had not been transferred to Wilson and Brown, and was undelivered. And as by law, the contract of sale, before actual delivery of the goods sold, establishes nothing more than the obligations which each has become bound to implement, the respondents are entitled to retain the tobacco, and the creditors not entitled to claim it, without payment of the price. All the hogsheads were in possession of the respondents on the 15th August, two days before the bankruptcy, and they are entitled to retain these as security for the price on emerging bankruptcy. There is no delivery by samples known in the law; but even if delivery to the bankrupts had been otherwise complete, it was only the act of an honest man to return back goods which they had no means of paying, and which they were bound to do if they contemplated bankruptcy. To do otherwise would be a fraud. And indeed the whole transaction was void, on the head of presumed fraud, because at the time it was impossible to suppose that they had purpose or ability to pay the price, and must therefore be looked on as parties having the intention to become bankrupt *cedere foro*, at the time of the delivery of the eight hogsheads.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *John Morthland, Wm. Adam.*

For Respondents, *Ilay Campbell, W. Grant.*

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[M. 15,618.]

Mrs. ANN PATERSON of Eccles, and PHILIP ANSTRUTHER, Esq. her Husband, MARY PATERSON, and ALEXANDER CAMPBELL her Husband, and HENRY CAMPBELL their Son,	}	<i>Appellants;</i>
STEPHEN BROMFIELD, Esq. - - - -		
		<i>Respondent.</i>

House of Lords, 19th May 1786.

ENTAIL.—A party had made an entail with power to alter. He afterwards altered, and made a new entail, differing in the destina-