

“ MY LORDS,

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“ I must lay aside all the computations and comparisons of William and Henry Waddel’s fortunes, and the allegations as to abstraction or concealment of papers, no such thing having been proved. That the sole question was, Whether Henry’s account pocket book, and the paper containing the account in 1773, were evidence to support the demand? That they afforded strong ground of suspicion that Henry died possessed of William’s money to a considerable amount, was beyond all question; but I cannot consider these documents as amounting to legal evidence. It was not this cause alone which he had to consider, but the danger of such a precedent of introducing loose evidence. He therefore moved to affirm.”

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It was therefore ordered and adjudged that the interlocutor complained of be affirmed.

For Appellant, *R. Dundas, Thomas Macdonald.*

For Respondents, *J. Anstruther, Wm. Adam.*

[Mor. p. 4949.]

HENRY JAFFREY and Others, Partners of the Stirling Banking Company, (Stein’s Creditors,)	} <i>Appellants ;</i>
MESSRS. ALLAN, STEWART & Co.,	
	<i>Respondents .</i>

House of Lords, 23d Dec. 1790.

BANKRUPTCY — SALE — DELIVERY — RESTITUTION — FRAUD — STOPPING IN TRANSITU.—A party, a distiller, had entered into a bargain for the purchase of an extensive quantity of grain from the respondents, while he was verging towards, and on the eve of bankruptcy. The grain was furnished; and, up to the date of the bankruptcy, between 20 and 30 cargoes stood thus: 1. The greatest quantity was delivered more than three days before bankruptcy; 2. Several cargoes were delivered within the three days of bankruptcy; and, 3. At the date of his becoming bankrupt, several cargoes had arrived at the port of delivery, but were not then landed, but lay in the ships before being carried to the warehouse of the buyer. The respondents claimed restitution of the whole; in regard to the first, on the ground of presumptive fraud. In regard to the second, on the ground of positive fraud; and in regard to the third, on the ground of their right to stop *in tran-*

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situ on emerging bankruptcy. Held, that they were not entitled to restitution of what was delivered more than three days before bankruptcy; but that they were entitled to restitution of that delivered within three days of bankruptcy, as well as that taken possession of on board of the ships at the port of delivery. Reversed in the House of Lords, and held, that there were no circumstances inferring presumptive fraud, or fraud of any kind, in this case, and that the fact of goods delivered within three days of bankruptcy is not *per se* a circumstance from which fraud may be inferred: and case remitted back to Court of Session, to take evidence and hear parties further on the point of stopping *in transitu* in regard to the grain at the port of delivery.

1787. For a considerable time previous to his bankruptcy, James Stein, late distiller in Kilbagie, had been carrying on an extensive trade, but, unknown to any one, under great difficulties, so much so, that he had communicated to his nephew, an intention to stop payment in July 1787. In September, to the same party, he says by letter, "I have £32,500 to pay this and next month. I am really diffculted about it." In October he writes that he is £5000 short for the week, and adds, "he must absolutely stop payment." In order to keep up his credit, the circulation of bills was resorted to, aided by a plan of raising up two nominal companies for that purpose. It was in these
 Oct. 31, 1787. circumstances, and of this date, that he entered into a contract with the respondents, whereby the latter were to supply him with all their grain at seven months credit. They were then ignorant of his situation, which he managed to conceal from them. It appeared in February following that a bill was passed making alterations on the distillery laws
 Feb. 19, 1788. calculated to injure distillers in general, and on the 19th February a cow was sent him by the minister of Alloa for purchase, but this is returned, stating, "On account of the distillery laws he has this day curtailed his operations."
 Feb. 23, 1788. Mr. Stein finally stopped payment on 23d Feb. 1788.

Between October 1787 and 23d Feb. 1788, the respondents had supplied him with 20 or 30 cargoes of grain. At the time of the bankruptcy, four cargoes not then landed, but lying in the ships at the port of delivery, were taken possession of by the respondents, and of other cargoes part was landed on 7, 12, 13, 18, 19, 20, 21, 22, and 23 Feb. When these were shipped off, the respondents usually took bills of lading in their own name, and indorsed them to the

bankrupt, who got a bill in return at seven months. The last cargo was shipped on 4th February, and next day they got from Stein a bill at 7 months date for the amount. The questions were, 1. Whether the respondents were entitled to restitution of the grain delivered within three days of bankruptcy, on the ground of presumptive fraud, arising from concealed bankruptcy; 2. Whether they were entitled to restitution of grain delivered more than three days prior to bankruptcy, from actual fraud inferred from the circumstances of the case; and, 3. Whether the creditors (appellants) were entitled to have the grain taken possession of by the respondents at the port of delivery restored to them?

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The Court found “ the petitioners (respondents) entitled to restitution of the grain delivered by them into the granaries of James Stein, within three days of the 23d Feb. 1788, when he stopped payment, and which then remained in his possession unmanufactured.” And “ appointed them to give in a condescence, specifying the particular acts inferring fraud, upon which they found their claim of restitution of the grain delivered to the bankrupt more than three days prior to the bankruptcy.” On reclaiming petition, this interlocutor was adhered to.

Dec. 3 and 11,
 1788.

Dec. 4, 1788.

Mar. 3 and 4,
 1789.

The appellants petitioned the Court, praying that the four cargoes seized and taken possession of by the respondents ought to be restored to the creditors; but the desire of this petition was refused.

Mar. 4 and 5,
 1789.

The respondents then gave in their condescence, which stated, that they had access to the books and letters of the bankrupt, and were prepared to establish fraud, from the facts which they disclosed. They quoted passages from several letters, leading to the suspicion of fraud; and stated that they would, if allowed, prove others. They also offered to prove various acts of fraud, or facts and circumstances inferring it, by the oaths of witnesses, and also to instruct the extent of the bankrupt's insolvency at different periods, from all which, fraud of three different kinds would be established. 1. Fraud in taking the goods with a deliberate intention never to pay them; 2. Fraud by positive acts, and efforts resorted to for deceiving the respondents as to their credit; 3. Fraud, consisting of falsehood, deceit, and imposition, employed by an insolvent party to prevent his credit in general from failing.

The Court, of this date, found “ the facts and allegations stated in the condescence are not relevant to infer

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“ fraud, so as to entitle Messrs. Allan, Stewart and Company
 “ to restitution of the grain delivered by them more than
 “ three days prior to the bankruptcy of James Stein ; and
 “ therefore refuse a proof thereof.”

The appellants appealed to the House of Lords against these interlocutors, in so far as they gave restitution of the grain within three days of bankruptcy ; and also, in so far as their petition was refused for having the four cargoes of grain restored which were taken possession of by the respondents after the arrival of the ships at the port of delivery. A cross appeal was brought by the respondents against the last quoted interlocutor of 5th March 1789, finding the facts and circumstances condescended on not relevant to infer fraud, so as to entitle to restitution of that delivered more than three days before the bankruptcy.

Pleaded for the Appellants.—A contract of sale, followed by delivery of the goods, as in this case, operates as a complete transfer of the property ; and the seller, once this transfer is completed, can have no lien or security for payment of the price, even although he may have been deceived by trusting to one who knew he was insolvent, and probably would never pay. In this there is no fraud. There is no fraud in a merchant’s going on in trade as long as he can—no fraud in concealing his difficulties, and no art or deception used, while he merely struggles on to the last. The doctrine, that any thing done within three days of bankruptcy, entitles to restitution, is therefore not to be supported, because of the advanced stage of commerce, and of the injury that it may do to the general body of creditors—to the benefit and advantage of a particular creditor. In entering into such contracts, the seller must undergo the usual risks of the party with whom he deals. It is not usual to ask the purchaser if he is solvent ; nor for the purchaser to explain any thing injurious to his own credit. There is no authority except *Inglis v. Cave*, Dict. vol. i. p. 336, for holding that transactions entered into within three days of bankruptcy, are void on presumed fraud. But, supposing that to be the law, it could not apply to this case, where the contract had been entered into on 31st Oct., and the last sale sent off on 4th Feb. following. Yet the case founded on stands alone, unsupported by any other authority ; and the presumption, that goods delivered within three days of bankruptcy have been fraudulently purchased, has no foundation in the law of Scotland, and is not referred to

by the institutional writers. This being the case, in reference to the grain within the three days, the conclusion is inevitable with reference to that delivered more than three days prior to the bankruptcy. And, in regard to the cargoes taken possession of after arrival at the port of delivery, and while on shipboard, the appellants submit that the bill of lading being indorsed to the bankrupt, and the transit being at an end, delivery was completed, and therefore they were entitled to have these restored.

Pleaded for the Respondents.—The rule of restitution of goods delivered *intra triduum*, or restoring to the seller what he has delivered to the insolvent purchaser *qui cedit foro*, or becomes bankrupt within three days after delivery, is a fixed point in the law of Scotland. Bankton says: “It has already been observed, that when a person, knowing himself to be insolvent, buys goods on trust, the seller is preferable, as to the property of such goods, to the buyer’s creditors; but this preference is restricted to the goods received within three days of the bankrupt’s going aside by absconding,” &c. This rule is founded on a legal presumption of fraud, and the doctrine in Bankton and Cave’s case was recognized and repeated in *Shepherd v. Campbell and Robertson* in 1775, where the doctrine of presumptive fraud was given effect to. So that it is erroneous to state, as the appellants do, that the presumption *intra triduum* rested entirely on the authority of a single case. Here the date of the delivery, and not the date of the bargain or contract, is to be considered, and therefore whatever was delivered within the three days of bankruptcy, the respondents ought to have restitution of, as on presumed fraud. And in regard to the actual fraud, so as to entitle the respondents to restitution of that delivered more than three days prior to the bankruptcy, this affords, beyond all doubt in law, a good ground of restitution. The question is, have there been actual fraud in this case? If the whole circumstances stated in the condescence were proved, there could be no doubt of actual fraud. They were induced to enter into the contract upon the representations of Smith, Stein’s active agent, that Stein was worth £50,000 or £60,000, while in fact he was not worth one shilling. Smith’s oath would have proved this, had it been allowed, and the banker’s account shown by Stein and Smith to induce the belief that he was of substantial credit, would also have established the same fact.

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House of
Lords, Nov.
8, 1776. *Vid.*
ante. vol. ii.
p. 399.

After hearing counsel,

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LORD CHANCELLOR THURLOW :

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“ MY LORDS,

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“ I reject the rule of presumptive fraud in this case, because, after attentively examining the adjudged cases relied on, in support of the judgment of the Court of Session, I cannot perceive that the Court have ever proceeded on that positive rule, which the sellers had contended to be now fixed law. It is rather my opinion, from the examination of those cases, that the Court had considered the failure within three days as *one* circumstance only, from which fraud might be presumed, but not as that from which singly fraud was to be absolutely inferred, though other circumstances might show there was none. In the present case, there was not a single circumstance condescended upon, which applied more to the three days immediately preceding the bankruptcy, than to an earlier period, and the buyer's failing within three days after the transaction, or after the receipt of the goods, was not *per se* sufficient to void the contract. There were no circumstances condescended on which inferred fraud : on the contrary, it seemed to be made out, that Stein had no intention of stopping or giving up his trade till 23d Feb. 1788 ; and consequently, till then, he had a right to make contracts, or to receive goods delivered in performance of contracts previously made, just as any merchant or dealer would do in the usual course of trade.

“ But the question is, Whether the respondents (vendors) were entitled to stop certain quantities of grain, which were consigned or forwarded by them to Stein the bankrupt, before the actual delivery to him, the bankruptcy having intervened ? By the law of England, and, as I conceive, by the law of Scotland also, the shipping of goods to one who commissions them, or the delivery of them to a carrier to be conveyed to him, was a completed sale. But within the last hundred years, a rule has been introduced, from the customs of foreign nations, that in the case of the vendee's bankruptcy, the vendor might stop and take back the goods *in transitu*, or before they came into the hands of the vendee ; and this is certainly now a part of the law of England, and I understand it to be the law likewise of Scotland.”

It was therefore ordered and adjudged that the said interlocutor of the Lords of Session, dated the 3d, and signed the 11th December 1788, finding the respondents entitled to restitution of the grain therein mentioned ; and also the interlocutor of the said Lords, dated the 3d, and signed the 4th March 1789, adhering thereto, complained of by the original appeal, be, and the same are hereby *reversed*. And it is further

ordered and adjudged, that the interlocutor of the said Lords, dated the 4th, and signed the 5th March 1789, also complained of by the said original appeal, be, and the same is hereby also *reversed*, without prejudice to the respondents in the original appeal insisting and producing evidence to show that they were entitled to stop and detain the grain consigned by them to James Stein the bankrupt *in transitu*, or before *actual delivery*; and also without prejudice to the appellants in the original appeal making such objections thereto as they shall be advised. And it is hereby further ordered that the cause be remitted back to the Court of Session in Scotland, to take such evidence, and to hear the parties; and to do therein what shall appear to them just as to that point. And it is further ordered and adjudged, that the said interlocutor of the said Lords, dated 4th, and signed 5th March 1789, complained of by the cross appeal, be, and the same is hereby affirmed.

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 LA MOTTE
 v.
 JARDINE.

For Appellants, *Ilay Campbell, Allan Maconochie.*

For Respondents, *A. Pigott, Math. Ross, Cha. Hope.*

MAGDALANE BARBARIE DE LA MOTTE, *Appellant*;
 SIR WM. JARDINE of Applegirth, formerly }
 Captain Wm. Jardine, } *Respondent.*

House of Lords, 25th Feb. 1791.

DIVORCE—PROOF—RE-EXAMINATION OF WITNESS.—Where bribery and malice were objected against a witness adduced, the objector allowed a proof of these before oath was allowed to be put. A party, after she had adduced four witnesses to prove the above objections, prayed the Court, by minute, to be allowed to re-examine these four witnesses, in order to prove certain conversations, said to have taken place with James Spalding, Margaret Johnstone, and Thomas Brockie, witnesses for the respondent, about the time, or after they had given evidence in the cause. Held, that this was incompetent, the intention being to discredit the respondent's witnesses, by proving those conversations, and the facts besides not falling within the conjunct probation.

This was an action of divorce, raised by the respondent