

[7th August 1834.]

HENRY ALEXANDER DOUGLAS, surviving Assignee under a Commission of Bankruptcy of John Stein, Appellant. No. 26.

GEORGE BRUNTON and GEORGE WARDLAW,
Respondents.

Cautioner. — A party in July applied to the sheriff for a warrant to compel delivery of goods alleged to have been deposited for his behoof with a warehousekeeper in January, in security of bills which he had then granted in favour of the owner. At this time the owner was insolvent; and having granted a conveyance of his estate to trustees for behoof of creditors, they agreed to deliver the goods on the party finding caution to account for the proceeds (reserving all claims competent to the creditors); and caution having been found, the goods were delivered:— Held (affirming the judgment of the Court of Session) that, in a question with the cautioners, it was not competent to allege that the goods so delivered were not the same as those consigned, or intended to be consigned, in January, and that thereby an illegal preference had been obtained, but that the cautioners were bound to account only on the footing that the goods were the same as those consigned in January.

JAMES WILLIAMSON, spirit dealer in Edinburgh, presented, on the 27th July 1812, a petition to the sheriff, stating “ that in the month of January last
“ Mr. John Stein, distiller at Canonmills, proposed to
“ consign to him fifty puncheons of malt aqua vitæ, upon

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“ the petitioner permitting Mr. Stein to draw on him
 “ to the amount of 3,414*l.* 15*s.* 6*d.* sterling, which was
 “ agreed to; that a consignment was accordingly made,
 “ and as the petitioner at the time had not room in his
 “ own cellars to receive the spirits, the same were de-
 “ posited, for his behoof and on his account, in a cellar
 “ belonging to Mr. James Bartram at Canonmills; and
 “ it was also conditioned, that so soon as Mr. Stein
 “ retired the two bills which the petitioner granted, or
 “ any others that might be substituted in their place,
 “ the spirits were to be delivered over to him, but in
 “ case the petitioner was obliged to retire either or both
 “ of the bills, he was to have it in his power to sell the
 “ spirits.” He then stated that he had granted two
 bills, which were retired, and others substituted in their
 place, which were current; that he had now room for
 the spirits, which were contained in fifty puncheons,
 marked in an invoice of consignment, and as Bartram
 declined to deliver them, he prayed the sheriff to “ordain
 “ the said James Bartram to give the petitioner access
 “ to the said cellar, and to remove the said fifty pun-
 “ cheons of malt aqua vitæ to his own cellars.”

At this time Stein was insolvent, and sequestration of
 his estates was about to be applied for. Bartram lodged
 answers, merely stating, that as Stein was the party chiefly
 interested he ought to be called. He was accordingly
 called, and gave in a minute, stating “ that the trans-
 “ action between Mr. Williamson and him is correctly
 “ set forth in the petition; but in his particular situ-
 “ ation, and as he expects that a sequestration of his
 “ estate will be immediately applied for, and awarded,
 “ he does not think it proper to interfere further in this
 “ business, leaving it to the person who may be ap-

“ pointed interim factor to urge any plea he might be
 “ advised to, and to your Lordships to pronounce such
 “ orders as to you may seem just.”

In place of a sequestration Stein executed a conveyance of his estates to trustees, for behoof of his creditors, whereupon an arrangement was entered into between the trustees and Williamson, as expressed in the following letter, dated 7th August 1812, addressed by Williamson to the trustees:—“ Whereas on the application made by me to
 “ the sheriff of Edinburgh for a warrant on Mr. James
 “ Bartram, to deliver to me fifty puncheons of whiskey,
 “ consigned to me by Mr. John Stein, Canonmills, and
 “ now lying in Mr. Bartram’s cellars, sundry proceedings
 “ took place; and it has been agreed upon by you, as
 “ trustees of the distillery companies in which John
 “ Stein is concerned, to consent to my receiving these
 “ spirits, on my giving the obligation underwritten,
 “ guaranteed by Mr. George Brunton and Mr. Thomas
 “ Wardlaw, as also under written. Therefore I oblige
 “ myself, and my heirs, to account for the proceeds of
 “ the said fifty puncheons of whiskey to you, as trustees
 “ foresaid, when required so to do; and I declare that
 “ your consenting to my now receiving the same shall
 “ not put me in a better situation than if you had with-
 “ held your consent, but that all my claims on the said
 “ whiskey, under the foresaid obligation or otherwise,
 “ and all the defences of the said John Stein or his
 “ creditors thereagainst, shall be and are hereby re-
 “ served entire.” Brunton and Wardlaw, of the same date, each wrote a document in these terms:—“ I oblige
 “ myself, as surety for the said James Williamson, that
 “ he shall fulfil his obligation in the before-written
 “ letter, and that I shall sign a regular obligation on

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“ stamped paper, when required so to do.” Williamson then got delivery of the whiskey, and sold it.

Thereafter a commission of bankruptcy was issued against Stein, as a banker in London, and the appellant, as surviving assignee under it, raised an action, in name of the trustees, against Williamson, on the footing that, as the spirits had not been delivered out of Stein's stock at the date of the petition, and that those which were delivered under the arrangement with the trustees did not correspond with the spirits specified in the invoice, such delivery constituted an illegal preference, and therefore concluding for payment of the whole proceeds, after deducting the expenses of sale. Pending this action Williamson became bankrupt, and his estates having been sequestrated, he was discharged, after payment of a dividend of about sixpence in the pound. The appellant then instituted an action against the respondents, Brunton and Wardlaw, the sureties, concluding, on the same footing, that they should be ordained “ to make payment of the free proceeds thereof, as also of the sum of “ 75*l.* sterling, as the value of the fifty casks containing “ the said spirits.”

In defence, the respondents maintained, that as, at the date of the transaction between the trustees and Williamson, the trustees were in the undisputed management of the affairs of Stein, as a distiller, and held out to the respondents that the fifty puncheons, delivered to Williamson in July, were the same as those referred to by him in his petition, and which he stated to be those which had been put in Bartram's cellar in January; and as the respondents interposed as sureties on that footing, it was not now competent, in a question with them, to maintain any plea founded on the assumption that the spirits deli-

vered in July were not the same as those put into Bartram's cellar in January; and as the alleged illegal preference rested entirely on that assertion, no claim could be made against them to account for the spirits otherwise than subject to deduction from the proceeds of the amount of the bills paid by Williamson.

The Lord Ordinary pronounced this interlocutor:—

“ Finds, that the action, though raised and insisted in
 “ in the name of the assignees of John Stein, is laid on the
 “ obligation of the 7th of August 1812, granted by the
 “ defender Williamson, and Messrs. Brunton and Ward-
 “ law, as his cautioners, to the voluntary trustees of
 “ John Stein: finds, that that obligation bore express
 “ reference to certain proceedings which had taken
 “ place in an application made by the defender William-
 “ son to the sheriff of Edinburgh for a warrant on
 “ Mr. James Bartram to deliver fifty puncheons of
 “ whiskey said to have been consigned to him, William-
 “ son, by John Stein, Canonmills, in security of certain
 “ acceptances granted by him to John Stein: finds, that
 “ in these proceedings the averment of the defender
 “ Williamson was, that the fifty puncheons of whiskey
 “ had been consigned to him by John Stein in the
 “ month of January 1812, and had been at that time
 “ placed in the cellar of Bartram for his, Williamson's,
 “ behoof: finds, that in support of this, reference was
 “ made to the invoice there produced, bearing date the
 “ 11th of January 1812, identifying the puncheons by
 “ the particular numbers of the casks: finds, that in
 “ these proceedings appearance was made by Bartram,
 “ who, without denying these allegations, expressed his
 “ readiness to obey any order pronounced by the sheriff
 “ regarding ‘ the spirits in question:’ finds, that in

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“ these proceedings appearance was also made by John
 “ Stein, who stated in a minute ‘ that the transaction
 “ ‘ betwixt Mr. Williamson and him was correctly set
 “ ‘ forth in the petition ;’ but waived interference on
 “ the ground that a sequestration of his estate was likely
 “ soon to be applied for : finds, that in these circum-
 “ stances the obligation libelled was granted by the
 “ defender Williamson and his cautioners, bearing refe-
 “ rence to the proceedings before the sheriff, and binding
 “ them to account for the ‘ proceeds of the said fifty
 “ ‘ puncheons of whiskey :’ finds, that on that obligation
 “ being granted, the whiskey was delivered to William-
 “ son, and has since been sold: finds, that the action
 “ concludes against the defenders for the whole free
 “ proceeds of the sales of the whiskey, on the allegation
 “ of fact that the whiskey had not been consigned to
 “ Williamson and placed in Bartram’s cellars in January
 “ 1812, but had been transferred from Stein’s stock so
 “ late as the 27th of July, and the ground in law that
 “ the delivery as of this last date was illegal and invalid
 “ in consequence of the bankruptcy of John Stein :
 “ finds, that the obligation by the cautioners, bearing
 “ reference to the proceedings before the sheriff, and
 “ granted to the voluntary trustees of John Stein, was
 “ qualified by the admission made by John Stein and
 “ all the parties in those proceedings, that the fifty
 “ puncheons of whiskey had been delivered in January
 “ 1812 : finds, that the grounds of action above stated,
 “ however available against Williamson or any of the
 “ other parties who may be proved to have been cogni-
 “ zant of such misrepresentation or fraud, is not covered
 “ by the obligation contracted by the cautioners, against
 “ whom no such charge is made, and therefore assoilzies

“ the cautioners, Messrs. Brunton and Wardlaw, from
 “ the conclusions of the action for the whole free pro-
 “ ceeds of the whiskey, and decerns; but in respect
 “ they admit their liability for the balance of the price
 “ of said whiskey, in so far as not exhausted by the
 “ retirement of Williamson’s acceptances, appoints the
 “ case to be enrolled, that such balance, if any, may be
 “ ascertained: and farther, in respect that the pursuers
 “ aver that the defender Williamson procured the
 “ transference of the whiskey on the 27th of July 1812,
 “ and consequently was aware of the misrepresentation
 “ in that particular made in the proceedings before the
 “ sheriff, appoints parties to be farther heard on the
 “ disposal of that part of the case.”

The appellant reclaimed, but the Court (12th Feb. 1833) adhered.*

Douglas appealed.

Appellant.—As Williamson obtained delivery after the insolvency of Stein, and when (as was offered to be proved) he was in the knowledge of the insolvency, such delivery was illegal; and neither he nor his cautioners were entitled to avail themselves of the spirits to the effect of applying the proceeds which belonged to the general creditors, in liquidation of a debt due to Williamson.† Nor could the arrangement made with the trustees, who were ignorant of the facts, and had no power to compromise the rights of the assignees, afford any protection against an illegal appropriation of part of the bankrupt’s estate, even though such arrangement had

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been sanctioned by the sheriff, which it was not. Besides, all the rights of the creditors were reserved entire by the terms of the letter, and consequently such reservation qualified the cautionary obligation to the effect of rendering the respondents liable in case it should be found that Williamson had no legal right to delivery.

Respondents.—The demand made by the appellant is, that the respondents shall account on the footing that Williamson got possession of the goods unlawfully, and on terms inconsistent with the statement in the petition. But Stein judicially declared that that statement was quite correct; it was adopted by the trustees as such, and the respondents undertook their obligation on the faith of the statement so made by Stein, and held out to them as correct by the trustees. The letter of Williamson expressly referred to the petition, and therefore the cautionary obligation must be held to be qualified by the declaration that the spirits delivered in July were the same as those deposited for his behoof with Bartram in January. The respondents have always been willing to account on that footing, but they cannot be called on to account on a footing directly the reverse.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of one hundred and sixty-five pounds six shillings and five-pence, for their costs in respect of the said appeal.

HYNDMAN and GODDARD, RICHARDSON and CONNELL,
Solicitors.