1788. *December* 4. ALLAN STEWART and COMPANY *against* CREDITORS of JAMES STEIN.

FRAUD.

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.

[*Fac. Coll. X.* 84; *Dict.* 4,949 and 14,218.]

JUSTICE-CLERK. When *dolus dedit causam contractui* there is a *rei vindicatio*, if the subject exist; if the subject does not exist, there will be only action of damages, which will give no preference before other creditors. The question is not, whether Stein was insolvent? but whether, at the time of the purchase, he had a probability of paying for the goods which he purchased? A man who makes a *fori cessio* may be presumed to have known of it three days before it happened. Stein must have known that his bankruptcy was inevitable as soon as he learnt that the bill concerning the distilleries was to pass into a law.

HENDERLAND. Insolvency is not sufficient to set aside a sale, otherwise no man could contract without showing a state of his affairs. Here there was nothing more than a *dolus incidens;* for Stein is able to pay so many shillings in the pound of his debts. Goods, if delivered, must go to the debtor, (the purchaser,) and consequently to his creditors. It is true that, in one case, fifty years ago, the Court fixed on the term of three days before the *cessio fori* as the *terminus* for restitution: this it did on the authority of Simon Van Lewen, who, however, gives no satisfactory reasons for his opinion; and it is contrary to the opinion of the greatest commercial lawyer that ever lived, (Lord Mansfield.)

HAILES. It is true that the case of *Cave* was determined fifty years ago; but the decision was deliberately given, and has not been called in question for half a century; and very many decisions have been pronounced, all taking it for granted that the case of Cave was rightly judged. Van Lewen was not merely a *doctor umbraticus*: he was skilled in the practice of law; and it is to be presumed that he delivered an opinion founded on practice.

DREGHORN. If there is a *series rerum similiter judicatarum*, it is, however, admitted by Allan and Stewart, that a bargain of sale cannot be set aside on account of insolvency: there must also be some circumstances of fraud. If, by our law, there is no hypothec for the price, how shall the creditor-seller have a security? Here the property was transferred, and bills taken: if the property is transferred, the fraud of the buyer does not void the sale. There is no proof of Stein's fraud.

SWINTON. A fraud, giving occasion to a contract, renders it null. Here it is said that there was no dole. The dole lay in this, that a person, knowing that he cannot pay, purchases goods. Stein, as soon as he knew that the bill was to pass the House of Commons, knew that it behoved him to stop.

MONBODDO. Had the goods sold to Stein been sold by him to another there would have lain no action. The question is, Did Stein know that his circumstances were irretrievable when he received the goods? The decision in the case of Cave is fifty years old; but it is not the worse of that: it has never been altered. It determined a *præsumptio juris et de jure infra triduum*. But it does not say that there may not be fraud even in older bargains. The sale of the grain was not completed till *fides habita de pretio*, and at that time Stein knew that he could not pay.

ROCKVILLE. No decision has narrowed the ground of the decision in the case of Cave, though many have gone beyond it.

GARDENSTON. The decision was a good one, and has been held to be a rule of law. The question is not with the party contracting, but among creditors who have all been deceived: the parties admit that, before any of the debts in question were contracted, Stein was irrecoverably bankrupt. He must necessarily have known, three days before the *cessio fori*, what was about to happen, and that he could not pay the grain which he bought and received.

DUNSINNAN. The case of Cave was intended for a rule, and it has ever been considered as such; but I do not incline to go beyond it. Actual fraud, at any time, may be proved. If I could see circumstances to convince me that Stein knew he could not stand, I should go back beyond the three days, in a question with Stein himself; but, in a question among creditors, I cannot go back any farther.

PRESIDENT. In the case of *Pallet*, in 1680, the Court thought that the books of a merchant, showing that the person purchasing could not have paid, was sufficient to establish *dole*. But that decision has not been repeated; for the law must follow the stream of manners: and, in the case of Cave, the Lords laid aside the point of insolvency, and adopted another principle, which might not be arbitrary. I still admit that a special act of fraud, even before the three days, would void the sale.

On the 4th December 1788, "The Lords sustained the claim for the redelivery of the grain, delivered within three days of the 23d February, when the *cessio fori* happened.

Act. Mat. Ross. *Alt.* Allan M'Conochie, &c.

Diss. Henderland.

1788. *December* 16. MADELAINE DE LA MOTTE *against* WILLIAM JARDINE.

ALIMENT—HUSBAND AND WIFE.

A Wife divorced brought a reduction of the decree. She was found entitled to the expense of carrying on the reduction, and to aliment during the dependence of it; and this decreed after the reasons of reduction had been repelled.

[*Faculty Collection, X.* 109; *Dictionary,* 447.]

JUSTICE-CLERK. After a decreet of the consistorial court the woman is no