

No 76. self seizes the goods. And the present question is, if he can be obliged to the delivery thereof, or be liable in damages, if he fails therein, since he might have seized the effects immediately upon delivery.

To the *third*: The seller and buyer are indeed upon equal footing, as to the liberty of seizing the goods, and being entitled to triple value, &c.; all which plainly shows, that the contract is not binding upon the one party more than the other; so that, upon the whole, it is evident, that this act, in order to discourage the running of goods, has not only annulled contracts of sale concerning the same, but likewise imposed severe penalties upon the execution thereof.

The LORDS found the reason of suspension relevant, that the purchaser knew, at the time of the sale, that the goods were prohibited or run-goods, in terms of the act of Parliament,

C. Home, No 34. p. 64.

1740. November 6.

THOMAS WILKIE Merchant in Cowper of Angus, *against* THOMAS M'NEIL Merchant there.

No 77.
Action sustained on a bill granted for prohibited goods; the goods having been delivered to the buyer and seized by an officer of the revenue while he was carrying them home.

THE said Thomas Wilkie purchased from one Patrick Wallace, merchant in Aberbrothwick, 33 ankers of brandy, which were to be delivered to him next day at Hayston; and next morning, Thomas M'Neil (who was present at the bargain) came to Wilkie, who was then going to receive the brandy, and desired that he would allow him to be a partner for 13 ankers of the cargo. Wilkie agreed to the proposal; and, in order to execute the same, he drew a bill on him for the price of the quantity, (which he consented to give him), payable to Wallace. M'Neil accepted the bill, and gave it to Wilkie, to be delivered to Wallace upon receiving the brandy. After this, Wilkie went to Hayston and received the brandy, and gave Wallace Mr M'Neil's bill for the price of the 13 ankers, and his own for the remainder. But, in his way home, a Customhouse officer seized the whole.

Mr Wallace the seller, insisted against Wilkie for payment, not only of his own bill, but likewise for payment of M'Neil's bill, since Wilkie had signed the same as drawer.

Wilkie having been obliged to pay M'Neil's bill to Wallace, and having got an assignation thereto, proceeded to discuss the suspension of a charge which had been given by Wallace to M'Neil.

For the suspender it was *pleaded*, That though the bill bore value received, yet really and truly no value had been paid for it: That the true cause of granting it, was a promise to deliver a certain quantity of brandy, which had never been delivered; and that by the act 29. of 11th Geo. I. all bargains with respect to an unlawful subject of commerce or prohibited goods, such as brandy, though

not expressly annulled, was virtually so. And as Wilkie has acknowledged, that the cause of the bill was run brandy to be delivered to the suspender, which he might have seized, notwithstanding his bargain, had it been offered to him, its being seized by a customhouse officer cannot vary the case. M'Neil was never concerned in the bargain with Mr Wallace, the original proprietor of the brandy, but was to receive a certain quantity of it; and, seeing it was not delivered, the risk ought, before delivery, to fall on Wilkie the seller. See *Scocgal against Young and Gilchrist*, No 76. p. 9536. l. 34. § 1. *D. De contra Empt.*

No 77.

Answered: That delivery to Wilkie for his own and the suspender's account, at his desire, was delivery to himself; that as he was admitted to a share of the bargain with Wilkie, he must run the same risk. If, indeed the charger had sold him the brandy upon an advanced price, more than had been agreed for with Wallace, it might justly have been said, that, before the brandy was delivered to the suspender, the goods behoved to perish to Wilkie: But that was not the case; the suspender was witness to the whole of the bargain with Wallace, desired next day to have a share in it, and entrusted Wilkie with the receiving the goods for both their accounts. It is impossible therefore, to imagine that Wilkie could undertake the risk and expence of transporting the suspender's share of it, when he was not to get a farthing by it; and that after the brandy was delivered, the property of the suspender's part was as much his, as that of the rest was Wilkie's; so that when the whole perished, or was lost, each parcel must be lost to its proper owner. See No 75. p. 9533.

The statute does not concern this case; for the penalties thereby imposed upon the buyers or sellers, in favours of the one against the other, if he ceased to take the advantage, cannot apply, where one for his own and another's behoof, gets a bargain of brandy, or any such run-goods, delivered to him. For, to be sure, one of the partners cannot seize in prejudice of the other, or subject the other more than himself to any hardship, as the hazard must be common where the subject itself is so.

The LORDS found there was sufficient evidence, that the charger and suspender were partners in the bargain as to the brandy purchased from Wallace, and found that the delivery by Wallace to Wilkie, was equal to the delivery to M'Neil; and therefore repelled the reasons of suspension.

Fol. Dic. v. 4. p. 31. C: Home, No 155. p. 263.

1741. November 11.

ROBERT COCKBURN *against* JOHN and JAMES GRANTS.

THE said Robert Cockburn purchased some ankers of French brandy from the Grants, part of which he received, and paid the price thereof; but the

No 78.
No action lies
for damages,
on account of
the not-delivery
of rum