

No 37.

to the shipmaster, were again placed in the possession of their owners, along with all the rest of the goods; that hogshead included which was not brought ashore till after the missives were exchanged. It was in Messrs Buchanan's own cellars that they were lodged; and the circumstance of the revenue-officers taking charge of them there, cannot be imagined to have placed them in the custody of a third party. There was then, in fact, no delivery; neither could it, with justice, have been required, since the cause contracted for, on the other hand, was precluded by the bankruptcy of the purchasers. Not only, indeed, the price could not be paid, but even the stipulation of previously granting bills was not complied with. Since, then, no delivery has intervened, nor any title been created for claiming it, the property in question still remains with the purchasers.

The cause was reported by the Lord Ordinary; when the Court seemed to approve of the defender's argument. At the same time, it was

Observed on the Bench; Even though delivery of moveables has been made in consequence of a sale, the seller, if by any lawful means the subjects sold have come again into his possession, is entitled to retain them until he is secured in the price. In heritage, if after the execution of a minute of sale, the purchaser shall become bankrupt, the seller is entitled to refuse implement on his part.

THE LORDS assoilzied Messrs Buchanan.

Reporter, *Lord Gardenston*. For the Factor, *Morthland*. Alt. *Wilson*. Clerk, *Home*.
S. *Fol. Dic. v. 4. p. 251. Fac. Col. No 196. p. 307.*

. This case was appealed.

THE HOUSE OF LORDS, 11th April 1786, "Ordered that the appeal be dismissed, and the interlocutors complained of be affirmed."

1786. February 7.

CHARLES SALTER *against* The FACTOR on the Sequestrated Estate of:
KNOX and COMPANY.

No 38.
How far, by the measuring out of goods, without farther delivery, the property is transmitted?

ON 13th December 1785, Charles Salter paid to Knox and Company L. 63 Sterling, as the price of sixty bolls of malt, to be afterwards delivered.

On 2d February following, Knox and Company gave notice to Charles Salter, that the stipulated quantity of malt had been then measured and set apart for him.

A few days after, however, Knox and Company stopped payment. The factor on their sequestrated estate took into his possession the whole malt found in their warehouses; and Charles Salter petitioned the Court of Session, that

the sixty bolls, for which he had paid, might, as his property, be delivered up to him. He

Pleaded; The actual delivery of moveables, from hand to hand, is not in every case essential to a transmission of the property. Where the price has been paid, or even *ubi fides habita est de pretio*, it has been found, that any act, expressive of the seller's design to divest himself, is sufficient for this purpose. Thus even symbolical delivery has been sustained, in a question with one who had afterwards attained the natural possession; 1762, *Gray contra Cowie*; See APPENDIX. And, in express terms, it has been decided, that the weighing out of fungibles, whether the price has been paid or not, was equivalent to an immediate surrender of the property, 27th July 1776, *Main contra Maxwell*, No 17. p. 9124.

Answered; The general rule of law is undoubted, that *Traditionibus, non modis pactis, dominia rerum transferuntur*. It is true, that in special circumstances our customs have introduced certain modes of symbolical tradition wherein something else is delivered as representing the subject intended to be conveyed; Erskine, B. 2. Tit. 1. § 19. It is likewise true, that delivery may be effected without the personal intervention of the purchaser, as in the instance referred to, of goods weighed out in the public office to the purchaser's wife, and afterwards marked with the initials of his name; in which case, as well as in those where symbolical tradition is allowed, the seller has no longer any power over the subjects sold. The present case, however, is very different. That no symbolical tradition took place, must be admitted. It is equally plain, that no actual delivery was made, either to the purchaser, or to any one in his behalf. The goods still remained as before, in the custody, and under the administration of the original owners. They might have been, by voluntary conveyance, transferred to a third party; they might have been attached by poinding at the suit of individual creditors; and the sequestration which followed gave to the whole creditors a right equally broad.

The Court were unanimous in rejecting this claim. It was observed by one of the Judges, That a purchaser had indeed an equitable claim to goods of which he had paid the price; but however equity may afford relief, by *undoing* what has been illegally done, it cannot, in a question with third parties, supply the want of those things which, though required by the law, have been left *undone*.

THE LORDS refused the petition.

For the Petitioner, *Dean of Faculty*.

Adv. Maclaurin.

C.

Fol. Dic. v. 4. p. 254. Fac. Col. No 256. p. 391.