

verdict, the plaintiff in error was entitled to judgment on all or any of the counts on which that verdict was found?

1799.

Whereupon, the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the judges present upon the said question, delivered their unanimous opinion, that the plaintiff in error was entitled to judgment on all counts on which that verdict was found. Then

HUME
v.
HAIG, &c.

Ordered and adjudged that the judgment given in the Court of Exchequer in Scotland be reversed; and it is further ordered and adjudged, that judgment be entered for the plaintiff in error.

For the Plaintiff, *Sir John Scott, R. Dundas, John Mitford, Geo. Wood.*

For the Defendant, *Wm. Grant, Wm. Adam, Henry Erskine, Jas. Montgomery.*

Writ in Error, by Bill of Exceptions.

ANDREW HUME, Officer of Excise, prosecuting for His Majesty and Self, } *Plaintiff in Error.*

JAMES HAIG and JOHN HAIG, Distillers at Lochrin, } *Defendants in Error.*

House of Lords, 11th June 1799.

DISTILLERY LAWS—SURVEY.—Question, Whether the officers of excise were legally entitled to make a survey of distilleries with reference to a new act of Parliament, regulating the duties payable, and mode of exacting them, *before* the passing of the act; or whether they could make such survey under any previous existing act not then repealed? By the Court of Exchequer in Scotland, held such survey, before the passing of the act to be illegal. Reversed in the House of Lords.

Prior to 1798, the excise distillery duty throughout Scotland was much increased in amount, besides being altered in the principle and mode of exaction. The duty was laid on the size of the still, and not the quantity of wash, of low wines, or of spirits produced from it. As a necessary consequence of this system, all survey of the manufactured

1799.

HUMN, &c.

v.

HAIG, &c

commodity, and taking account of the quantity, by the excise officer, was given up.

On the 15th June of that year, certain resolutions were passed in the House of Commons and agreed to, that an excise duty of 1s. 6d. per gallon additional be charged on all British spirits which might be found in the possession and custody of any distiller, &c., on and after 15th June 1798, by the surveying officers of excise. A bill was brought into Parliament embodying these resolutions. It was agreed to by both Houses, and finally passed into an act of Parliament on the 29th of June.

Stat. 38 Geo.
III. c. 92.
(June 29,
1798.)

Before this act was passed, and in terms of an Order in Council proceeding from the Treasury, all excise officers were ordered, in terms of the resolutions, to survey all the distilleries in Scotland, and to take account of the quantity of spirits on hands, in order to charge the duty in terms of the above resolutions. The officers came to the Lochrin distillery for that purpose on the 18th June, but were refused admittance. The officers of excise met with the same opposition at other distilleries in Scotland, on the ground, as was alleged, that they had no right to take such account under the existing laws. The excise officers were obliged to resort to the aid of the military. They returned to Lochrin distillery, supported by military force, and effected a survey on the 21st and 22d June.

This survey being taken, the defendants were charged with the duty, and, on payment being refused, a bill was filed in the Exchequer Court against them. The question involving one of pure law for the Court, the Chief Baron directed the jury to return a special verdict, leaving that question to be decided by the Court; but if they chose to return a *general* verdict, he would now state his opinion and that of the other Barons, to be, “ That the said officers
“ of excise were not authorised by law to make such sur-
“ vey on the 19th, 20th, 21st, and 22d days of June last
“ past, the same being before the passing of the said act
“ made in the 38th year of the reign of his present Majesty ;
“ and that the said survey, made by the said officers, on
“ the said days, was not such actual survey, as by and under
“ the provisions of the said statute, was sufficient to charge
“ the said defendants with the said further duty above men-
“ tioned, and with that direction left the same to the jury.”
In consequence of this direction, the Lord Advocate for the plaintiff in error, tendered a bill of exceptions, to the

Jan. 17, 1799.

opinion of the Chief Baron so delivered to the Jury; which exceptions being sealed up by the Chief Baron, according to the statute made and provided thereanent, (39 Geo. III.) the jury returned a verdict for the defendants on the whole counts. And judgment was given in terms of the verdict.

Against this judgment the plaintiff in error brought the present writ in error to the House of Lords.

Pleaded for the Plaintiff in Error.—The officers of excise had a right to make a survey upon the defendants and other distillers in Scotland, on or after the 13th, and prior to the 29th June 1798, under the then existing laws, for the purpose of ascertaining the quantity and strength of the spirits in their possession, so as to be charged with the additional duty imposed by the stat. 3 Geo. III., cap. 92, § 2. The defendants in error were at the time not only licensed, but entered distillers, and their distillery, where the officers made their survey, was an entered place, into which these officers had a right to enter, and take account under the general provisions of a former statute, still unrepealed, 6 Geo. I. c. 21, § 14,—a statute which authorized this, not so much for the purpose of ascertaining the amount of duties, as for preventing fraud, by the introduction of smuggled spirits, and is not virtually repealed by the alteration of the duties in exonerating the spirits of the duty, and laying it upon the contents of the still. Neither is the act of 6 Geo. I., nor any other act relative to the distillery, prior to the 28 Geo. III. c. 46, expressly or completely repealed by the license act, because its 83d section does anxiously provide that all the regulations, provisions, &c., in the distillery acts in force at the time of passing the statute 24 Geo. III. sec. 2, c. 46, and the stat. 26 Geo. III. c. 73, shall be continued and in force, except, 1. Where the same are expressly altered, repealed, &c., by the 28 Geo. III. c. 46. 2d. Where the same are *repugnant* to any of the matters, provisions, or regulations, in 28 Geo. III. c. 46. That, therefore, under the statute 26 Geo. III. c. 64, and 28 Geo. III. c. 46, § 21, it was “lawful to and for the officers of excise “to enter by day or night into the still-house, or other “place or places, where any still or stills shall be kept, and “to examine the same.” And the statute, 38 Geo. III. c. 92, upon which the information in the present case was brought, expressly recognized this to be still an existing power under the former acts, by ordering a survey of the

1799.

 HUME
 v.
 HAIG, &c.

1799.

HUME
v.
HAIG, &c.

distiller's stock to be taken, in order to charge the additional duty. The statute, although only passed on June 29, 1798, was made to have a retroactive effect, and made to take effect from the 13th of June. And this being the case, it was necessary to survey the distilleries in the interval, so as to take the stock as at that date, otherwise the act would be completely nugatory for 16 days, during which time every possible means might be taken to evade it.

Pleaded for the Defendants in Error.—The duties for which this information was brought have been imposed by the act 38 Geo. III. c. 92, on all British spirits distilled for consumption in Scotland, that shall be “found on the first
“actual survey by the proper officer of excise, upon or
“after the 13th June 1798, in the stock, custody, or pos-
“session, of any distiller, rectifier, dealer in or rectifier of
“spirits.”

By the words, actual survey, must be meant not merely a survey *actually* made by an officer of excise, but a survey *legally* made under the authority of the law; for the legislature cannot be presumed to sanction or give any effect to an illegal act. The act provides, that *from and after passing thereof*, the officer of excise shall be entitled by gauging, measuring, or otherwise, to take an account of the quantity of the spirits in the hands of the distiller; but it does not declare, that any survey made, or account taken, *before* the passing of the act, shall be legal; and as the survey, on which the present charge in the information is founded, was made *before* the passing of the act, it is perfectly clear that the opinions of the Barons of the Exchequer, that the officers of excise were not authorized by law to make such survey, was well founded, unless indeed it can be shown, that by the former acts they were entitled to make such survey. Whatever an officer of excise does under new powers, devolving on him by a new act of Parliament, these powers cannot be put into operation before the passing of the act, because the statute being the warrant of these new powers for charging the duty, nothing can be legally done until it has passed into a law. And it is not enough to say, in answer to this, that the officers of excise had power to enter distilleries under the previous acts still unrepealed in these respects, because, if they did not enter into these distilleries to take a survey as under these old acts, but manifestly for a different purpose, namely, to serve the purpose of the new act imposing the additional duty, it is clear that

this circumstance, even if unquestionable, could not legalize their proceedings. But, in point of fact and law, they had no such powers that could be held as still subsisting under the old acts, because these had been repealed, and quite a new system of exacting the duty imposed, which dispensed altogether with the necessity of a survey, such survey being in fact entirely inconsistent with the mode then adopted of levying the duties by the contents of the still. The powers which the previous statutes, imposing the license duty, gave to the officers to enter the distillery, was merely to examine to the effect of managing and levying the duties thereby imposed, and not to survey and take account of the stock, which construction of the acts is fully supported by the legislature imposing a license duty. But, supposing the survey in this case *before* the passing of the act were legal, it was not an actual survey, because the officers did not produce the specification of the gauges of the casks, or utensils, from which the general amount of the spirits was said to be calculated.

After hearing counsel this day, to argue the errors assigned in this cause, the following questions were put to the judges:—

Whether the officers of excise were authorised by law, to make the survey stated in the information on the days therein mentioned?

Whether the survey so made by the officers was such actual survey, as by and under the provisions of the act of the 38th of His Majesty's reign, cap. 92, was sufficient to charge the debtors in error with the further duty imposed by that act?

Whereupon, the Lord Chief Baron of the Court of Exchequer, having conferred with the rest of the judges present upon the said questions, delivered their unanimous opinion in the affirmative.

Then it was

Ordered and adjudged that the judgment in the Court of Exchequer in Scotland be reversed. And it is further ordered and adjudged, That the said Court of Exchequer do award a *venire facias de novo*, and proceed according to law, and that the record be remitted to the said Court of Exchequer in Scotland.

For Plaintiff in Error, *Sir John Scott, R. Dundas, John Mitford, Geo. Wood.*

For Defendants in Error, *W. Grant, W. Adam.*

1799.

HUME
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