

No 75.

' viz. the purchaser undertook the risk and hazard of transporting the goods ' free from seizure.' Had the purchasers (that is Thomson and Scot) undertaken this risk for the sake of the seller, to aid him in carrying on the fraud, it is already admitted, that the hire stipulated to them might be avoided; but that is not the case; Thomson and Scot made no bargain of this kind; the seller was not at all concerned what they did with the goods; and if they proposed to evade the custom-house officers, the risk was their own, and they were to account to themselves for it. On the contrary, the bargain with the seller consisted singly in this, that he was to receive the price, and deliver to them the brandy; and that, after it was in their possession, he was to be no further concerned; for the meaning of undertaking the risk *rei venditæ*, is no more than negative as to the seller, that he is no further obliged than to deliver the goods; the consequence whereof is, that the buyer, naturally undergoes the hazard of goods which by delivery are his own.

THE LORDS found, that action on the bills in question, for the price of run goods, though bought as such, is competent.

Fol. Dic. v. 2. p. 24. Rem. Dec. v. 1. No 40. p. 80.

1736. November 16. SCUGAL, &c. against JAMES GILCHRIST.

No 76.

No action lies for damages, on account of the not-delivery of goods sold, if the buyer knew, at the time of the sale, that they were prohibited or run.

THIS was a charge upon a decret of the Bailies of Edinburgh, for the damages sustained through the suspender's not-delivery of certain goods, such as brandy, &c. sold by him to the chargers.

For the suspender, it was *alleged*; That the goods in question were sold as run goods, which appeared from the prices, and whole circumstances of the case; therefore he could not be liable in delivery thereof, or for any damages arising through not-delivery; seeing, by the 11th of Geo. I. chap. 29. ' It is provided, That, if any person shall expose to sale prohibited or run goods, the same shall be forfeited, and may be seized by the party to whom the same shall be exposed to sale, or any officer of the customs, &c.; and that the person so offering to sale such goods, shall also forfeit and lose triple the value thereof.' Whence it was *contended*, That the suspender could not be liable to deliver those goods, which the buyer, without payment of the price, could not only have seized, but likewise have subjected the seller to triple the value; that thereby the sale was annulled by public law, and the exposing thereof to sale was a statutory crime, subject to severe penalties, to which, by no law or equity, the suspender could be compelled.

2dly, It is also provided, by the same statute, ' That all prohibited or run goods, so bought by any person, shall, in like manner, be forfeited, and may, after delivery to the buyer, be seized and taken from him by the seller, or any officer aforesaid; and the buyer, beside forfeiture of the goods, shall forfeit and lose triple the value, &c.' Whence it was *argued*, It did likewise

appear that the contract of sale was annulled; seeing the seller was so far from being bound to grant warrandice to the buyer, that he might seize the goods himself, and have action against the buyer for triple the value; which is quite inconsistent with the substance of the contract of sale.

Replied for the chargers: That the statute does not make void the contract touching run goods, which, however, could not have escaped the legislature, had it been intended. And, as to the above provisions, *imo*, The forfeiture of the goods, and triple the value, is not in favour of the person who seizes, but of the Crown; the act here entrusts the seller with a power to be exercised for the benefit of the public, which he may use or not at his pleasure, and which does not at all impinge upon the precise obligation betwixt private parties. For, *2dly*, Let us suppose the goods actually delivered, and, upon that, seized by the officers of the public; surely it will not be pretended, that this would save the purchaser from payment of the price: or, let us even suppose the goods were so seized by the seller himself; neither could this stand in his way to demand payment of the price, which became due upon delivery; and his afterwards seizing of the goods, as an officer of the Customs or Excise might have done, could infer no *culpa* or blame to forfeit his price: if so, the consequence is undeniable, that the seller should be liable in damages, if he does not implement his bargain. *3dly*, Admitting the forfeiture were to access to the benefit of the person who seizes, even this would make no alteration; for, though the seller might seize the goods after delivery, yet the buyer has the very same thing to plead; he might seize before delivery, and so the benefit of the forfeiture access to him: so far they are *in pari casu*; and, if neither the one nor the other has done this, what remains, but that the bargain should stand?

Duplied: That though the statute does not expressly annul such contracts, yet it virtually does it, as above, and superadds severe penalties. And, to the *first*, It was *answered*, That, by an express clause in the act, the forfeiture and penalties are divided between his Majesty and the seizer. To the second, *second*, The present question is not concerning the recovery of the price of run goods; for though, perhaps, if the buyer had received and disposed of the same, he would be liable for the price, yet that does not affect the present case; for, in many instances where the contract of the sale is void, yet the buyer will be liable for the price in point of equity. Thus, if a minor, without authority of his curators, or even a pupil, purchases goods and disposes thereof to advantage, he will be liable for the price, though the contract was originally void; but the action, in such case, does not arise from the contract, but from the natural ground of equity, that no person is allowed to profit by another's loss. And it is absurd to pretend, That, where the seller himself seizes the goods delivered, he could have action for the price; if the price was actually received, he might possibly retain it *in pœnam* of the buyer, though the statute is silent on this head; but, for certain, it is contrary to the nature of a contract of sale and warrandice therein implied, that the seller could sue for the price, when he him-

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