No 48. Lord Ordinary complained of; and remit to his Lordship to proceed accordingly."

Both parties reclaimed. Both petitions were appointed to be answered; but, on advising them (23d November 1804) the Court adhered.

The Court were, upon the whole, of opinion, that the circumstance of subsequent insolvency was not sufficient to prevent Marquis from receiving delivery of the goods he had commissioned some time before; that fraud did not give rise to the transaction, as he continued carrying on business as usual, although under diligence, which afterwards rendered him bankrupt. But they resorted to a distinction between what had actually come into his possession and what was still *in transitu* at the time of his bankruptcy, not listening to the plea, that the delivery of a part of the cargo barred the right of stopping as to that which was still undelivered.

Lord Ordinary, *Cullen.* Act. *Gillies.* Agent, *Jo. Peat.*
Alt. *Campbell, J. Clerk, Forsyth.* Agent, *Wm. Callender.* Clerk, *Home.*

F. *Fac. Col. No* 185. *p.* 413.

1804. *November* 23.

Mathie's Trustee *against* Auchie, Ure, and Company.

No 49.
Goods bonded in the King's cellars for payment of the duties, may be reclaimed by the original seller, if the purchaser has not paid the price.

Messrs Auchie, Ure, and Company of Glasgow, having imported a considerable quantity of rum into the port of Greenock, it was deposited in cellars belonging to Messrs Sandemans, who granted a bond for payment of the duties to Government. According to the established practice, founded on statute, one key of these cellars was kept by Messrs Sandemans, and another by the revenue-officer.

At a public sale, on the 15th December 1802, Auchie, Ure, and Company, sold to William Mathie thirty-two puncheons, at a certain price; for which an acceptance, at four months date, was given by the purchaser, in terms of the bargain, who, in return received from the seller an order upon Messrs Sandemans for delivery of the rum. This order was immediately intimated to them; and they in consequence made an entry in their books of the transference of the rum, by marking, opposite to each puncheon, the name of Mathie, as the new proprietor, to whom they were now to be deliverable.

Mathie, in consequence of this transaction, exercised his right of property, by taking eighteen puncheons out of the cellars, after having paid the duties. When the bill became due, the parties failed to retire it. Fourteen puncheons still remained in Sandeman's cellar. A petition was, in consequence, presented to the water-bailie of Clyde, praying for delivery of these to Auchie, Ure and Company, as the purchaser had failed to pay the price. This was opposed

by the Trustee for Mathie's creditors. Of this date, (26th August 1803), the following interlocutor was pronounced: "Finds, That the pursuers are entitled in law to reclaim the fourteen puncheons of the rum sold by them to the defender William Mathie, still remaining in the King's cellars, in respect the price thereof has not been paid; therefore prefers them to the said rum, as being still their property; authorises them to receive the same from Messrs Sandemans and the revenue-officers, in whose joint custody they are now stated to be, upon payment of the duties, and to sell the same by public roup, after due advertisement in the Glasgow and Greenock newspapers, and three days intimation of the time and place of sale to Mr Spence, trustee above-mentioned, employing for that purpose a licensed auctioneer, for whom they shall be answerable, and reporting a distinct state of sale, and expenses thereof, within three weeks thereafter; till which time reserved to pronounce further." No 49.

Against this judgment two bills of advocation were refused.

The Trustee reclaimed, and

Pleaded; The question is simply, whether complete delivery of the rum has been made, and the property transferred from the seller to the purchaser. The rum was in the hands of a third party, for behoof of the importers, the King having no other interest in it than the statutory pledge for payment of the duties. When the importers gave up their right to the rum, they transferred it to the purchaser; the custodier of it consequently held it for the purchaser; and, in evidence of this, made a transfer of the property in his books. The custodier from that time ceased to be the agent of the importer, and became the agent of the purchaser, whose orders he was bound to obey. The condition of the goods was such, that it admitted of no other kind of delivery. The delivery was as complete as the seller could make it; for all the right which he had in them, he had in the most ample manner transferred to him; and the purchaser had nothing more to do than to satisfy the Crown for the duties, in order to receive the rum when he pleased. He had no occasion to apply again to the seller, who had completely divested himself of his right; nothing remained for him to perform, for the purpose of vesting the property in the purchaser. The property, therefore, was completely transferred; and, in general, when goods are in the custody of a third party, the property may be transferred from one person to another by a sale, without the purchaser having obtained the natural possession of them; Buchanan and Cochran against Sedan, 13th June 1764, No 42. p. 14208.; Hastie and Jamieson against Arthur, 2d March 1770, No 43. p. 14209.; Bogle against Dunmore and Company, 2d February 1787, No 44. p. 14206.; Ellis *v.* Hunt, Term. Rep. vol. iii. p. 464.

It cannot be maintained, that the property of bonded goods can never be transferred till the duties are paid. The interest of the King is merely a right of pledge in security of the duties; and there is nothing in the nature of the property to prevent it being transferred from one person to another, subject al-

No 49. ways to this pledge or burden. The purchaser may have an absolute property in the goods, just as consistent with the King's right as that of the original importers was. Were it otherwise, and that the property of goods could not be acquired while bonded, nor till the duties are paid, commercial dealings would be greatly counteracted; for a quick transfer of goods is essential to commerce.

Answered; The property of moveables originally, by our law, could be transferred only by possession obtained upon actual delivery. But, in the progress of commercial intercourse, a symbolical delivery, without the corporal apprehension of the subject, has been, in particular cases, admitted as equivalent to real delivery. These constructive deliveries owe their origin to the case, which often happens, of the purchaser being obliged to pay the price before he can obtain actual possession of the goods; in consequence of which payment only, he comes to have an interest in these goods; whereas, if it be supposed that the price is not yet paid, or effectually secured, the vender continues to have such a lien upon the subject, as ought in reason to justify his interference, to prevent a more complete transfer of the possession till he is satisfied. It is not enough, that all the delivery has been given which the circumstances of the case allowed, nor even that the agent of the vendee has received them into his custody; they may be stopped when the price has not been paid, wherever actual delivery to the vendee himself has not taken place; Hunter *v.* Beal, 3. Term. Rep. p. 466.; Hodgson *v.* Loy, 7. Term. Rep. p. 440.

But the custodier of bonded goods is not custodier for the owners of the goods merely. There are other rights for which he is equally trustee; such as the direct right of pledge, which the Crown holds over them; and the right of relief which the importer has, if, upon failure by the purchaser to pay the duties, the Crown shall recover them in virtue of the importer's personal bond, instead of by a sale of the goods. The duties, however, in this case, never were paid; and actual delivery, of course, was never accomplished. The goods, therefore, remained subject to the right of stopping *in transitu;* Hill against Buchanan, 26th January 1785, No 37. p. 14200.; Taylor against Campbell, Ruthven and Company, 1803 *; 2. Espinasse's *Nisi Prius*, p. 613. Nor is there any hardship in the doctrine; for a purchaser has it always in his power, by either paying the price or the duties, to take the goods into his own exclusive custody.

In this case the Court were nearly unanimous. It was held a fixed principle in the law, that a right of stopping *in transitu* is competent to the vender, when the price is not paid, and actual delivery of exclusive possession has not been made.

* Not reported. See Appendix.

The interlocutor of the Lord Ordinary was affirmed, (23d November 1804), on advising a petition, with answers. No 49.

To which judgment the Court adhered, (18th December 1804), by refusing a reclaiming petition without answers.

Lord Ordinary, *Hermand.* Act. *Solicitor-General Blair, Fletcher.* Agent, *Ja. Gilchrist*, W. S.
Alt. *Geo. Jos. Bell.* Agent, *Jo. Lang.* Clerk, *Home.*
F. *Fac. Col. No* 186. *p.* 416.

SECT. IV.

Lesio ultra duplum.—Sale by sample,—weight,—measure, &c.—*Actio redhibitoria et quanti minoris.*

1594. *December.* L. of SORNBEG *against* SCHAW.

No 50.
Qui scienter emit rem vitiosam has no recourse against the seller.

THE auld Laird of Sornebeg having disponit certain lands to William Schaw his sone, he band himself be ane several obligation to warrand him fra all uther alienations, wodsetts, takkis, &c. This obligation of warrandice being registrate against this Laird of Sornebeg, oy and aire to the auld Laird, he was chargit be warrant the said William fra certain takkis thairof set to the tennentis be the auld Laird. He suspendit, *alledgeand*, That this persewar could have na warrandice fra the said takis, becaus the samen wer set of his express knawledge, in sa far as at the setting thairof, he ressavit the gresummis, was witness insert in sum of the said takkis, and he had oft tymes ressavit the dewtie thairof, et sic cum scienter emerit prædia hoc onere affecta non debet ei cavere de evictione; whilk reasoun of suspensioun the LORDS fand relevant, albeit it was ane secund suspension, and urgit not the suspendar to verifie it *instanter* or be wreit, bot admittit it to probation be the witnesses insert in the takkis, the wryttars thairof and the delyveraies of the gressummis and duties. Durum id permultis visum est.

Fol. Dic. v. 2. *p.* 358. *Haddington, MS. No* 456.

1629. *January* 9. BROWN *against* NICOLSON.

No 51.

IN a pursuit for the price of a horse, an exception was made, That the horse was crooked when he was bought; and the defender offered him back in as