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.

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

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.
goods, if the buyer knew them to be such at the time of the bargain.

price having risen, the other part was not delivered, whereupon he brought an action against them for damages.

Pleaded in defence, That the pursuer knew that the brandy was run or prohibited goods; and, conseqnently, the bargain fell under the statute, *undecimo Georgii I.* that the commerce of such subjects was plainly prohibited by that act; for, besides the general prohibition to import such goods, without regular entry and payment of the duty, and the severe penalties therein specified, it is enacted, 'That if any person shall offer or expose to sale any such goods, wares, '&c. the same shall be forfeited, and the person to whom they shall be offered to sale may seize the same for his own behoof; and, further, the person 'who so offers and exposes them to sale, is made liable in triple the value; 'and, by another clause, such goods may, after delivery to the buyer, be 'seized and taken from him by the very person who sold the same; and the 'buyer is also made liable in triple the value.' It is true, the statute does not, in terms, discharge the buying and selling of goods so unlawfully imported; yet there can be no doubt, that such prohibition is strongly implied from the whole scope and purport of the law, where they are not only prohibited to be imported without payment of the duty under high penalties, but when so imported contrary to the prohibition, are, in effect, discharged to be bought or sold. For it is plainly impossible the common rules of law, in emption and vendition, can take place in a consistency with what is statuted in the act. How can there be a proper sale, where the property of the thing sold neither is nor can be transferred, but the goods may be retaken by the seller himself immediately after delivery? If the defenders could not have obliged the pursuer to pay the price, though the goods had been delivered, it follows, that he cannot bring an action for delivery, or damages in case of not-delivery; and so it was determined, 16th November 1736, Scougal and Young, No 76. p. 9536.

Answered, There was nothing in the title or statutory part of the law which could support the defence; 2*dly*, Where certain penalties are inflicted by law, quite different from that of annulling the contract of sale, upon those who buy and sell such commodities, in some cases, those very penalties cannot be incurred without a previous sale; as, particularly, in this statute, the seller may seize the goods from the buyer; but no other person, except an officer of the Customs or Excise, can do this; which shows, that nothing can give him this privilege but the contract of sale, completed by delivery. If so, it must follow, that the sale is not prohibited, but that there is a necessity for a sale, before the penalty can take place; 3*dly*, There is a very great difference between an act discharging all buying and selling of such and such goods, and, in case of sale, declaring the bargain to be void and null, and an act which only prohibits the buying and selling under a penalty. Besides, it is plain from the whole clauses, that the Parliament carefully avoided the enacting of any thing so as to annul a bargain of sale, though, at the same time, they enacted such

penalties as would have had the same effect, had advantage been taken of them; 4*thly*, There is no such thing known in the laws of England as an implied prohibition; further, the buyer has the power first to seize, and the seller never has power to seize, except the buyer neglect to take the benefit of the law; so they are not upon a level: But if, by implication, the buyer shall be denied action, then the buyer becomes the most unfavourable person of the two, contrary to what ought to be, seeing the seller is the person who imports such goods. No 78.

THE LORDS found the pursuer could not maintain an action for recovering damages in this case.

Fol. Dic. v. 4. *p.* 31. *C. Home, No* 180. *p.* 301.

*** Kilkerran reports this case.

1741. *November* 2.—FOUND, on report, that no action of damages, for not-delivery, lay to the buyer against the seller of run goods.

This was so found upon the construction of the statute of the 11*mo Georgii* 1*mi*, *cap.* 29. entitled, Act for preventing Frauds and Abuses in the Public Revenue. Not that the said statute was thought to put run goods *extra commercium*; for where they are sold and delivered, it was not doubted but that there lay action for the price: But the act was thought to have this effect, to deny action for performance of any bargain about such goods, known to be such, not yet completed by delivery; and that such was the very intention of the statute, for discouraging traffic in that sort of commodity. For, in as much as it is thereby statuted, that the seller may, after delivery, seize the goods from the buyer, it was thought to be implied, that the buyer could not be bound to receive, when next breath the seller himself might seize; and if so, that same buyer could not have action of damages for not-delivery; and so the statute had formerly been constructed; 16th November 1736, Scougal and Young against Gilchrist, No 76. p. 9536.

Others were of a different opinion. Their notion was, that, as the statute had said no such thing as was argued to be implied in it, and which was obvious and easy to have been said, had it been so intended; so the end of the law, which was the discouraging this sort of traffic, was rather better attained by sustaining the action, and understanding the buyer bound to receive, even though the seller could forthwith seize; for, even in case of such seizure, they thought action would lie for the price, and also for triple the value, which would be yet a greater discouragement than the denying action to the buyer.

Notwithstanding this, the LORDS again found as above.

Kilkerran, (PACTUM ILLICITUM.) *No* 3. *p.* 363.