

No 63.  
 Victual being sold conform to samples not sealed at making the bargain, and the buyer having then declined to seal them, it was found, that the samples were not the rule of the bargain, and that the buyer relied upon the faith of the seller.

1713. *January 29.*

ANDREW CHEAP, Brother-german to the Laird of Rossie, *against* THOMAS CLEUGH, Brewer in Portsburgh.

IN the process at the instance of Andrew Cheap against Thomas Cleugh, a-  
 nent a bargain of victual sold by Cheap to him, conform to samples given to  
 him by the seller; the LORDS found, That the samples not being sealed at the  
 making of the bargain, and the buyer having then declined to seal them,  
 they were not the rule of the bargain; but the buyer relied upon the faith of  
 the seller.

*Fol. Dic. v. 2. p. 358. Forbes, p. 653.*

1735. *June 24.*

PROCURATOR-FISCAL of the Dean of Guild Court *against* Colonel M'DOWALL  
 of Castlesemple.

No 64.

WHEN liquor is sold in bottles, the bottles must be of a certain fixed mea-  
 sure known in law, and the seller is not at liberty to make use of bottles of an  
 uncertain measure. See APPENDIX.

*Fol. Dic. v. 2. p. 358.*

1761. *June 16.*

JOSEPH RALSTON, Servant to JOSEPH ALLAN of St Laurence Chapel, *against*  
 THOMAS ROBERTSON, Tenant in Blackwood.

No 65.  
 Repetition of the price of an unsound horse, recently quarrelled, sustained upon the implied warrandice of the contract.  
 See Nos 68.  
 70. 71. 72.

IN October 1758, Joseph Ralston was sent by Mr Allan, his master, to a fair  
 in the town of Ayr in order to purchase a couple of horses for him. He there  
 met with Thomas Robertson, the defender, who sold him a horse for L. 8 : 10 : 0  
 Sterling. The price was immediately paid, and the horse delivered; and the  
 pursuer had hardly gone thirty yards with him when he discovered that the  
 horse was racked or slipt in the back, and had also a blemish in one of his eyes.  
 Upon this he immediately insisted, that the defender should take back the  
 horse and repay the price.

This he refused to do, and said, that the horse had got the rack coming over  
 from Ireland in a boat. Upon this Ralston brought a process for repetition of  
 the price against Robertson, before the Sheriff, " who assoilzied the defender,  
 in respect it was not alleged, that he upheld the horse to be sound; and as the  
 faults alleged were not hidden or concealed faults." Soon after this, the horse

was seized and condemned by a sentence of the Justices of Peace of the county, as an Irish horse.

*Pleaded* for Ralston in an advocacy, That the defender certainly knew of the fault, as appeared from his saying that the horse had been racked by coming over in a boat; and therefore it was an act of fraud in him to sell what laboured under any material defect, without giving the least hint of it to the buyer.

But whether the defender knew the defects the horse laboured under or not, the action for repetition of the price was well founded. It is implied in the very nature of every bargain of this kind, that the thing bought is to be free of faults, especially of such faults as occur in the present case, which render the thing sold altogether useless, and which no man would have purchased if he had known of the faults attending it. In all sales, there is an obligation upon the vender, *omne vitium abesse*; and it is founded in the implied warrandice of the contract, that the seller is to make up to the buyer the loss accruing to him from faults which were unknown, and not under his consideration at the time of the bargain.

*2do*, The horse appears clearly to be an Irish horse, and was accordingly seized and condemned as such; and therefore the pursuer, who was ignorant of his being an Irish horse, is entitled upon the implied warrandice of the contract to re-payment of the price from the seller; more especially as he knew him, at the time of the bargain, to be an Irish horse, and so was knowingly *versans in illicito*.

*Pleaded* for Robertson the defender, That he had bought the horse at the public market only a very little while before he met with the pursuer: That he never offered or undertook to warrant the horse as free from faults; on the contrary, he told the pursuer expressly, that he knew nothing about the horse but what he saw, and could not venture to uphold him, as he had not had him five minutes in his possession; so that it was evident there was no fraud intended, nor any art or deceit practised upon the pursuer.

If the seller had upheld the horse as sound, he would have been liable *ex contractu*. If he had wilfully deceived or imposed upon the pursuer, he would have been liable *ex delicto*. But as neither of these was the case, it is not easy to see upon what principle of law re-payment of the price can be demanded, after the bargain was completed on both sides, and the property absolutely transferred.

*2do*, With respect to the horse being condemned as an Irish horse, the defender did not warrant the horse; and therefore cannot be made liable on the imaginary implied warrandice contended for by the pursuer: Neither is it easy to conceive upon what right or pretence the officers of the revenue could seize the horse above 20 miles from the sea, and after he had been so long in the country; nor does it appear in what shape, or upon what terms, he is said to be condemned. If the pursuer therefore has allowed the horse to be taken

No 65. from him without any good reason, he has himself alone to blame, and the defender cannot be made liable for it.

It was *suggested* from the Bench, That when a man sells a horse for full value, there is an implied warrandice, both of soundness and title, nor is there any necessity to prove the knowledge of the seller.

THE LORDS "found the defender liable to the pursuer in the price of the horse."

Reporter, *Lord Kames.* Act. *Macqueen.* Alt. *G. Cockburn.* Clerk, *Gibson.*

*J. M.*

*Fol. Dic. v. 4. p. 255. Fac. Col. No. 38. p. 76.*

1765. December 14.

WILLIAM BAIRD, Merchant in Glasgow, *against* JOHN PAGAN and Others, Merchants there.

No 66.

Where goods are purchased for a particular purpose, and through latent insufficiency do not answer the purpose for which they were bought, the purchaser relieved from the price.

IN 1762, John Pagan and others, purchased from William Baird a large quantity of strong ale, in order to be exported to the West Indies; but the ale not being properly prepared for the heat of that climate, great part of it was spoiled and lost; on which account, Pagan and the other purchasers refused to pay the price. Baird brought an action against them for payment; in defence against which, it was

*Pleaded* for Pagan and the other defenders, That when ale is to be exported to hot climates, it must be prepared with great attention; it must be kept a long time in the cask before it is bottled, in order that the fermentation may be entirely gone; and it must be corked with the best corks, and properly packed; for all which, the purchaser must rely on the brewer from whom he buys; and, as it is impossible for him to know what time the ale has been in cask before bottling, it is understood that the brewer, who sells ale for exportation, shall furnish it of such quality, and pack it in such a manner, as will stand the climate to which it is to be sent; that, in this purchase, the price was considerably higher than would have been given for ale for home consumpt; yet, that furnished was not of proper quality for exportation, or properly corked and packed; and, as it was purchased on purpose to be exported, of consequence, the seller was bound to deliver ale fit for exportation; and not having done so, the purchaser cannot be liable for the price.

*Answered* for Baird; The ale was sufficient when he sold it; the usual care and attention was paid to bottling and packing it; that he undertook no risque, and could not, therefore, be answerable for any accidents that might occur, or insufficiency that might arise from transporting the ale to a foreign market; that ale, in the West Indies, sells for an extravagant price, which shows, that exporting it is attended with considerable risque; and, as the purchaser has the profits, so he must run the risque; there are no certain rules fixed for managing ale for exportation; every brewer follows the method he judges best.