* N. 1. A parcel of Brandy that had not paid the duty sold at an easy price upon account that the Buyers undertook the Risk of bringing it Home to their own House, being seiz'd by the custom House officers: The Buyers when charged for the price suspended upon these Reasons 1°/ where persons know a thing they Bargain upon to be in circumstances that render it not the lawful subject of commerce, it is in the same case as a Bargain super re illicita, or simply prohibited; and this was Brandy known to the Buyer to be in the Hands of the Seller by Theft from the publick, which is more atrocious than Stealing from a private person. 2°/ This was not only a bargain about a commodity which parties knew had not paid the duty, but an undertaking to defraud the Revenue was expressly stipulated. And whatever either party becomes possess'd of thro' a Bargain in itself unlawful, can afford no action to the other, tho' it may subject both to a penalty. So that albeit the suspender had actually received the Brandy, the price could not be demanded from him by the charger.

It was Answered 1°/ Brandy cannot be deem'd Merx illicita, but it is certainly the subject of commerce, since neither the Importation nor the use of it is prohibited. All prohibitory penal Laws are to be strictly Interpreted, and where certain penalties are enacted, none other or greater can be Exacted. payment of the duty of Brandy is secured by many precautions. It is forfeited if either imported in prohibited Casks, or if seiz'd in the running of it; the duty may be recovered, if the Importation can be proved by the parties oath; and the persons who run it or assist in the Running are liable to penalties: But here the Law stops, Leaving Brandy still in the Hands of the possessor a mercantile commodity, and allowing the use of it to all the Lieges. To proceed further then, and to declare that no person who buys it is ~~[illegible]~~ liable to pay the price, would be to lay a further incumbrance on that Trade that hath no foundation in Law.

Any contract or agreement for running of Goods is indeed unlawful. That is if a person Bargains with a Runner to assist him to set them ashore or transport them by Land, both are guilty of transgressing the Law and defrauding the Revenue, and the hire or price of the guilty Action may properly fall under condictio ob turpem causam. But when the Goods are safe in the proprietors cellar, the single Act of Buying and selling them after they are run is not unlawful. Run Goods cannot be called Res furtiva ~~because the property of them~~, because the property of them before seizure and condemnation is in the private party, who may convey ~~[illegible]~~ it by delivery on a sale which a Thief could not do. 2°/ Had the Buyers undertaken the Risk of transporting the Goods free from seizure for the sake of the Seller, to aid him in carrying on the Trade, the hire stipulated to them might be avoided, but they made no such Bargain; The Seller was not at all concerned what they did with the Goods. If they proposed to evade the custom house officers, they were accountable only to themselves for the hazard they run. The Bargain with the Seller consisted singly in this, that he was to receive the price and deliver to them the Brandy, about which he was no further concerned, after it came in their possession.

The Lords sustain'd Action for the price of the Run Goods, tho' they were bought as such. 27 November 1723 Commissioners of the Customs contra Mr John Morison.

* N. 1. In the Reduction of a Bond upon the head of usury before the court of Session, the pursuer having offered to prove his Libel by witnesses present at the transaction who assisted in the calculation of the accounts: It was objected by the defender that usury is only probable by the instrumentary witnesses Act 7 parl. 16 J. 6. who are presumed to be chosen by both parties to testify the Truth of the transaction and therefore not by extraneous witnesses, especially when our Law [illegible] will to be taken away by witnesses. In cases of usury where an estate is to be gain'd by proving the single Act of paying receiving or Retaining consent [illegible] if witnesses [illegible] Chances were receivable all securities of the nation would be precarious and last no longer than till a wicked debtor find two witnesses no honester than himself to prove what indeed would be equal to a discharge of the debt.

Replyed for the pursuer. If there be not a great Indulgence given in the proof of usury that oppressive practice will be carried on with Impunity. And where our Law hath allowed such a latitude in the proof thereof as to take the oath of the person guilty against himself contrary to what is observed in other Crimes, the pursuer cannot be denied to prove his Libel as any other crime may be proved by witnesses. And tho' our Law doth not allow payment of a Bond to be proven by witnesses, where the Bond itself appears undischarged & uncancelled, because of the presumption that no debtor will pay without retiring the obligation or getting a discharge: yet Many Things that may indirectly influence the Taking of [illegible] as the cause of granting or manner of Eliciting them by fraud, force &c. are every day proved by witnesses. Nor doth the Act 7 par. 16 J. 6. tie down the proof to Instrumentary witnesses or oath of the creditor, but only allows proof by oath of the creditor or Instrumentary witnesses without necessity of the debtors oath, which a former Law (Act 247 par. 15 J. 6) seems to have required. But further now after usury through all Britain is tied down to the same standart 12 A. St. 2. ch. 16. It would seem strange if the same person tried for usury in Scotland should be assoilzied, and in England for that Individual fact should be condemn'd; tho' in both nations the Trial be upon the same Statute. And therefore since any witnesses are admitted in England in such a case, they ought to be received here.

Duplyed for the defender. The British Statute concerns only the definition of the crime, what facts are comprehended under the Law, and what not, but determines nothing as to the manner of proof in the several parts of the united Kingdom, for establishing Facts that infer the crime, which continues as before to be observed according to the Form & Genius of the Law in Each country. So that to tie us down here to the manner of proof in England is no less unreasonable than to try the proof before the court of Session by a Jury, because such is the Custom in England.

The Lords found the Libel probable by other habile witnesses, as well as by Instrumentary witnesses. 7 January 1724 Mitchel contra Petrie.