

S E C T. XIII.

Smuggling.

1723. November 27.

The COMMISSIONERS of the Customs *against* Mr JOHN MORISON,
Student in St Andrews.

MORISON having had a parcel of brandy that had not paid the duty, proposes to sell it to Scot and Thomson, they running the risk of seizure in bringing it over the water from Fife; the buyers agree; and upon that account, get a considerable abatement of the price. The brandy happened to be seized by the custom-house boat; and when the seller charged the buyers upon their bills, they suspended upon this ground amongst others, That the bills were granted as the price of brandy, which they knew not at the time of the bargain to have been un-entered; and that it was seized by the custom-house boat. To which it *was answered* at discussing the suspension, That they well knew the brandy was not entered, and that *de facto* by the bargain, the buyers were to run the risk.

While this debate was in agitation, the Commissioners of the Customs perceiving it would give a considerable check to these unfair traders, if the credit that subsists in the transactions among them were broken, interposed by petition, craving that the LORDS, before they should descend to examine the particular arguments used by the defenders for avoiding payment of their bills, would take the general point into their consideration, and find that process is not competent upon such illegal transactions.

The topics insisted upon were two: *1st*, That this was a bargain *super re illicita*; which in law can afford no manner of action to the party, who knowing it to be such, transacted upon it: That though where a thing is not simply prohibited, or *extra commercium*, there may be lawful bargains upon it, where parties act *bona fide*; yet where the parties contractors are in the full knowledge, that the thing they bargain upon, is in circumstances that render it not the lawful subject of commerce, it is *quoad* them in the same case as it were simply prohibited; it is a thing known to the buyer, to be in the hand of the seller by theft from the public, which is rather more atrocious than theft from a private person. But, *2do*, (and upon this point was laid the main stress,) That here there was not singly a bargain upon a commodity, knowing the same not to have paid duty; but a bargain made for defrauding the revenue, where one of the express stipulations is, "the undertaking to commit the fraud." And here the disposition of the law is clear, that a bargain being in itself unlawful, whatever either party becomes thereby possessed of, he retains unaccountable to the other, to whom the bargain can afford no action, though

No 75.

Action found competent for the price of smuggled goods, tho' bought as such.

No 75.

it may subject both to a penalty ; and therefore, though the brandy had been actually received by the suspender, he could not, upon such an unlawful bargain, have action for the price. To illustrate this matter, let it be supposed the brandy had landed safe at Pinky, and that Scot and Thomson had agreed with a common car-man to bring his car by night to assist them in carrying off their purchase, for which he was to have ten times the ordinary wages ; can it be thought, in this case, that the car-man would have action for his wages ? It is believed not ; and the reason is yet stronger, why Morison should not have action against Scot for the price.

To which it was *answered*, Were brandy altogether prohibited as to the use as well as importation, it might come possibly under the description of *merx illicita* ; though, even in that case, it might be a question, ' Whether the price of it, when truly bought and delivered, would not be due ; ' but since neither the importation nor the use of brandy is prohibited, since it is most certainly the subject of commerce, it is hard to find a reason why it should be deemed *res illicita*. All prohibitory penal laws are strictly to be interpreted ; and, where the law has provided certain penalties, it is a rule, that none other or greater can be exacted. If the law had satisfied itself with prohibiting the importation of brandy without paying duty, and had gone no further, it is certain, that the brandy imported contrary to that prohibition, would not have been forfeited ; and as the law has gone further, and has provided diverse forfeitures and penalties for each transgression, this must be deemed the sole sanction with which the execution of the law is enforced ; and recourse cannot be had to further expedients, until they are by statute enacted. The payment of the duty of brandy, is secured by many different precautions ; if it is imported in prohibited casks, it is forfeited ; if seized in running to be laid on land, or even in carrying at land, it is forfeited ; if, by the party's oath, the importation can be proved, the duties may be recovered ; the persons who run it, and those who assist in running, are liable to penalties. But here the law stops, leaving brandy still in the hands of the possessor a merchantable 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 liable to pay the price, would be surely to lay a further incumbrance on that trade ; but an incumbrance that has no foundation in the laws of the revenue, and that nothing less than the legislature could induce. Were games at hazard simply prohibited by statute, without any further provision, such as play would be guilty of a trespass ; but surely the bills, bonds, or other securities given for play-debts, would not be void ; which was the reason why the statutes made in that behalf added to the general prohibition a special provision, that securities given for sums lost at play should be ineffectual. It is suggested, ' That any contract or agreement, for running of goods is unlawful.' This is admitted ; and it will be plain, from enquiry into the reason of this, that the single act of buying goods after they are run, is not unlawful. If a person bargain with a runner of goods, to assist

him, for a certain sum of money, to set these goods clandestinely on land; or if a car-man, after they are on land, should bargain privately to transport them, such persons, doubtless, are art and part of the fraud; their paction is *de re turpi et illicita*, to aid a person to trespass the law, and to defraud the revenue; if the runner's action is guilty, the action of the person assisting is no less so; and the hire or price of the guilty action may properly fall under the *condictio ob turpem causam*. But when the goods are safe on shore in the proprietor's cellar, when they have past perhaps through several hands in sale, the person who buys them commits no trespass against the law, neither does he who sells them; because, by no statute, is the buying and selling prohibited; and, where there is no prohibitory statute that can be transgressed in the act of buying and selling, no illegality is committed; and consequently there is no turpitude. Every man in the nation who purchases Burgundy or Champagne, knowing it to be imported from Holland, buys a commodity prohibited to be entered, which has paid no duty, and consequently forfeitable, since, by the statute of navigation, these wines are not enterable from Holland. Every person who in Scotland buys claret, knows that he buys French wine, which has not paid the duty of French wine; and purchases it indeed as such, since he would not give the price for it, if it were Spanish, under the name whereof it is entered. What then must be said? are these purchases void? are the buyers excoemed from paying the price? must the bargains, which, between them and the sellers, are absolutely fair and just, be null and of no effect, to the seller's-prejudice, without any law or statute on that behalf? one should, with submission, think this cannot be admitted without a great absurdity. Again, it is by express statute forbidden to kill salmon after a limited day, and a penalty is inflicted on transgressors; nevertheless, thousands of people trespass against this law, kill black fish, smoak them, and sell them. Should a purchaser, who buys such smoaked fish, knowing them to have been killed in forbidden time, pretend to avoid payment of the price on no other ground, than that the salmon caught in breach of the law was *res illicita*, it would be a good answer, that though the killing was unlawful, no law prohibited the sale, which being fair and just betwixt the buyer and seller, must, with regard to them, have the legal effect. It is hinted, 'That run brandy is a kind of *res furtiva*;' a consequence whereof would be, that the bargain made concerning it, it being known to be such, is unlawful, and can yield no action. But it is a point of certainty equal to a principle, that the property of run goods, prior to the seizure and condemnation, is in the private party. The Crown indeed has a right to the duty, and the goods are forfeitable if seized; but, prior to the seizure, there is no *jus in re* to the Crown; the owner may export, use, or dispose of them at pleasure; and therefore there is no foundation to suggest, that he cannot convey the property by delivery on a sale, which certainly a thief could not. It is further suggested, 'That, in the case in question, there was a separate consideration, which amounted to an explicit bargain for defrauding the revenue,

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