

APPENDIX.

PART I.

PACTUM ILLICITUM.

1776. February 8. WILLIAM DUNCAN *against* DAVID THOMSON.

DAVID THOMSON, merchant in Dysart, was, in the beginning of 1772, engaged, along with Daniel Fox, at that time residing in St Andrew's, in an adventure to the extent of sixty chests of tea, of which thirty chests were shipped for behoof and at the risk of Thomson, and the other thirty for behoof and at the risk of Fox.

The tea arrived in safety ; and the thirty chests belonging to Mr Fox were lodged in a house in St Andrew's, said to belong to his father-in-law, William Duncan, merchant in that town. A short time after, Fox found it necessary, from some circumstances, to leave this country, and settle in Holland. Previous to his departure, he asked of Thomson to take the whole tea, and allow him his share of the profits. To this Thomson agreed ; and a calculation of the profits being made out, granted a bill to Fox, payable three months after date, for L. 102, 6s. Sterling, as the probable amount of his share of the profits.

Thomson, in consequence of this agreement, went to St Andrew's a few days afterward to receive the tea. By this time, however, Fox had left the country, and Thomson being ignorant of the place where the tea was lodged, and not caring to make any public inquiry concerning it, upon his return home, wrote to Fox, desiring immediate information where the

NO. 1.

Action denied upon a bill granted for smuggled goods. See No. 83. p. 9546.

No. 1. goods were, and demanding their instant delivery. Soon afterward the goods were seized.

Upon this William Duncan, to whom the bill above mentioned had been indorsed by Fox, gave Thomson a charge for payment. Several creditors also of Duncan, hearing of this charge, laid arrestments in Thomson's hands to a much greater amount than the sum in the bill, in consequence of which, Thomson brought a multiplepoinding, and likewise offered a bill of suspension of the charge against him.

In discussing this suspension, it appeared that Duncan acted only as trustee for Fox ; and Thomson the suspender accordingly contended, that every objection formerly competent against Fox was now competent against the indorsee, and that the exception against a charge for payment of the profits of the tea was sufficiently supported, upon the ground that there was no delivery of the goods, and that the original cost of them had never been paid, Thomson having advanced the whole of it to the foreign merchant. After some procedure before the Lord Ordinary, and upon advising a condescendence and answers, he found the letters orderly proceeded, and decerned.

In a reclaiming petition, in which the suspender insisted chiefly upon the circumstance that there had been no delivery, and that it is the acknowledged law and practice of this country, that the sale of no moveable is completed, but by delivery thereof to the purchaser, he contended, that he could not therefore be liable for any loss through the seizure of the tea, so long as it remained undelivered in the custody of Fox, or those to whom he delivered it.

The Court did not seem satisfied with this defence, and the petition was accordingly refused.

In a second reclaiming petition, the suspender went upon other grounds. As he had maintained formerly that there was no delivery, so now he maintained that there was no sale ; that bills in their own nature imply a value received ; that it is a solid objection to a bill that it is *sine causa*, and that when granted in the view of something to be performed, if the stipulation on the part of the drawer be not performed, the bill becomes void, and cannot be the ground of action or diligence.

Besides this, he further argued, that action does not lie for sales of goods that are known to be smuggled. This, it was observed, is a question which falls to be determined rather upon the principles of the English law, than upon those of the law of Scotland, the whole of our revenue laws being English, and the consequences therefore that result from them, being deducible only from the law of England. And a case was mentioned, which had been decided on the 1st of November 1775, before Mr Justice Gould, by a special jury, in which the plaintiff having smuggled a parcel of

muslins, and the defendant, even after receiving the goods, having informed the officers of the revenue that they were smuggled; upon the plaintiff bringing his action for the price, the judge and counsel on both sides agreed, that it was established by many precedents, "that no person selling smuggled goods, can ever bring an action legally to recover of the purchaser, the property of such goods being at all times his Majesty's." This, it was said, was altogether consonant to the genius of the English law, by which it is understood, that the forfeiture takes place *ipso facto*, while the sentence of condemnation is no more than declaratory, and according to which the forfeiture is made effectual, even against an onerous *bond fide* purchaser.

In opposition to these arguments, the pursuer contended, That the transaction between the parties was truly a sale by Fox to the suspender of his share of the goods: That had there been no sale, and had the suspender only undertaken to dispose of the goods for Fox's behoof, as well as his own, and account to Fox for his share of the profits arising from the sale, he would have granted him an obligation to that purpose; and never would have come under a simple acceptance for a sum of money; and that therefore, the only question to be determined was, whether or not action lies against the defender for payment of his accepted bill; or, in other words, whether, because the goods were smuggled, Fox was by law prohibited to sell, and the suspender by law prohibited to purchase them.

Upon this point the pursuer argued, That smuggled goods, though they be by law liable to seizure, are not yet put *extra commercium*; and to establish this, a decision 27th November 1723, the Commissioners of the Customs against Mr John Morrison, No. 75. p. 9533, was particularly appealed to. In this case, the question which came under the consideration of the Court, was, whether a legal security given for the price of uncustomed goods, known to be such by the purchaser when he bought them, is effectual; or if, on the contrary, is void and reducible. And here the judgment of the Court was, "That action on the bills in question for the price of run goods, though bought as such, is competent." Another decision also, 27th February 1757, Walker against Falconer, No. 80. p. 9543, was founded upon, in which action had even been sustained for the price of smuggled goods sent into this country upon commission.

It was further, and, lastly, argued for the pursuers, That the present action was not brought for implement of a smuggling contract, but for payment of a bill granted, as is supposed, for the price of smuggled goods. For that a smuggling contract, which is reprobated by the law, and for implementing which it refuses to give its aid, can mean only a contract or agreement entered into for the purpose of smuggling goods; whereas the present case

No. 1. has no relation to the smuggling of goods, but is an action for payment of the price of goods which were already smuggled.

For the suspender, it was replied, That the decision, Commissioners of the Customs against Morrison, founded on by the pursuer, was of a singular nature; that the defence was not proponed by the party to the suit, but by the Commissioners of the Customs, who had no interest whatever in the matter; and that the Court, therefore, were not entitled to take up the consideration of the general point, when it was waved by the party having interest. The interest of the Crown, or of the public, besides, was, in this case, fully satisfied, the goods having been seized and confiscated, and the contract, properly speaking, was not a smuggling contract, as it contained no stipulation in defraud of the revenue. The case thus being dissimilar, would not apply.

As to the distinction made by the pursuer, that the present action is not an action for implementing a smuggling contract, but an action for payment of a bill, this, it was said, created no essential difference. In all bills, it is competent to inquire into the cause of granting. If it be not a proper onerous cause, the bill will be set aside, and if granted for an illegal cause, it must be held to be void. A bill for a game debt, thus, upon the cause of granting being ascertained, would be held as void; and in the same manner, where it is granted in consequence of a contract which the law holds as void, and upon which it refuses action, no action will lie on the bill. Were it otherwise, the law might in all cases be frustrated, by taking a bill in consideration of an unlawful contract, by which means, that action which the law refuses on the contract, would arise upon the bill.

The Lords found, "That no action lies in this case, in respect the same " is brought between smugglers for implement of a smuggling contract; " and therefore suspend the letters *simpliciter*, and decern." And to this interlocutor the Court adhered, on advising a reclaiming petition and answers.

Lord Ordinary, *Gardenstone.* Aft. *Nairne, Neil Fergusson.* Alt. *Crosbie, Macnochie.*
J. W.

* * * There is another case under the title PACTUM ILLICITUM, falling under the period, the decisions of which were awaiting in the Faculty Collection, viz. 3d December 1776, Hope against Tweedie, No. 66. p. 9522., for the particulars of which, reference is made to this Appendix; but the editor has not hitherto been able to obtain the session papers. See Appendix, Part II.