

No 82. 413. § 16., and 27th November 1723, Commissioners of the Customs *contra* Morison, No 75. p. 9533; Walker *contra* Falconer, No 80. p. 9543.

To the 2d; The goods were shipped on board a Sweddish ship, bound to that part of the coast of Scotland where they were directed to be sent, though the vessel was driven, by stress of weather, into the Frith of Forth. Foreign factors, or merchants, are always understood to have fully implemented their commission, so soon as they have shipped the goods commissioned, agreeably to the directions of their constituents;

And, as to the 3d defence; It was *observed*, that it was usual for the foreign merchant to claim the goods in the Court of Exchequer, in order, if possible, to save them from condemnation.

“ THE LORDS repelled the reasons of suspension; found the letters orderly proceeded, and expenses due.”

C. B. *Fol. Dic. v. 4. p. 31. Fac. Col. No 15. p. 225.*

1776. February 8. DUNCAN *against* THOMSON.

No 83.

Two persons having been engaged in a smuggling adventure, the one granted bill to the other for the value of his share of the profits. The goods being afterwards seized, the LORDS refused action for payment of the bill. See APPENDIX.

Fol. Dic. v. 4. p. 32.

1779. February 26. M'LURE and M'GREE *against* JOHN PATERSON.

No 84.

Action denied for the price of brandy purchased on board a vessel within port, the brandy having been in casks of a size which could not have been entered.

A VESSEL loaded with foreign brandy in small casks having come in to Clancy Bay, on the coast of Galloway, Paterson, jointly with others, purchased on board of the ship part of the cargo.—The casks were brought on shore by the purchasers during night in boats hired by themselves, and were left on the coast among the rocks until a convenient opportunity should be got of carrying them away. In a few days after, the purchasers granted an obligatory missive to Thomas Ferguson, proprietor of the goods, for the price.

Part of these spirits were seized by the revenue officers; but the remainder came safe to the hands of the purchasers, who afterwards refused payment of the price.—Ferguson indorsed to trustees the obligatory missive, and they brought an action upon it against the purchasers before the Admiral which was carried into the Court of Session by advocacy. The purchasers *contended*, that, at any rate, they were only liable for the price of what spirits they had received; but, *separatim*.

Pleaded in defence against payment of any part of the price; Foreign brandy is prohibited, by the revenue statutes, to be imported in small casks, under the penalty of forfeiture to the Crown. The goods, in the present case, falling within the enactment of these statutes, were imported into this country, and had incurred forfeiture before they were sold to the defenders.—Previous to the sale, the vessel with the prohibited goods on board, had come into Clanyard bay, which is within the limits of a port.—This is held in law to be an act of importation, as much as if the goods had been landed on shore; and the revenue officers were entitled to have seized them on board of the ship as forfeited by law.

In every instance where goods are smuggled, the property of them vests in the Crown from the time of committing the offence, and not merely from the time of seizure or condemnation. This necessarily excludes all kind of commerce in the goods-smuggled.—The holder of them cannot transfer the property of them to a purchaser.—Any sale made by him flows *a non domino*, and the Crown could seize the goods, though in the hands of a *bona fide* purchaser.

But, at whatever time the property of smuggled goods vests in the Crown, if both parties are in the full knowledge that the subject sold was smuggled, the sale is a contract *super re illicita*; and no action can be given to purchaser or seller for implement of the contract.—All traffick of this kind is considered by the law as criminal. Severe penalties are enacted by statute against those who knowingly offer prohibited goods to sale, or knowingly purchase them, 11th G. III. c. 30. § 18.

It is of no consequence, therefore, that the importing of such goods is not a moral wrong in itself.—When, by the act of the legislature, the public revenue is fixed, and smuggling prohibited, it is thereby rendered criminal; and the defrauding the King of his revenues is to be considered thereafter as a moral wrong, as much as the defrauding an individual of his property.

The Court have repeatedly found, that no action lies at the instance of a buyer against a seller for delivery of smuggled goods, nor for damages on account of the non-performance of any smuggling contract; Scougal and Young against Gilchrist, No 76. p 9536; Cockburn against Grants, No 78, p. 9539; Duncan against Thomson, No 83. p. 9546.

In the present case, there was not merely a sale of goods knowing them to be smuggled, but a joint adventure, where both parties were equally concerned in defrauding the Crown of its revenue.

Answered for the pursuer; Goods, on being smuggled, do not vest *ipso facto* in the Crown.—In no case of forfeiture whatever has the Crown any real right in the effects from the time of committing the offence, unless the statute enacting the forfeiture declares, that it shall draw back to that period.—If this is not expressly provided, the property remains with the holder, and does not vest in the Crown until condemnation, or at least till seizure.

No 84.

The revenue statutes contain no declaration, that the forfeiture is to draw back to the time of smuggling.—They plainly intimate the contrary.—The words of these statutes are, ‘ That the goods shall be forfeited.’ Although, therefore, goods are liable to forfeiture by being smuggled, they remain *in commercio*, and are the property of the holders until they are condemned, or at least seized by the Crown officers.—The contrary doctrine is not supported by any authority from the law of this country, or the law of England.—But, in the present case, there is no room for this question, At what time the goods were forfeited? As they never were condemned in the Court of Exchequer, they cannot be considered by this Court as forfeited now, or at any other time.

The knowledge of parties, that the goods sold were smuggled, is no defence against payment of the price.

Foreign brandy is the subject of commerce in this country as much as any other article of trade; and, although smuggled into the country, yet, as long as the goods remain the property of the private party, and are not put *extra commercium* by seizure and condemnation, the sale of them is lawful.

The offence in the case of smuggling is entirely *malum prohibitum*. By importing foreign brandy in small casks, no moral wrong is committed, and the criminality of the importer arises solely from transgressing a statutory prohibition. The only penalties or forfeitures, therefore, which can be inflicted by judges on the offence, are those which the statutes have enacted.—This is the rule of law in every case where a trespass is declared by statute.—If it is meant that any contract or transaction betwixt the parties should be voided, over and above other penalties, it is so declared in the statute. The legislature thought this expedient in the case of game debts; and, accordingly, the obligation of debt is declared expressly to be voided by the act 9th Anne, c. 13. But, on the other hand, although members of the Court are, by act 1594. c. 220. expressly prohibited from purchasing pleas, and penalties annexed to the offence; yet, as the statute does not go further, and declare the transaction itself to be annulled, it is a fixed point, that the sale of the plea is good.—Among the many revenue statutes enacting forfeitures and penalties, no statute is to be found declaring, that persons selling smuggled goods shall forfeit to the purchaser the price of the goods sold and delivered to him.—From this, it may be concluded, that the legislature has purposely avoided that mode of correcting the evil as dangerous to the freedom of commerce.

The decisions founded on do not apply. In these cases, action was brought for implement of contracts to furnish smuggled goods. The pursuer was, therefore, demanding performance of an unlawful act, which could not be enforced by the Court.—But the payment of the price for goods delivered, is an act of common justice, and, therefore, it cannot be unlawful to demand it.—In one of these cases, Cockburn against Grants, for delivery of run goods, Lord Kilkerran observes, that, ‘ where they are sold and delivered, it was not doubted that there lay action for the price.’ Accordingly, in every case where

such action has been brought, it has been sustained; Commissioners of the Customs against Morison, No 75. p. 9533, where action was sustained for the price, although the goods were seized before delivery; Wilkie against M'Neil, No 77. p. 9538; Drummond against Yule, (See APPENDIX.) Bank. b. i. t. 19. § 17. Walker against Falconer, No 80. p. 9543.

No 84.

The Court were of opinion, That, in this case, it was not necessary to determine the point, at what time smuggled goods are put *extra commercium*, and vested in the Crown, as, from the other circumstances, there was sufficient ground for holding the transaction to be unlawful.

The judgment was, " Find no action lies on the note in question, and assoilzie the defenders."

A reclaiming petition for the pursuers was refused without answers.

Lord Ordinary, *Auchinleck*. Act. *Rae, G. Wallace*. Alt. *Cullen*. Clerk, *Tait*.
Fol. Dic. v. 4. p. 31. Fac. Col. No 74. p. 138.

1788. December 5. JAMES M'LEAN against JOHN SWORD.

No 85.

SWORD purchased, within land, from M'Lean, some brandy and coffee-berries, of which the latter was not the importer. The goods not being accompanied with a permit, were soon afterwards seized, by the officers of the revenue; and, in fact, it appeared that the duties had not been paid for them. M'Lean brought an action for payment of the price against Sword, who

Pleaded; That this being a smuggling, and therefore an illegal contract, could afford no ground of action in a court of law; agreeably to the decision in the case of M'Lure and M'Cree *contra* Paterson, 26th Feb. 1779, No 84. p. 9546.

Answered for the pursuer; In the case referred to, action was indeed refused for the price of brandies imported in unenterable casks, and purchased at sea, within the limits of a port. But it would be dangerous to extend this principle to such cases as the present, where goods have passed, on shore, from hand to hand: For thus it would be in the power of every retail customer to plead that objection, to the great embarrassment and prejudice of trade.

The Court admitted the distinction, and adhered to the judgment of the Lord Ordinary, 'Repelling the defences, and finding the defender liable,' &c.

Lord Ordinary, *Alva*. Act. *Armstrong*. Alt. *Wm. Stewart*. Clerk, *Tait*.
L. Fol. Dic. v. 4. p. 32. Fac. Col. No 2. p. 2.