

The cause having come before the Court of Session by suspension, and into the innerhouse upon informations, the Court ordered a hearing in presence upon this abstract question, whether an action lies for payment upon the performance of a smuggling contract? After the hearing, there were informations ordered; but one of the parties having dropt the suit, the point was not decided.

Act. Montgomery, J. Dalrymple. Alt. Garden, Lockhart. Clerk, Justice.
J. M. Fol. Dic. v. 4. p. 33. Fac. Col. No 64. p. 148.

1765. November 13. MORE and IRVINE against STEVEN.

STEVEN, merchant at Newtyle, having commissioned a quantity of tea, brandy, &c. from More and Irvine merchants at Gottenburg, to be shipped on board the first Swedish vessel bound to the coast of Scotland between Ythan and Peterhead, the vessel was driven, by stress of weather, into the Frith of Forth, where it was seized, and afterwards condemned in the court of Exchequer; and, in the trial, More and Irvine appeared and claimed the cargo as their property.

It was *pleaded* for Steven, in a suspension of a charge for payment of the price; *imo*, As this was a bargain entered into by subjects of this kingdom, for the importation of goods, which the contractors well knew were prohibited to be imported, it was *pactum illicitum*, on which no action ought to lie; and it would be expedient to refuse action, as that would be a means of discouraging smuggling;

2do, The conditions of the commission had not been observed, as the ship, instead of touching at the part of the coast directed, had come into the Frith of Forth, where it was seized;

3tio, The chargers, by claiming the cargo as their property, shewed they did not understand the commission to have been properly implemented.

Answered to the *1st* defence; Though, by special statute, the goods in question are, in certain circumstances, put *extra commercium* in this country, yet they are, *jure gentium*, of free commerce at Gottenburg, from whence they were commissioned. The prohibitory enactments of these statutes can have no force at Gottenburg, or any place beyond the jurisdiction of the British legislature; persons residing in a country subject to different laws, are not presumed to know or attend to the various laws enacted in this country for regulating such matters; nor are they obliged to enquire, whether the purchasers are to enter the goods or not, but, as factors, must answer such commissions as are sent them. The dismissal of this action would not have the effect of discouraging smuggling; it would only change the course of the trade, and throw the whole of it into the hands of foreigners, who would only deal for ready money. See Lord Bankton, v. 1. p.

No 81.

No 82.

Action lies at the instance of a foreign merchant, for the price of prohibited goods seized on the passage.

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*.