

[This was universally rejected, as reprobating all arrestment on a dependance, and all claims on a decret in absence.]

On the 26th February 1779, "The Lords preferred George Goldie;" adhering to Lord Auchinleck's interlocutor.

*Act.* A. Elphinstone. *Alt.* A. Crosbie.

1779. *February 26.* CREDITORS of Patrick M'Dowal *against* CHARLES MAC-DOWAL.

ANNUALRENT.

The Lords found, that distressed cautioners were entitled to charge interest upon interest.

[*Fac. Coll. VIII. 31; Dict. 532.*]

BRAXFIELD. When Mr Charles M'Dowal obtained his decret of valuation, the chequer was closed. I consider that decret as equivalent to a decret of sale at that period: all debts are innovated and all accumulated. If Mr M'Dowal, being cautioner for his father in L.1000, has paid L.100 of interest, and L.100 of interest is still due, he states himself creditor for L.1200: he can get *that*, and he can get no more: he cannot afterwards make any farther claim.

On the 26th February 1779, "The Lords found that the debt must be struck as at the time of the decret of valuation;" varying Lord Kennet's interlocutor.

*Act.* Ch. Hay. *Alt.* G. Ferguson.

1779. *February 26.* MESSRS M'CLURE and M'CREE *against* JOHN PATERSON and OTHERS.

PACTUM ILLICITUM.

Sale of Smuggled Goods.

[*Faculty Collection, VIII. 138; Dictionary, 9546.*]

BRAXFIELD. The subject of the present action is foreign spirits, in circumstances not enterable. The purchase was made on board a ship: no action can lie against the purchaser, because this is a *pactum illicitum*, and inferring a moral turpitude. I do not enter into the distinction between a *malum*

*prohibitum* and a *malum in se*; the king has as good a right to the taxes lawfully imposed, as any person has to his estate. It is said, "We do not ask you to do any thing that is unlawful, for paying money is lawful." The case of *Colonel Campbell* against *Scotland* will be remembered. Action could not have lain against the seller by the purchaser, and why *vice versa*? This action is founded on an unlawful contract: I hope that the judgment to be given by the Court will have the effect of making rogues not true to each other. In some cases, it matters not how decisions go, if they are uniform; but this rule applies not to questions concerning offences against the law of the land.

PRESIDENT. The Court never ventured to determine the general point in favour of the unlawful contract.

MONBODDO. If there is no action against the first purchaser, so neither is there any against the second or third. This would lead us to try causes by the Exchequer law, which I do not understand. Were I to assume legislative powers, I should find that no action lies; but we must judge according to law and precedents. There is a distinction between *malum in se* and *malum prohibitum*, as much as between *jus naturale* and *jus civile*. A smuggling contract may be void and null, and yet a contract for the sale of smuggled goods may be valid. There is a distinction betwixt a law prohibiting, and a law not only prohibiting but also annexing penalties: there is no law annulling the sale of smuggled goods. No action lies against the seller, because the buyer could, by law, seize the goods when delivered.

HAILES. I supposed that the general bent of the decisions was for sustaining action on such contracts: my mind always revolted against this, for I never could see how the King's Judges were properly employed in rendering effectual bargains that are against law: The distinction between *malum prohibitum* and *malum in se* is well known, and I do not dispute the propriety of the distinction; but I doubt of its application to this case. What I mean will be best illustrated by an example: To engage in foreign military service with a prince in amity with Britain, is not a *malum in se*; this will be admitted by the lawyers of Scotland, for we know that such was the general practice of Scottish gentlemen, as indeed is the case in every nation brave and not wealthy. But such military service is prohibited by statute. Here then is a *malum prohibitum*. Now, suppose that a French officer should agree with a person to make 50 recruits for him, and, with that view, should put L.500 into his hands to account,—the contractor furnishes the men,—the employer learns that they have been levied at the expense of L.400, and, by his attorney, brings an action for accounting: Would not such an action be rejected? And yet *here* there is only a *malum prohibitum*, and not a *malum in se*. I have put this case in a way which might actually occur; for the attorney of the French officer could not be liable to any punishment for bringing such an action, and therefore might bring it. Yet, I am persuaded that the Court would not listen to a count and reckoning on facts prohibited by law.

ELLIOCK. Here is a contract for smuggling goods: no action lies, for the action is for completing that bargain.

KAIMES. Every one knows my opinion. I think that here there is a gross malefice, contrary to the duty of a subject. This is a contract to smuggle: Can I, as a judge, support persons in their actings against law?

GARDENSTON. If action is allowed here, action must be allowed on every unlawful contract. When the legislature prohibits a thing, I infer that a contract for doing *that* is unlawful: I do not admire the distinction between *malum prohibitum* and *malum in se*. What is *malum in se*?—not treason, adultery, or theft; for, in a state of nature, there was no government marriage nor separate property. [Confounding an imaginary state of nature with the law of nature and nations.] This is altogether a smuggling contract: How can the contract be ineffectual as to the seller, and yet be effectual as to the purchaser. I do not see any decision sustaining action on a contract obviously for smuggling. Action lies to the foreign merchant, who has done nothing unlawful in selling the goods: but that is not the *species facti* here. The only decision near the point is that of *Thomson and Duncan*; and *there* action was denied.

JUSTICE-CLERK. This, above all others, is a covenant for smuggling. The case here respects the very act of smuggling. The king's judges cannot sanctify an act so illegal. It would have been still a more simple case, if the goods had been seized and an action brought for damages: *there* the interest of the king would have been at an end, and yet the Court would not have admitted such action. In a matter of this kind, which depends on statutes originally English, I should be sorry to see our judgment differing from that of English judges. I am persuaded that an action of this nature would be a novelty in England.

COVINGTON. I assimilate this case to the case of a resetter of stolen goods. The Crown has a right to certain duties, and here is a contract for defrauding the Crown of that right. I think that, if a person purchases goods knowing them to have been smuggled, even then no action lies, although the purchaser is not accessory to the smuggling himself.

KENNET. There is no occasion to enter into such disquisitions. The only question here is, Whether there is a smuggling contract or not? That there is, appears from the original obligation.

PRESIDENT. I agree with my brethren on the general point; but I have heard some propositions advanced, to which I cannot assent. I do not think that action can be denied for goods bought in a fair way of trade, and I have no notion of an *ipso facto* forfeiture. In the case of *Crawford* the *ratio decidendi*, in the Ordinary's interlocutor, was left out when the cause came to be determined in the Inner-House, and the decision was grounded on the special circumstances of the case. I mention this, because the judgment in the case of *Crawford* has been represented as inconsistent with the judgment now to be pronounced.

On the 26th February 1779, "The Lords found that no action lies;" altering the interlocutor of Lord Auchinleck.

*Act. G. Wallace, D. Rae. Alt. J. M'Laurin, Ilay Campbell.*

Hearing in presence.

The judgment in this very important cause was unanimous: the judges differed in their reasons, but not in their conclusions.