

No 26. would defeat the purpose of it, and enable the defender to frame a story consistent with the evidence. *2do*, For the same reason, the defender is not entitled to see the vouchers, and other papers, found in Mr Bogle's repositories.

The Court highly condemned the conduct of the pursuer in taking the precognition; but did not think the defender entitled to see the evidence of the witnesses in it, nor the writings found in Mr Bogle's repositories, previous to his examination.

The COURT remitted 'to the Lord Ordinary to take the defender's declaration on the facts and circumstances set forth in the condescence; but, before proceeding thereto, ordains the former declaration, emitted by the defender before the Magistrates of Glasgow, to be shown to the defender, and thereafter to be again sealed up.'

Fac. Coll. No 40. p. 69.

(COURT OF JUSTICIARY.)

1793. *March 18. and December 23.*

HIS MAJESTY'S ADVOCATE *against* ALEXANDER BROWN and JOHN MACNAB.

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Falsehood and forgery in revenue matters may be punished at common law, even though the thing counterfeited be liable to legal objections.

By sect. 2. of the statute 26th Geo. III. c. 51. relating to the duties on starch, the manufacturers are directed to paper each piece of starch, and to tie it with strings, crossing each other on that side of the piece where the ends of the paper are folded, and to affix with warm glue, on each piece of starch so papered and tied, a label or thin piece of paper, of certain dimensions, and of a different colour from the paper inclosing the starch, and this on that side of the piece where the ends of the paper are folded, so as to prevent the opening of the piece, without tearing the label. All these things are directed to be done in presence of the revenue officer, who 'shall cause every piece of starch, so papered as aforesaid, to be stamped or sealed upon each label or thin piece of paper aforesaid, with such stamp or seal as shall be provided by the Commissioners, for the duties on starch in England and Scotland respectively for that purpose, before any such piece of starch shall be put into the stove to dry.'

By sect. 4. the Commissioners are authorised to provide and distribute stamps or seals for the above purpose, and to vary and alter them at pleasure; and the officers are directed in using them, to do as little damage as possible to the starch, or paper inclosing it.

By sect. 13. all starch not so stamped is declared liable to seizure, and penalties are inflicted on the manufacturer or dealer in whose possession it is found.

And by sect. 14. it is declared, that if any person shall forge or counterfeit any stamp or seal which shall be provided in pursuance of this act, 'for stamping or sealing starch made and papered in Great Britain, or shall counterfeit and resemble the impressions of the same, upon the papers containing starch,

‘thereby to defraud his Majesty, &c. of the duties upon starch,’ he shall, upon conviction in due form of law, ‘be adjudged a felon, and shall suffer death, as in cases of felony, without benefit of clergy.’

Upon the passing of this act, the Commissioners of Excise in Scotland distributed to the proper officers hand stamps for stamping the labels after they were affixed to the pieces of starch, when duly papered and tied, in terms of the statute.

These, however, after they had been used for some time, having been found inconvenient, by reason of the indistinctness of the marks impressed, and the consequent facility of imitation, were laid aside, and the Commissioners caused an engraving to be executed on copperplate, from which impressions were taken on a thin paper, and distributed to the revenue-officers, who, at sight of the trader, affixed them as labels on the starch, papered and tied as above mentioned.

This alteration in the practice was acquiesced in by all the starchmakers, from 1787 to the end of 1792, when Alexander Brown, starchmaker at Monkton, and John Macnab his overseer, were brought to trial on a charge of counterfeiting the copperplate and impressions employed by the Commissioners. The indictment in the major proposition states, that ‘albeit, by the laws of this realm, as well by the common law as by the statute-law thereof, and by the laws of every other well governed realm, falsehood and forgery, or the bearing art and part thereof, particularly the forging or counterfeiting any mark, stamp, or seal appointed to be used for marking, stamping, or sealing any goods or manufactures, in order to secure and ascertain the payment of the duties granted to us, and charged or imposed on such goods or manufactures, or the using any such false or counterfeited mark, stamp, or seal, knowing the same to be false and counterfeited, in defraud of us and the public revenue, or the counterfeiting or resembling the impressions of any such mark, stamp, or seal, upon such goods and manufactures, or the papers, pieces, or packages containing the same, or upon the label affixed or pasted on such papers, pieces, or packages, contrary to law, and in order to defraud us and the public revenue of the duties imposed by law upon such goods and manufactures, are all and each of them crimes of an heinous nature, and severely punishable, and more particularly, by an act passed in the 26th year of our reign.’ The 14th section of the act is then inserted.

The minor proposition charges the pannels as guilty of one or other of these crimes. ‘In so far as the Commissioners of Excise for Scotland, as Commissioners for the duties on starch in Scotland, having, in pursuance of the powers vested in them by law, and particularly by the above mentioned statute, directed certain stamps for starch to be engraved upon copperplates,’ &c. A description of the mode in which the offence was supposed to have been committed is then given, and the libel concludes, ‘At least, times and places libelled, the stamps provided by the Commissioners were counterfeited,’ &c. by the pannels.

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Various objections having been stated to the relevancy of the indictment, informations and additional informations were ordered, in which the pannels.

Pleaded, 1st, The distinction between simple felonies and those without benefit of clergy, between felonies and other crimes, is unknown in the law of Scotland. The 14th section of the act, therefore, which employs exclusively the technical language, and refers to the judicial proceedings of the law of England, must have been intended to apply only to that country. Several revenue statutes have been passed since the Union, which evidently do not extend to Scotland; and in these the same language has been employed as in the present; 4 Geo. I. c. 11.; 6 Geo. I. c. 23.; 8 Geo. II. c. 18.; 9 Geo. II. c. 35.; 11 Geo. II. c. 26.; 24 Geo. II. c. 40. § 28. Whereas in others, which were meant to apply to both kingdoms, it is declared, that offenders in England shall be punished as felons, and those in Scotland be prosecuted before the criminal courts of that country, and suffer a capital punishment; 19 Geo. II. c. 34.; 24 Geo. III. c. 47.

2do, To authorise a conviction upon a penal statute, the offence must come under the letter as well as the spirit of the law, and no argument from analogy or expediency can warrant its extension to other cases.

The words stamp or seal, whether as denoting the instrument with which an impression is made, or the impression itself, are clearly distinguished in common language from an engraving on copperplate, or an impression taken from it by means of machinery.

The mode in which the operation of stamping is to be performed, as pointed out by the statute, is quite inconsistent with the practice adopted by the Commissioners; see 26 Geo. III. c. 43. Accordingly hand stamps have always been provided by the Commissioners in England.

3tio, The facts charged do not warrant a criminal prosecution at common law. The present indictment is irrelevant, because the pannels are charged with counterfeiting the copperplates, and the impressions thereof furnished by the Commissioners, 'in pursuance of the powers vested in them by law.' Whereas the Commissioners exceeded their powers, and the starch, with the copperplate impressions on it, might have been seized as not having the stamps required by the statute.

Besides, the common law only reaches such offences against the revenue as are attended with a breach of the peace, or an injury to an individual; 16th July 1716, John Roy and Alexander Ramsay; 1729, Porteous. See APPENDIX.

The public revenue is the creature of statute, and frauds against it, as occasioning less injury to the offended party, and inferring less turpitude in the offender, are viewed in a different light from frauds against individuals. Hence the Legislature has taken care to affix pecuniary penalties and forfeitures to each transgression, and to ascertain the particular punishment to be inflicted in those cases, where a criminal prosecution was at all thought necessary. In some cases,

where prior statutes had punished offenders with pecuniary penalties, (13 and 14 Charles II. c. 11. § 8. ; 7 and 8 William and Mary, c. 22. § 10.), the Legislature has afterwards thought it necessary to subject them to a criminal prosecution ; 29 Geo. II. c. 23. § 14. ; see also 24 Geo. II. c. 41. § 12. ; 32 Geo. III. c. 7. § 9. 23. c. 70. In others, the statute originally prohibiting the offence, has expressly introduced the same punishment which, had the same offence been directed against an individual, common law would have inflicted ; 9 and 10 William III. c. 25. § 59. ; 12 Anne, stat. 2. c. 9. § 13. ; 13 Geo. III. c. 56. Now, from all these statutes, it may be inferred that, with regard to offences of this description, no prosecution is competent at common law.

4to, The crime of falsehood is defined to be the fraudulent suppression or imitation of truth ; Mackenzie Crim. tit 27. ; Erskine, Book iv. tit. 4. § 66. But, in the eye of law, nothing is *true* which is not *legal*. The copperplate engravings provided by the Commissioners of Excise, and the impressions taken from them, having no legal existence, the pannels had as good a right to use them as the Commissioners of the Revenue, and cannot be guilty of the crime of falsehood by so doing.

Answered ; 1mo, By the 18th article of the Union, it was provided that both countries should have the same revenue-laws.

If the statute had merely declared that offenders should suffer death, its meaning would have been sufficiently explicit by the law of Scotland. But the addition of the words, ‘ as in cases of felony, without benefit of clergy,’ was necessary to make it so by the law of England. They were added, however, not to regulate the mode of prosecution, but to ascertain the punishment to be inflicted on conviction.

In various revenue-laws where the jurisdiction of the Court of Justiciary is expressly recognised, the offence committed is denominated a felony ; 9 Geo. II. c. 35. § 38. ; 19 Geo. II. c. 34. § 12. And the following statutes, which are conceived in similar terms with the present, have always been understood to apply to Scotland ; 9 Anne, c. 11. § 44. c. 23. § 34. ; 10 Anne, c. 19. § 97. ; 29 Geo. II. c. 12. § 21. c. 13. § 5. ; 30 Geo. II. c. 19. § 27. ; 31 Geo. II. c. 32. § 15. ; 7 Geo. III. c. 43. § 18. ; 14. c. 72. § 8. ; 16. c. 34. § 15. ; 19. c. 66. § 8. ; 21. c. 56. § 9. ; 23. c. 70. § 9.

It would be singular that a statute should make the same acts criminal in both countries, and yet make them the subject of prosecution only in one of them.

2do, Penal statutes must receive, though a strict, yet a fair construction. The object of the act in question was merely that a mark should be affixed to each parcel of starch, demonstrative of its having paid the duty ; and if this purpose is accomplished, it does not signify by whom, in what manner, or by what instrument the operation is performed.

Besides, the impression made by an engraving on a copperplate, is in familiar language called a stamp. If therefore the machine for making the impression

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had been placed in the manufactory, and each parcel of starch had been marked with it after it was labelled, the statute would clearly have applied; and if the manufacturer had complained that his starch was injured in this way, he might have required the officer to make the impression on the label before it was affixed. The Commissioners have done nothing more; and as they have power to vary the stamps or seals at pleasure, they may also vary the mode of conducting the operation.

3^{to}, Even admitting that the Commissioners have exceeded their powers, the libel as laid is relevant at common law, because falsehood and forgery being charged generally both in the first part of the major proposition and in the conclusion, the description of the offence given in the other parts of the indictment cannot restrict it.

Although it were true that a mere fraud against the revenue cannot be the subject of a criminal prosecution, yet wherever, as in the present case, that fraud has been committed by the intervention of a crime known at common law, the offender is liable to prosecution; as, for instance, in the case of a smuggler, who beats or bribes a revenue-officer, or is guilty of perjury.

Neither does a statutable penalty supersede the punishment formerly competent at common law; 5th February 1754, *Jollie*; 1st July 1754, *Mackirdie and Hamilton*; 24th July 1786, *Simson and Brown*; 1st December 1788, *Caithness and Bisset*. Spring Circuit-court at Glasgow 1788, *James Kerr*.—Late case of *James Stein*.—10th May 1733, *John Macfarlane*; 1762, *John Newton*. *Burrow's Reports*, vol. ii. p. 803. vol. iii. p. 1418.; 1 *Salk.* 45. *Stephens against Watson*.

4^{to}, The facts charged come under the generic crime of falsehood; *Mackenzie*, *Crim. tit. 27. § 2. tit. 28. § 1.*; *Erskine*, b. 4. tit. 4. § 66.; *Reg. Maj. b. 4. c. 13.*; 6th February 1716, *James Auchterlonie*. Spring Circuit at Perth 1784, *George Small*; 11th August 1773, *Peter and James Dows*. The essence of the crime consists in the suppression or imitation of truth, with an intention to defraud, and may be committed, although the original was liable to objection, for example, in a bill of exchange executed on paper not stamped according to law; *Worcester Lent-term 1783, King against Hawkeswood*; *Trinity-term 1788, Crosbie against Arkwright*; *Term. Reports*, vol. ii. p. 609. So that it is at any rate unnecessary to enquire how far the conduct of the Commissioners was legal in this case.

Observed on the Bench: As the statute libelled on relates to the revenue, there is no doubt that it extends to Scotland. But it does not apply to this case. Penal statutes must be strictly interpreted. Although there is not much in the distinction between an impression made by an engraving on copperplate, and one made in any other way, it is clear that hand-stamps only were in the view of the Legislature, and that the impression was intended to be made after

the label was affixed to the starch. The statutes give the Commissioners no discretionary power as to the mode of conducting the operation.

But laying the statute entirely out of the question, the facts charged warrant a prosecution at common law, on the head of falsehood and forgery, so as to infer an arbitrary punishment. Frauds against the revenue are highly pernicious in their consequences, and equally criminal with frauds against individuals, and when they are committed by means of a crime at common law, they are punishable in the same manner. The present indictment is clearly relevant, as it asserts that the Commissioners had authority independent of the statute. But to warrant a conviction at common law, it is sufficient that *de facto* they made a regulation, which was acquiesced in by the trade, and had the effect of protecting the goods from seizure. If, some years ago, when the Commissioners of Excise, although they had no legal authority to do so, appointed the strength of spirits to be ascertained by a hydrometer, the distillers, instead of resisting the measure, had acquiesced in it, and had forged permits, bearing that such proof had been adhibited, they would have been liable to punishment at common law; and the same would be the case of a person who should forge, and operate payment of an usurious bond or bill liable to objections in law.

The Court unanimously found, that the statute libelled on extended to Scotland; that the fact charged in the minor proposition did not fall under it; but that the libel was relevant as laid on the common law.

The diet was then deserted *pro loco et tempore*, and a new indictment, founded solely on common law, was raised, which only differed from the former, in stating simply as a matter of fact, that the Commissioners had directed certain stamps to be engraved on copperplate, and impressions therefrom to be distributed, for the purposes of the act 26 Geo. III. c. 51. without stating under what authority they had proceeded.

This libel being likewise objected to, informations were ordered, and the Court, (on the 23d December 1793) upon the grounds already stated, unanimously found it relevant to infer the pains of law.

Upon this last indictment Brown was afterwards fugitated for non-appearance, and Macnab convicted and banished from Scotland for fourteen years.

For the Crown, *Lord Advocate Dundas, Solicitor-General Blair, John Anstruther,*
For the Pannels, *Dean of Faculty Erskine, Wight, Macconochie, D. Williamson.*

D. D.

Fac. Col. (APPENDIX) No I. p. I.

* * * For the effect of keeping away a member from an election by a fraudulent combination among the other members, *See 1st July 1740, Convener and Trades of Aberbrothock against the Magistrates and Council thereof, voce VIS ET MERUS.*

Kilkerran, (FRAUD) No I. p. 216.