

No 80.

not be ignorant how the law stood in this respect, as he is a native of Scotland, and carried on business here as a merchant for some years before he went abroad. It would therefore be improper to sustain action upon this contract, which was entered into directly against law. Nor is it enough to say, That the statute has inflicted certain penalties upon transgression, such as forfeiture of the goods, &c. ; and that the Court has no power to add new penalties. The present objection, if sustained, is not adding any penalty upon the pursuer ; it is only denying the aid of the law, to render effectual a contract which is reprobated by the law.

Answered for the pursuer, The maxim, *Quod lege prohibente fit, est ipso jure nullum*, admits of this general exception, That where the prohibition is enforced with a penalty, and does not enact an express nullity of the transaction, the sole effect of contravention is to incur the penalty. The legislature of Great Britain has prohibited the importation of certain commodities under particular penalties ; but has not yet gone the length of denying action to the foreign merchant who furnishes such goods upon commission from his correspondents in this country. Nor would it be proper or expedient, that such a certification were imposed ; for, however faulty or criminal it may be in the subjects of this country to import uncustomable goods, this cannot, in justice, strike against the foreign merchant or factor, whose duty it is to answer his commission, and furnish his correspondent, without enquiring, whether the goods may be lawfully imported into this or the other country. A merchant residing abroad, whether a native of this country or not, cannot have access to know, or be informed, of the different revenue acts which are from time to time passed in Great Britain ; neither is it his business to enquire into these matters. His commission is at an end how soon the goods are shipped upon the risk and peril of the person who gave the commission. The importation is the act of the purchaser ; which, however criminal with regard to him, cannot vitiate the antecedent sale. No trade could be carried on among different nations, if the contrary doctrine were to be established.

“ THE LORDS repelled the defence.”

Act. *Lockhart.*

Alt. *A. Pringle.*

W. J.

Fol. Dic. v. 4. p. 31. Fac. Col. No 16. p. 27.

No 81.

1761. November 23. MAGNUS GRAY against JOHN BARRON.

MAGNUS GRAY freighted his ship for six months to John Barron. Both from the charter-party, and from the circumstances of the voyage, it appeared that she was freighted for a smuggling adventure. Her contraband cargo was seized in the Orkneys.

Gray pursued Barron in the Admiralty Court for payment of the freight. The Judge Admiral found, That the contract was unlawful, and that therefore Gray had no action for payment of the freight.

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.