

themselves, or others in their name, or for their behoof; and the infraction may be proved against the obligants by the confession of the meanest inhabitant. No 79.

By the act Henry VIII. *anno* 33. c. 39, all obligations concerning the King's Majesty shall be made *domino regi*, and to none other person, for his use *solvend. eidem domino regi*; and if any person take any obligation to the use of the King otherwise, such shall suffer such imprisonment as shall be adjudged by the King or his council; this bond being taken to these officers, otherwise than as directed by the statute, is null.

*Answered*, The officers have not illegally exacted this bond; but it was voluntarily granted by the obligants; they were concerned for their tenants, who had made themselves liable to punishment, and to exempt them therefrom, they came under this obligation, which the statute of Henry VIII. does not regard, as it concerns securities for debts previously due to the King; but here it was lawful to modify this original obligation as the parties pleased; it is not taken to the use of the King, but to the officers themselves; and whereas, at moving of the petition, it was observed that, considering it in this light, no more of the penalty would be found due than was equal to that interest of the officers, which they could shew was affected by the breach of the bond; it is *answered*, a person may stipulate a sum to himself on any condition, l. 38. § 17. D. De verb. oblig.

The statute does not annul securities taken, not according to its directions, but punishes the persons.

“THE LORDS found that the bond was illegal, and could produce no action.”

Act. H. Home.

Alt. Ferguson.

Fok. Dic. v. 4. p. 33. D. Falconer, v. 2. No 229. p. 277.

1759. February 27. ANDREW WALKER against JOHN FALCONER.

JOHN FALCONER merchant in Nairn, commissioned from James Jamieson merchant in Gottenburg, a quantity of teas; which having been shipped by Jamieson on board a vessel for Portsoy, in terms of the commission, the vessel was, upon her arrival, seized by the customhouse-officers, together with all her cargo.

Jamieson, by his trustee Andrew Walker, brought an action against Falconer, for payment of the price of the teas.

*Pleaded* for the defender, By act 12mo, Charles II. cap. 17. teas are prohibited to be imported into Great Britain from Gottenburg, or any other place of which they are not the product, or from which they are not usually first shipped for transportation; the contract therefore between the pursuer and defender was unlawful, and can afford no action in a court of law. The intention of the parties was to carry on a smuggling trade; and Mr Jamieson could

No 80.

Action sustained at the instance of a foreign merchant, for the price of prohibited goods sent on commission.

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.