

1751. November 12.

WILLIAM STEWART *against* LAMONT of that Ilk, and CAMPBELL of Ottar.

No 79.

A bond, with a penalty, to an officer of the Customs, and his successors, to be paid in case any of the obligee's tenants should smuggle, found void.

ARCHIBALD LAMONT of that Ilk, John Campbell of Ottar, and sundry other Gentlemen, granted bond, narrating, that William Stewart, Surveyor of the Customs at Greenock, had, at their request, and on their becoming so bound, discharged a prosecution before the Vice-Admiral of Argyle, against James Black and others, for invading, beating, and bruising him, and obstructing him in the execution of his office; and that they had made payment to him of his expenses debursed in the said prosecution, and of a further sum in lieu of assythment; therefore, binding them, that no tenant, or person residing on their estate, should, for the space of seven years, by himself, or others in his name, or for his behoof, directly or indirectly, be concerned in smuggling certain goods mentioned, under the penalty of L. 100 Sterling, to be paid to the said William Stewart, or his successors in office, or the Collector of the Customs at Greenock for the time being, by the person on whose estate the person so smuggling should reside for the time, for every such delinquency; which should be probable by the confession of the delinquent, or the oath of two or more witnesses, and be cognoscible by the Sheriff of Argyle, in a summary way, by petition at the instance of the said William Stewart, or the said Collector, or their successors in office, who should be holden to make previous intimation of such intended prosecution, to the landlord of the delinquent, 14 days before the proof should be adduced therein.

After the lapse of the seven years, William Stewart petitioned the Sheriff of Argyle, shewing, That within the time, certain persons residing on the grounds of Lamont and Ottar, had been concerned in smuggling, though the goods were not landed on either of their grounds; and the cause was advocated; and the LORD ORDINARY, 23d February 1751, "Remitted the cause *ad hunc effectum*, that a proof might be taken before answer before the Sheriff, with this instruction to him, That he should allow a conjunct probation to both parties, of all facts and circumstances which had been condescended on by either of them."

Pleaded in a reclaiming bill, It was illegal in an officer of the revenue to exact such a bond; the legislature has reserved to itself the power of imposing duties, and of limiting the penalties necessary for putting the laws in execution; and it is not in the power of any officer to vary the regulations of the law. It would be dangerous if officers had this power; as they might, by threatening prosecutions, intimidate people to submit perhaps to the regulations of Excise, with regard to duties to be uplifted as customs. The terms of this very bond are extremely unreasonable; as, although the obligants should guard their estates, they could not hinder persons residing on them to smuggle elsewhere; and by the bond the penalty is incurred, if they shall be concerned by

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.