

1776. February 7. DAVID THOMSON *against* WILLIAM DUNCAN.

PACTUM ILLICITUM.

Action denied upon a bill granted for smuggled goods.

[*Faculty Collection, VII. 184; App. 1, Pac. Illicit., No. 1.*]

HAILES. Is not this in effect an action for liquidating the profits of contraband adventure? How can a Court of Justice determine on such questions?

JUSTICE-CLERK. This is plainly the sequel of a smuggling contract. The contract is not completed: How can action lie for implement? This is going farther than the Court has hitherto gone. Suppose two persons, on ship-board, having a large quantity of contraband commodities: they divide it; it is seized on coming on shore: Can action lie to the one for recourse against the other? What difference is there between that case and the present one, where the division was made the day after the landing, and while the subject was still liable to be seized?

KAIMES. Suppose I should buy a greater quantity of tea than the law permits: the officers of the law seize it; am I bound to pay the price, when the subject is evicted? I am not. The case here is much stronger. There was an actual bargain for smuggling of tea, and part of the tea was evicted: How can the seller pursue for the price?

COVINGTON. The tea comes to land, and is divided: Can a man be allowed to refuse payment of his share?

PRESIDENT. I am very confident that action would not be allowed in England in such a cause, and that it was so decided by Lord Chief-Justice de Grey in the Court of Common Pleas. I do not choose to bind myself by English law; but, in revenue matters, the laws of the two nations are the same, and the principles ought to be the same. The judgment of the English Courts affords a precedent to be copied after.

On the 7th February 1776, "the Lords, in respect that the case was between two smugglers for implement of an unlawful contract, found that no action lay;" altering the interlocutor of Lord Gardenston, Ordinary, and their own interlocutor of _____.

Act. Crosbie. *Alt.* W. Nairne.

Diss. Covington, Kennet, Stonefield. *Non liquet*, Monboddo, Elliock.

The judges who voted that no action lay, were Justice-Clerk, Kaimes, Auchinleck, Hailes, President.