

1778. November 28.

Colonel ARCHIBALD CAMPBELL and his Trustees, *against* ROBERT SCOTLAND.

No 72.

A party who had received money without receipt, for the purposes of a canvas for election of a member of Parliament, found not liable to account.

IN 1775, Colonel Archibald Campbell appeared as candidate to represent, in the ensuing Parliament, the district of burghs, of which Dunfermling is one, and employed Robert Scotland, a shop-keeper in that burgh, as his agent for managing his political interest there. A large gratuity was agreed to be given to Scotland for his trouble; and, in consequence of his undertaking this business, money was, from time to time, put into his hands by different persons for behoof of Colonel Campbell, to the amount of about L. 3000. No receipt or voucher was given by him for any part of this money.

It was afterwards suspected by Colonel Campbell and his friends, that Scotland had betrayed his interest in the burgh, and favoured the other party. Colonel Campbell himself having gone abroad, and named trustees for managing all his affairs in this country, Scotland was required by them to show his accounts for the money he had received; and, upon his declining to comply, the trustees brought an action of count and reckoning against him, in their own name, and that of their constituent, and insisted that he should, in the first place, be ordained to produce his accompts. Scotland acknowledged his having received the money; but

Pleaded in defence against this action; As the defender's acknowledgment is the only evidence of his having received the money, it must be taken subject to the intrinsic qualities under which he makes it, viz. that he got the money for the purpose of employing it in bribery; and actually employed it to that purpose. The trust committed to the defender was therefore of an illicit nature, and all action on it is denied by law. The circumstance, that the defender, by undertaking the trust, was equally criminal as the pursuer, does not preclude him from pleading this exception to the action. It is an established point in the case of smuggling contracts, and others of a like kind, where both parties are equally criminal, that the defender is not barred on this account from pleading the exception. Were it otherwise, the object of the law in denying action on illicit contracts would be entirely defeated.

Answered for the pursuers; That Colonel Campbell had not entered into any illicit compact with the defender: That the money was put into his hands for the purpose of giving entertainments to the people; but that he had received no instructions from the defender to employ it in bribery. The pursuer is charged with a crime, and he must be presumed innocent till his guilt be shown. The defender's averment fixes only his own turpitude; but he must establish by proof the unlawful concert he alleges, otherwise his defence, which rests on the hypothesis, that an unlawful agreement had taken place, falls to the ground.

Observed on the Bench; If the pursuer could produce any voucher of this money being in the hands of Scotland, the averment of a *turpe pactum* would

not be sufficient to screen the defender from accounting; but, as the receipt of the money rests on the acknowledgment of the defender, the *causa dandi* is an intrinsic quality, and cannot be separated from the other parts of it. The judgment was,

“Sustain the defences, and assoilzie.” See RECOMPENCE.

Lord Ordinary, *Braxfield*. Act. *Ilay Campbell*. Alt. *Raz, M^rLeod*. Clerk, *Tait*.
Fol. Dic. v. 4. p. 29. Fac. Col. No 46. p. 80.

1786. February 1. Mrs DALRYMPLE against SHAW.

Mrs DALRYMPLE pursued Shaw in an action of declarator, for having it found, That as, at the solicitation of her friends, the office of keeper of the register of sasines for the county of Ayr had been obtained for him by the Member of Parliament for that shire, on a condition stipulated by her, of his paying to her, and her children after her, five sixth parts of the fees and emoluments of that office; so he was now bound to fulfil that condition. When the cause came to be advised, this question was suggested, Whether such a paction was *contra bonos mores*, and so not actionable. Afterwards, in support of the objection, the defender

Pleaded, The stipulation in question is inconsistent with the nature of a public office. The salaries or emoluments pertaining to such, are not to be deemed merely adequate to the service performed, but constitutionally requisite to preserve to the public officer that degree of independence, and that rank in life, which are suited to the extent of the trust committed to him. In another view, it is virtually a bribe received, or a corrupt bargain entered into for the procurement of an office of public trust; a thing reprobated by express statute in England, 12th Richard II. cap. 2., as it is by the spirit of our common law, the abuse not seeming to have ever risen so high in this country as to demand the special interposition of the Legislature. In a case similar to the present, action was denied on the principles now stated; 9th February 1759, Young *contra* Thomson, No 70. p. 9525.

Answered, The statute quoted, and others posterior, such as 5th and 6th Edward VI. cap. 16. afford proof, that by the common law of England, the sale of public offices was not *malum in se*; otherwise those enactments would have been superfluous. Nor is there any reason to suppose our own common law different in that respect. The case of Young and Thomson must have been decided on some other ground than that of *pactum illicitum*; since of two transactions to which that objection was equally applicable, one only was annulled by the judgment of the Court. In fact, nothing is more openly sold than are public offices every day; the clerkship of the High Court of Justiciary, for example, the depute-clerkships of the bills, the sheriff-clerkships.

No 72.

No 73.

Is it *pactum illicitum* if a person stipulate a benefit to himself, or to another, for obtaining for a third an office from Government?