Title:
Holmann v. Johnson [1775], 98 Engl. Rep. 1120 (1. Cowp. 341)

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Wednesday, July 5th, 1775

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Assumpsit for goods sold and delivered : plea non assumpsit and verdict for the plaintiff. Upon a rule to chew cause why a new trial should not be granted, Lord Mansfield reported the case, which was shortly this: the plaintiff who was "resident at, and an inhabitant of, Dunkirk, together with his **[342]** partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action brought, to the order of the defendant, knowing it was intended to be smuggled by him into England: they had, however, no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the common and ordinary course of their trade.

Mr. Mansfield, in support of the rule, insisted, that the contract for the sale of this tea being founded upon an intention to make an illicit use of it, which intention and purpose was with the privity and knowledge of the plaintiff, he was not entitled to the assistance of the laws of this country to recover the value of it. He cited Huberus 2 vol. 538, 539, and *Robinson v. Bland*,[1] to shew that the contract must be judged of by the laws of this country, and consequently that an action for the price of the tea could not be supported here.

Mr. Dunning, Mr. Davenport, and Mr. Buller, contra, for the plaintiff, contended that the contract being complete by the delivery of the goods at Dunkirk, where the plaintiff might lawfully sell, and the defendant lawfully buy, it could neither directly nor indirectly be said to be done in violation of the laws of this country; consequently it was a good and valid contract, and the plaintiff entitled to recover. It was of no moment or concern to the plaintiff what the defendant meant to do with the tea , nor had he any interest in the event. If he had, or if the contract had been that the plaintiff should deliver the tea in England, it would have been a different question ; but there was no such undertaking on his part. They pressed the argument ab inconvenienti, and cited several cases. MSS. at Ni. Pri before Lord Mansfield, sittings in London.-An action brought by the plaintiffs, who were lace-merchants in Paris, for laces (which were contraband in this country) sold and delivered to the defendant's order at Calais. The question made was, whether the vendor of contraband goods at Paris was not bound to run the risk of their being smuggled into this country? But Lord Mansfield held, that as the contract on the

part of the plaintiff was complete by his delivering the laces at Calais, he was clearly entitled to recover, and the jury found a verdict accordingly.-*Faikney v. Reynous and Richardson*, East, 7 Geo. 3, B. R. since reported in 4 Bur. 2069, & 1 Black. 633, where one partner in a stock-jobbing contract lent the other 15001. to pay his moiety of the differences on the rescounter day; and though this was pleaded **[343]** to the bond, the Court upon demurrer over-ruled the plea, and held the plaintiff was entitled to recover. *Bruston v. Clifford*, in Chan. before Lord Camden, 4th December, 1767. *Alsibrook v. Hall* in C. B. where money paid for the defendant for a gaming debt was held recoverable by the plaintiff.

Lord Mansfield.-There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.-There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. For no country ever takes notice of the revenue laws of another.

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for, his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa,, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bong his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis.

The question therefore is, whether, in this case, the plaintiffs demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country.-An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all positivi juris. What then is the contract of the plaintiff? It is this: being a resident and inhabitant of Dunkirk, together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dun-**[344]**-kirk to the defendant's order, to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for goods sold and delivered at Dunkirk. Where then, or in what respect is the plaintiff guilty of any crime Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at Dunkirk.

To what a dangerous extent would this go if it were to be held a crime. If contraband clothes are bought in France, and brought home hither; or if glass bought abroad, which ought to pay a great duty, is run into England; shall the French taylor or the glass-manufacturer stand to the risk or loss attending their being run into England? Clearly not. Debt follows the person, and may be recovered in England, 1gt the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore, I am clearly of opinion, that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any Act of Parliament.

I am very glad the old books have been looked into. The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the general case in question, thus: tit. De Conflictu Legum, vol 2, pag. 539. " In certo loco merces quaedam prohibitae sunt. Si vendantur ibi,

contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia, contractua rode ab initio validus fuit." Translated; it might be rendered thus: In England, tea, which has not paid duty, is prohibited; and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid.-He goes on thus: " Verum si mercer venditae in altero loco, ubi prohibitaa sunt essent tradendae, jam non fieret condemnatio, quia repugnaret hoc juri et commodo reipublicae quae merces prohibuit." Apply this in the same manner.-But if the goods sold were to be delivered in England, where they are prohibited ; the contract **[345]** is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the State if such an action could be maintained.

The gist of the whole turns upon this; that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price ; and the plaintiff had undertaken to sand it into England, or had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England. Therefore, let the rule for a new trial be discharged.

The three other Judges concurred.

The end of the Trinity term.

[1]2 Bur. 1077, since also reported in 1 Black. Rep. 234, 256.

Referring Principles:

IX.6 - No restitution in case of knowledge of illegality of performance