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The argument contained in them was not, in any thing material, different from that which occurred in the case of Cantley, 11th February 1790, No 87. p. 9550.

On advising the memorials, the LORDS, by a small majority, passed the bill."

Reporter, *Lord Justice-Clerk.*

Act, *Abercromby.*

Alt. *Cullen.*

S.

Fol. Dic. v. 4. p. 32. Fac. Col. No 144. p. 286.

No 89.

1791. *January.* NISBET'S CREDITORS *against* ROBERTSON.

An heritable bond was granted for the price of smuggled goods by a merchant in Scotland to his correspondent in Holland, who was accessory to the importation; the bond was assigned for value to a third person, who took infestment on it. On the bankruptcy of the debtor in the bond, the trustee for his creditors brought reduction of the security on the score of its being *pactum illicitum*, and the LORDS reduced it accordingly. See APPENDIX.

Fol. Dic. v. 4. p. 33.

1793. *May 15.*

ATTORNEY OF THOMAS CULLEN & Co. *against* DAVID PHILP.

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A merchant settled abroad, whether a foreigner or a native, who is accessory to smuggling goods into this country, has no action for the price of them.

THOMAS CULLEN and Company, merchants, at Ostend, had been in the practice of supplying David Philp at Boarhills in Fifeshire with contraband goods, sometimes on commission, and sometimes at shore price, that is, a price payable on delivery of the goods in Britain, and sufficiently high to ensure the vender against the risk of seizure.

Captain Oldfield always had the charge of the vessels employed by Cullen and Company on these occasions. By a letter from Cullen and Company to Philp in January 1789, they informed him, that Oldfield was to sail in a few days from Ostend, with a quantity of gin and brandy; that he meant first to call at Boarhills, when he expected Philp would be prepared for him, and assist him in the disposal of the cargo.

The letter was so expressed as to leave room for arguing, that the goods were the property of the captain.

Oldfield accordingly arrived at Boarhills soon after. Philp agreed to take a considerable quantity of the cargo, and accepted bills for the price, payable to Thomas Potts, nephew to Thomas Cullen, who acted as supercargo on this occasion. The greater part of the goods were seized in the landing.

The bills were indorsed to Sir William Forbes and Company, for behoof of Cullen and Company, to whose account they were immediately placed; and

Philp being charged for payment by their attorney, brought a suspension, in which

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Both parties agreed, that on the principles established by the case of Cantley, 11th February 1790, No 87, p. 9550, and others, if Cullen and Company were accessory to the smuggling, no action could lie; and the one endeavoured to establish the accession by the evidence in process, and the other to show that there was none.

The Court were of opinion, that this adventure was just a continuation of the former illicit trade; and that the interposition of Oldfield was intended merely as a cover to the real transaction, and unanimously adopted the following distinction. When a merchant settled abroad, whether a foreigner or native of this country, simply sells goods to a smuggler, *tantum quilibet*, and makes delivery on the spot, he can maintain action for them in our courts, though he suspected, or even knew, that they were meant to be smuggled into Britain; but if he is accessory to the smuggling, and thereby to an infringement of the laws of the land, (which he is bound to know as far as concerns his trade,) he cannot demand the aid of the British Courts for recovery of his debt. And this, (it was observed,) was not a new doctrine, but established before the case of Cantley, by that of Sibbald against Wallace, in 1779.*

THE LORDS suspended the letters *simpliciter*.

On a motion for expenses by the counsel for Philp, it was observed, that the principle of the judgment was *in turpi causa melior est conditio possidentis*, and therefore that no expenses ought to be awarded.

Lord Reporter, Stonefield.
Alt. David Cathcart.

Act. Dean of Faculty, W. Murray.
Clerk, Home.

D. D.

Fol. Dic. v. 4. p. 32. Fac. Col. No 49. p. 102.

1793. May 15.

REID and PARKINSON against JAMES MACDONALD, JOHN ELDER, and Others.

MESSRS KIRKPATRICK and Company, natives of Scotland, settled at Ostend, had been in the practice of carrying on an illicit trade with persons in this country, and, in particular, had formerly been engaged in a smuggling adventure with Macdonald and Elder of Inverness, and others. In spring 1790, Macdonald, &c. having embarked in a new scheme of the same nature, transmitted bills, for the price of the goods to be furnished, to Messrs Kirkpatrick and Company. These dealers at first undertook the commission, but afterwards declined executing it, on account of the disagreeable consequences (as they said) with which such adventures are attended, alluding to the late cases where action had been refused. They, however, recommended a person whom they called

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Found in conformity with the above.

* Not reported, see APPENDIX.