1789. *January* 13. TRUSTEES of HENRY GREIG *against* JOHN DAVIDSON.

No 86.
The court sustained action at the instance of a Scotsman carrying on trade abroad, for the price of contraband goods furnished by him to a person in Scotland.

GREIG, a Scotsman, who was settled as a merchant at Gottenburg in Sweden, shipped, in consequence of the commission of Davidson, a quantity of tea and other prohibited goods, on board of a vessel bound for the coast of Buchan in Aberdeenshire. Greig himself paid the freight; which was so far above the ordinary rate, that the excess appeared to be a compensation for the risk attending a smuggling voyage; and in the bill of lading which he took from the shipmaster, the hazard of seizure, as well as that of the sea, was excepted.

An action having been brought against Davidson for payment of the goods, he *pleaded* in defence, That as the pursuer was a native of this country, though residing abroad, he was in a different situation from that of a foreign merchant; insomuch that the degree of participation in the smuggling adventure, which was apparent from the circumstances mentioned above, precluded his right of action.

The Lord Ordinary, in a process of advocation, affirmed a sentence of the Judge Admiral repelling the defence; and the Court, on advising a reclaiming petition and answers,

Adhered to the interlocutor of the Lord Ordinary.

A second reclaiming petition however having been presented, the Court expressed doubts of the preceding judgment and appointed the petition to be answered; but in the mean time the dispute was compromised by the parties. A similar question was afterwards determined in the case of the Attorney of James Cantley *contra* Thomas Robertson, 11th February 1790, *infra*.

Lord Ordinary, *Dunsinnan*. Act. *Abercromby*. Alt. *Hay, Maconochie*. Clerk, *Home*.
S. *Fol. Dic. v.* 4. *p.* 32. *Fac. Col. No* 53. *p.* 94.

1790. *February* 11.

ATTORNEY of JAMES CANTLEY *against* THOMAS ROBERTSON.

No 87.
The Court refused to sustain process at the instance of a Scotsman carrying on trade abroad, for the price of contraband goods, furnished by him to a person in Scotland.

ROBERTSON sent, by a ship bound to Rotterdam, and from thence back to Scotland, a commission to a trader in that place for a quantity of gin. The person to whom the commission was directed not being found, the shipmaster applied to Cantley, then settled at Rotterdam, but who was a native of Britain, had formerly carried on a smuggling traffic in the north of Scotland, and still held correspondence with people of this country engaged in illicit trade.

Cantley on this wrote to Robertson, desiring authority to execute his order, and requiring either a remittance for paying the shipmaster his freight in money, or an order for the payment of it in goods.

Robertson in answer gave the authority required, and ordered the freight to be paid in goods at the rate of six shillings per anker, being greatly beyond

the allowance in fair trade. He added, in a postscript to his letter, that "he expected his goods to be delivered at Collieston," which is a noted place of rendezvous for smugglers. No 87.

Cantley shipped the goods, and took from the shipmaster a bill of lading, containing an exception of sea-hazard and searchers; and it bore the receipt of the above-mentioned rate of freight.

The cargo was seized on the coast of Scotland by the officers of the revenue; and Cantley having raised an action, in the name of an attorney, against Robertson,

The defender *pleaded*, The action being founded on a *pactum illicitum*, ought to be dismissed, the pursuer having been an accessory to the smuggling transaction. Mere knowledge, it may be admitted, that the buyer is acting for a British smuggler, and that smuggling is the object of the transaction, is not sufficient to constitute such accession; but, joined to this knowledge, there was, in the present case, an actual participation, by the pursuer's soliciting the commission, and by the whole other circumstances of the case.

The laws of this country will not permit a foreigner, more than a native, to violate them. Hence, the goods of a foreign merchant seized in the act of smuggling, are equally liable to confiscation as if they had been those of a subject; nor will action at his instance be sustained, if he be a party to the smuggle. But the accession of a native to an adventure in illicit trade, will be evinced by slighter circumstances than where a stranger is concerned, who owes no allegiance to our laws. Were a rebellion to exist in this country, a native residing abroad who should furnish arms which he knew were to be employed against the Government, would stand in a very different predicament from that of a foreigner entering into the same transaction.

It may be added, that nothing contributes so much to the increase of contraband trade, as the interference of natives of Britain when abroad, whose knowledge of the country, and of its inhabitants, gives them so peculiar an advantage, which therefore it is highly necessary to check.

In conformity to these observations was the decision in 1779, in the case of Sibbald and Company *contra* Wallace; * and in the Court of King's Bench, the English judges, in the case of Biggs and others *contra* Lawrence, 18th November 1789, refused action on this ground, that the plaintiffs, British subjects, carrying on merchandise abroad, acted illegally in furnishing goods which they knew were to be imported into Britain in defiance of its revenue laws.

Answered, A merchant having his residence abroad, whether a native of this country or a foreigner, is entitled to action here for the price of commodities sold by him, although he knew it was the intention of the buyer to import them in prejudice of the revenue, if he himself had no farther concern in the smuggle. This seems to be admitted; and were there any law to the contrary,

* Not reported; See APPENDIX.

No 87. it would lay such an embargo on the freedom of the commerce, as it could hardly survive. Nor is it any objection to so obvious a doctrine, that British subjects in foreign countries are prevented by their allegeance from furnishing, in the way of trade, warlike implements to be employed against our Government, which would be a true crime, a misprision of treason; whereas trespassing upon the revenue laws is not in itself immoral, being rendered criminal by positive law only, which is not of force beyond its territory.

Accordingly, that action ought to be sustained in such cases, has been repeatedly found, Walker *contra* Falconer, 21st February 1757, No 80. p. 9543; and Moir and Irvine *contra* Steven, 13th November 1765, No 82. p. 9545. Nor is the case of Sibbald and Company of a contrary tendency; for there the smuggling bargain was entered into, not with a merchant residing abroad, but with a native at home, who engaged himself to import contraband goods in defiance of the very laws to which he was subject at the time.

In like manner, in England, action was sustained for the price of contraband goods, because, in the words of Lord Mansfield, "though the seller knew what the buyer was going to do with the goods, he had no concern in the transaction itself;" Holman *versus* Johnson, Cowper's Reports, p. 341. As to the case of Biggs *contra* Lawrence, the transaction took place between parties in Great Britain, in the same manner as in that of Sibbald above-mentioned.

Before the defence be sustained then, some accession to the running of the goods must be shown on the part of the pursuer. This could only be, by his having an active hand in the importation, by his being concerned in the profit or loss of the adventure, or by the payment of the price being made to depend upon the safe arrival of the goods. Nothing of that kind however appears from the *species facti;* nor indeed any thing farther on the part of the pursuer, than the knowledge of a design to run the goods, and a natural desire of a profitable transaction in the way of his business. It seems impossible to conceive that he could have been liable to penalties for illegal importation had he returned to Scotland, as the shipmaster or the defender would have been; which is the criterion by which to ascertain the point of accession.

Replied, It appears from the report in the case of Holman, that the sellers were a foreign company bearing no allegiance to Great Britain.

The LORD ORDINARY sustained action; and the Court at first adhered to that interlocutor.

But a reclaiming petition, with answers, having come to be advised,

By some of the Judges, the idea seemed to be entertained, that in cases of this nature, even without participation, from knowledge alone of the buyer's purpose, the sale becomes an illegal act, so as to bar action. A British merchant carrying on trade abroad, it was observed, is by no means to be considered in the same light as a foreigner. He still continues bound by his allegiance to this country. If, in furnishing arms to rebellious subjects, he would

be guilty of treason, his affording to smugglers the means of infringing the revenue-laws is also a public offence, even smuggling being a species of rebellion. No 87.

THE LORDS, by a very narrow majority, "altered their former interlocuter, and assoilzied the defender."

A reclaiming petition having been presented against this judgment, it was, by the same narrow majority, refused without answers.

Lord Ordinary, *Stonefield.* Act. *Dean of Faculty.* Alt. *Maconochie.* Clerk, *Home.*

S. *Fol. Dic. v. 4. p. 32. Fac. Col. No 112. p. 210.*

1790. *July 7.*

The ATTORNEY of YOUNG & Co. *against* ALEXANDER IMLACH.

No 88.
Found in conformity with the above.

IMLACH commissioned a quantity of tobacco and rum from Henry Greig, a merchant in Gottenburg, but a native of Scotland. The bill of lading bore the exception of seizure; and it was evident, that Greig knew of the goods being destined for a smuggling adventure. From his letters it appeared, that he had been looking out for a cargo of such contraband goods for Imlach's use, and that, on a former occasion, he had employed his own agents at London to make an insurance of a cargo of that sort sold by him to Imlach, against the hazard of seizure by the revenue officers, as was evinced by the amount of the premium.

The goods were seized on their arrival in the Frith of Forth, and carried into condemnation. Greig afterwards drew bills on Imlach for the value, in favour of Young and Company, his agents in London.

In consequence of a commission likewise from Imlach, John Christian, a native of the Isle of Man, who carried on trade at Dunkirk, of which town he was a burgess, shipped for him a quantity of Geneva. The bill of lading in this case, mentioned the ship's being bound for Bergen, and expressed nothing as to the hazard of seizure. It appeared, however, that Christian's agents at London had, at his request, insured part of this smuggling cargo for Imlach. The vessel carrying the goods happened to be totally wrecked in the Murray Frith.

Imlach having granted a promissory note for the value, it was indorsed to Young and Company, who were also agents for Christian. They accordingly, in the name of an attorney, brought an action against him, for payment of both parcels of goods, before the Admiralty-court, where they obtained decree. A bill of suspension was presented, which the Lord Ordinary reported to the Court, who appointed memorials on the cause.