

1789. *December 4*, and 1790, *February 11*. JAMES CANTLEY, Merchant in Rotterdam, *against* THOMAS ROBERTSON.

PACTUM ILLICITUM.

The Court refused to sustain process at the instance of a Scotchman carrying on trade abroad, for the price of contraband goods furnished by him to a person in Scotland.

[*Fac. Coll. X. 210 ; Dict. 9550.*]

1789. *December 4*.—ROCKVILLE. It always appeared to me extraordinary that natives of this country should have it in their power to go abroad, set the laws of Britain at defiance, and then claim the aid of those laws.

PRESIDENT. My prejudices are strong against smuggling, as a thing illegal and detestable. It is probable that Cantley was formerly a smuggler at Aberdeen, and that, for a like business, he settled at Rotterdam. Could he show that he is a foreign merchant, I should support his plea; but I cannot say that he was free from participation in this smuggling adventure. I cannot relish the doctrine, that it is of no moment to take notice of such *foreign merchant*, as he is called. In the English case quoted, the seller had no concern in the transaction; but, here, Cantley corresponded on the subject of the smuggling.

JUSTICE-CLERK. Smuggling is a *malum in se*, but the Court has repeatedly determined that the objection lies not against a merchant residing abroad, and selling commodities which may be run into Britain.

HAILES. In former cases I spoke against that sort of men called foreign merchants, but I was overruled. As the decisions stand at present, I must, for the sake of uniformity in judgment, adhere to what has been found formerly.

On the 4th December 1789, “The Lords decerned in terms of the libel;” adhering to the interlocutor of Lord Stonefield.

Act. H. Erskine. *All.* Allan M’Conochie.

Diss. Rockville, Monboddo, Dreghorn, President.

1790. *February 11*.—MONBODDO. The question is, Whether a Scotsman, residing abroad, may take advantage of the law of Scotland to recover the value of goods which he had furnished, in the view of their being brought into this country contrary to law.

HAILES. Viewing matters independent of decisions, I always thought it odd that a British subject, by going abroad, should be allowed to forget the laws of his own country. It has been questioned, “Whether a man can renounce his allegiance altogether to his native country, assume an allegiance to another state, and become, to all intents and purposes, a foreigner?” But it is more difficult to understand how a man may retain his right of succession, and

the power of returning as a native, and yet be allowed to act, in one instance, as if he had ceased to owe allegiance to his native country and obedience to its laws. But so the decisions of this Court have found; and whenever I stated my doubts, I was silenced with the words, "foreign merchant." So the remedy seems to lie elsewhere.

ROCKVILLE. I always thought it strange that a Scotsman should be allowed to pursue for payment of goods illegally furnished. Lord Kenyon well says, "A person suing in a court of law, must show a fair case."

DUNSINNAN. I admit that it is difficult for a man to shake himself loose of the law of his own country. But the decisions of the Court go against that principle. Here, however, there are specialties implying accession.

ESK GROVE. Local laws are to be distinguished from general universal laws. What is provided for the benefit of the revenue, must not hurt the general rules of commerce. A British subject, settling abroad, is no longer bound to the municipal laws of his own country: were he so bound, it would be an embarrassment on our countrymen in foreign parts. The bill of lading is the act of the shipmaster. The foreign merchant, unless otherwise ordered by the employer, must take it as the shipmaster chooses to give it. All the argument of the smuggler goes to show, that, if the goods had never been landed at all, still the foreign merchant must have stood the loss; and this puts the foreign merchant in a worse situation than the smuggler himself. The judgment now produced from the King's Bench confirms my opinion. *There* the company was held to be an English company.

SWINTON. Cantley, while in the knowledge of our revenue laws, aided the act of smuggling.

PRESIDENT. Cantley is a Scotsman, and the goods were smuggled. Cantley owes allegiance to this country, and yet he might have sold the goods, from his warehouse or cellars, to any one, if he had done no more. Suppose that there was a rebellion in Scotland, and that a commission goes to a Scotchman abroad for purchasing arms to be put in the hands of the rebels, he corresponds with the rebels and furnishes the arms,—this is high treason; and the foreign merchant, if he be found, will be hanged. The same is the case here, only *mutatis mutandis*, for the principle is the same. In the case of *Holman*, it is plain that the Court of King's Bench proceeded on this, that the company was a foreign house; and that the case was not affected by this circumstance,—that an Englishman was a partner for an eighth. The last case decided in the King's Bench went upon the notion of allegiance being due by the Guernsey Company. If Cantley has not infringed the laws of his country, my opinion goes for nothing.

HENDERLAND. The goods were lawfully sold. Cantley did not agree to land them in Britain. In the case of *Holman*, it was no matter whether he was a foreign merchant or not; the principle of that decision was, that he did nothing beyond the contract to sell: the late case was held to be that of a contract made in England. A native of Britain going abroad, must still obey the laws of his country, so far as they are *public laws*; but he is not bound to carry the knowledge of revenue laws along with him.

On the 11th February 1790, "The Lords found that no action lay, and therefore sustained the defence;" altering their interlocutor of the 4th De-

ember 1789; and, on the 2d March 1790, they “refused a reclaiming petition.”

Act. H. Erskine. *Alt.* Allan M'Conochie.

Diss. Alva, Eskgrove, Stonefield, Hailes, Henderland.

N. B. The alteration, 11th February 1790, was occasioned by the absence of Lord Justice-Clerk through indisposition. From a like cause, Hailes was absent 2d March 1790, though it is probable that he would have concurred in refusing the petition, as the last interlocutor seemed most consonant to principles.

1790. *February 24.* The CORPORATION of SHOEMAKERS of PERTH *against* ELIZABETH M'MARTIN and DANIEL CAMERON.

BURGH ROYAL.

The daughter of a soldier found not entitled to authorise her husband to carry on a trade within burgh.

[*Fac. Coll. X. 232; Dict. 2014.*]

HAILES. The defenders' counsel makes the most of what I must consider as an untenable plea. I am not quite satisfied that the statute in question was meant to be extended to Scotland; but I am satisfied that the legislature had chiefly in view the *companies* in London, and other great cities in England. The statute could not mean to consider what trades women were apt and able to exercise in every little burgh throughout the kingdom, or to suppose that they were apt and able to exercise every one of them. It is enough that they might have qualifications fitted for the exercise of some one or other of them; for example, brewers. Our old laws are full of female brewers. In ancient times all baking was performed by women; and we learn from Thucydides, that at Platea, during the siege, there were 200 she-bakers. Women may be habit-makers; and they have, with much success, practised the business of apothecaries and druggists. The office of vintners is exercised by women, notwithstanding an old Act of Parliament to the contrary. I suppose that women are capable of being fishmongers; for, in some countries they have occasionally practised the trade of legislation. They may be weavers of lace; and there is nothing to prevent them from being weavers of linen. Women have been good artists in that branch. Because an old preamble is prefixed to a new statute, the defenders conclude that the new statute must be interpreted by the old preamble. If a soldier may exercise by others any trade which others are apt to exercise for him, any man of quality, who ever served in the army, may, by journeymen and apprentices, take all unfreemen, tailors, weavers, &c. under his protection. In the county of Lanark alone there are half-pay officers enough