

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.

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Bonaventura Gibert, a Spaniard, as fit to be trusted with their business. He having accordingly (as it was said) furnished the goods, the bills were transferred to him.

Elder, one of the Inverness merchants, was at Ostend when the ship was loaded. The vessel, which belonged to Macdonald and Elder, was cleared for North Faro, although the Isle of Sky was its real destination.

Kirkpatrick and Company, after declining the commission, continued to furnish the Captain with necessaries for himself, and to advance him money for the repairs of the ship.

The goods arrived, but in a damaged state.

The bills were indorsed by Gibert to Reid and Parkinson, for behoof of Kirkpatrick and Company, without value. The acceptors being charged for payment, raised two suspensions, and

*Pleaded*; It is evident, from the correspondence and circumstances of the case, that Gibert was the clerk of Kirkpatrick and Company, who were accessory to the smuggling, and acted as agents for the suspenders.

*Answered*; There is no evidence that Gibert was connected with Kirkpatrick and Company, and if he had, as the goods were furnished to the agent of the suspenders, who was on the spot, and were by him put on board a vessel which was not the property of the chargers, and as they had no concern in the after proceedings, it would be contrary to the principle of former cases, and the opinion of the Court in the case of Cullen and Company against Philp, (*supra*) to deny action for the price.

The Court were satisfied, from various circumstances of evidence, that Gibert was a clerk of Kirkpatrick and Company, and a person interposed by them to cover their own concern in the transaction. Gibert's letters, in particular, were held to be evidence of this, being in the same hand with Kirkpatrick's, and shewing a thorough acquaintance with the English language. The Judges, in general, were also of opinion, that Kirkpatrick and Company, by their advance of money for the vessel, the false clearances, and their delivery of the goods on board the vessel, had acted as agents for the business, and become participant of the smuggling. Some were at first moved by the circumstances of Elder being on the spot, at the loading of the vessel, and held, that the evidence of accession was defective. But, in the end, an unanimous judgment on the above grounds was given.

The Lord Ordinary had 'suspended the letters *simpliciter*.' The LORDS 'adhered;' and on 30th May 1793, refused a reclaiming petition without answers.

Lord Ordinary, *Dreghorn*.  
Clerk, *Sinclair*.

A& Geo. *Fergusson*.

Att. *Ja. Grant, Cha. Hay*.

D. D.

*Fol. Dic. v. 4. p. 32. Fac. Col. No 50. p. 103.*