

this kingdom, from the date of the citation in this process till payment; but found no costs of suit nor expenses due; and decerned.'

No 77.

Lord Ordinary, *Alva.* Act. *Anstruther.* Alt. *M'Laurin.* Clerk, *Orme.*
Fac. Col. No 79. p. 153.

DIVISION IX.

Foreign Decrees, and other Judicial acts.

SECT. I.

Actio rei Judicatæ.

1713. December 3. JOHN GODDART against SIR JOHN SWYNTON of that Ilk.

JOHN GODDART having right from Ursilla Goddart his mother, administratrix to the deceased Robert Goddart, her husband, to a judgment obtained by her before the Court of Queen's Bench, against Sir John Swynton, for L. 390 Sterling, besides costs, as having been co-partner with the defunct and other eight merchants in a trading voyage to Guinea, and also cashier of the company who had intromitted with their effects without counting, pursued Sir John before the Session upon the foresaid judgment of the Queen's Bench, as a sufficient probation, and craved the Lords would interpose their authority in order to execution.

Answered for the defender, *imo*, It is neither proven that the pursuer's father was a partner of the company, nor that the defender was their cashier; *2do*, *Esto* these things were proven, the judgment of the Queen's Bench cannot be considered as *res judicata* here; because, *imo*, It was not an ultimate sentence in England, being subject to the review of the Court of Chancery, and the Lords of Session being a supreme court of law and equity here may review it, seeing it were absurd to exclude the defender from his remedy in equity, because the execution happens in this country; for should the Lords of Session confirm the judgment of the Queen's

No 78.

A co-partner in a trading company recovered a decree of the Court of King's Bench, against the cashier of the company, for his intromissions. The cashier afterwards residing in Scotland, the Lords allowed execution to pass upon the decree, the pursuer instructing that he was a partner, and that the defender was cashier or intromitter.

No 78. Bench, the defender would be cut off from his remedy in equity before the Chancery of England ; there being no resort by the treaty of Union from this Court to any of those in Westminster Hall ; *2do*, *Par. in parem non habet imperium, extra territorium jus dicenti impune non paretur* ; and where the sentences of Sovereign Courts are put to execution in any other country, it is *ex comitate*, not *ex necessitate* ; so with us, the decrees of the Sovereign Courts in England cannot have the effect of *res judicata*, unless the decrees of Session be received as *res judicata* there. And the defender has good reason to allege that the decrees of our Session have no manner of authority in England ; for even contracts and bonds for borrowed money, though never so formal according to the law of Scotland, are not sustained in England, unless they be astructured in the way and manner that the law there requires : Now, if the English be so tenacious of their own laws and forms in the matter of contracts, which are *juris gentium*, how much more reasonably may they be supposed to be so in judicial proceedings, which depend upon the particular laws of every country. We have a late famous instance, the case of Murray of Brughtoun and Sir Robert Murray, *alias* Crichton, where the Irish Judges having refused to sustain writs concerning some lands in Scotland and Ireland, improven by sentence of the Lords of Session, the sentence of the Irish Judges was overturned, upon an appeal lodged in the House of Peers, and the writs were approved.

Replied for the pursuer, *imo*, The Queen's Bench is a Supreme Court in every respect, except as to the House of Peers ; for there lies no appeal from it to the Chancery. And the Lords of Session have only an *officium nobile* in causes proper to themselves ; for, as by the treaty of Union no sentence of any judicature in Scotland can be reviewed or altered in Westminster Hall, so it is equal to think the same ought to be observed as to the sentences of English Judges ; *2do*, For the benefit of trade and commerce, and keeping up a right correspondence among nations, contracts, in relation to moveables, entered into according to the solemnity of the place, are understood to be binding every where, even where these solemnities would not otherwise be regarded. Thus we sustain process upon English bonds and contracts, and confirm executors upon English testaments. And there is the same parity of reason and expediency, (which are the foundations of the law of nations,) for doing so with respect to judiciary proceedings, which, by litiscontestation, become judiciary contracts, equally binding as those entered into by formal consent. This is confirmed by the authority of Huber in his *pralect. ad tit. ff. de legibus, &c.* in a digression *de conflictu legum in diversis imperiis*, §. 6. Nay, if it were otherwise, the effect of sentences might easily be eluded by the party's shifting his residence ; *2do*, The case of Murray of Brughtoun is not to the purpose, because that concerned reduction of rights of a land estate in Ireland ; and it is yielded that a foreign jurisdiction cannot extend to lands or effects lying *extra territorium*, but only to personal action upon contract, against persons subjected to the jurisdiction at the time. And as we sustain English writs according to their

forms; without enquiring nicely whether they allow of writs according to our forms; the same ought to hold in the judiciary proceedings aforesaid; because, by so observing the law of nations, we sustain no prejudice, but do rather find it an advantageous mean to facilitate commerce.

No 78.

Duplied for the defender; The opinions of the Doctors concern only sentences in the last resort, which the judgment of the Court of Queen's Bench is not; therefore the case must be tried upon the merits of the cause, without respect to the judgment. Nor doth Huber allow any farther authority to decrees pronounced in the last resort in foreign courts than *ex comitate*, and with two qualities, viz. That they be founded on principles agreeable to the law of nations, and contain nothing contrary to the particular laws of the place where they are craved to be put in execution. We have two instances of this kind in *Sande, decis. lib. 1. tit. 12. def. 5.*; and so a decree of the Chancery of England against the Earl of Buchan, No 82. p. 4544, founded on before the Session, was reviewed and restricted by the Lords.

THE LORDS sustained the decree of the Court of Queen's Bench, the pursuer instructing that his father was a partner, and that the defender was cashier or intromitter, to make the defender liable to the pursuer for his proportion.

Fol. Dic. v. 1. p. 323. Forbes, MS. p. 7.

1720: December 29.

HELENOR EDWARDS, Merchant in London, *against* KATHARINE PRESCOT of London, now Residenter in Kelso.

No 79.

KATHARINE PRESCOT being lodged in the house of Helenor Edwards, a fire broke out (as was alleged) in Mrs. Prescott's chambers upon the 15th October 1706, by which the house, &c. was entirely consumed. By the common law of England at that time, the person in whose house or chamber a fire happened, was obliged to make up the damage done in or upon the said house, without burdening the plaintiff with a proof of the defender's fault or neglect; the law presumed, *Incendium culpa inhabitantium fuisse ortum*. Upon this law, Mrs Edwards brought an action against Mrs Prescott before the Court of Queen's Bench, as she in whose chambers the fire broke out; and issue being joined upon the fact, the jury brought in their verdict for the plaintiff; and accordingly a decree was pronounced against her for L. 240 Sterling. To evade the effect of this decree, the defender retired into Scotland; but the pursuer having also laid an action against her here, founded upon her English decree, the question occurred, 'If an authentic extract of a decree of the Queen's Bench, ought to be sustained as *probatio probata* in Scotland, upon which execution must be decerned, unless it be shown contrary to the law of England; or if it is only to be sustained as a libel?'

The Lords allowed execution to pass upon a decree of the Court of King's Bench against the defender residing in Scotland, unless something competent in law or equity could be objected against it.