No 79.

fender's first argument falls at once to the ground: And, as to the *second*, comity, if it has any effect at all, must infer a presumption that all things are fairly carried on, and that the decree is just and equitable, unless the contrary appear from the decree itself: This matter is fully handled above, and it is particularly taken notice of, what confusion it must occasion in the way of an appeal, if the Lords should refuse their authority to an English decree, because the proof is not recorded. As for Goddard's case taken notice of in the last place, it comes noway up to the present; for there the Lords were of opinion, that the same relief was competent to the party in England which they gave him here; which, if the defender could here pretend, she should have been admitted in the terms of the decision in the same way to plead that relief; but that there is no foundation for, the decree being in every point unexceptionable according to the English forms; for here the argument from the decision is directed against the evidence upon which the decree proceeded, which having been by witnesses in a court which keeps no record, it is impossible that any relief could be had in that point, not even were the question before the Parliament; whereas, in Sir John's case, the evidence was by writ; in which case the law of England would allow relief, were there any thing overlooked.

'The Lords found, That execution ought to pass on this decree of the Queen's Bench, unless something competent in law or equity be objected against it.'

Against which a reclaiming petition was offered, but one of the parties dying in the interim, the cause was never further insisted in.

Fol. Dic. v. 1. *p.* 323. *Rem. Dec. v.* 1. *No* 21. *p.* 43.

1768. *July* 14.

Archibald Sinclair of the Island of Jamaica, and William Sutherland his Attorney, *against* Mrs Frazer, and her Husband Alexander Frazer, Younger of Strichen, Esq.

No 80.

Found, that a foreign decree, bearing to have been *in foro contentioso*, had not the effect of a *res judicata* in Scotland, but entitled the party claiming under it, to plead that the *onus probandi* rested on his opponent.

Mrs Frazer having succeeded, when under age, to an estate in Jamaica, her tutors appointed Archibald Sinclair, and one Mr Archdeacon, attornies for managing it. Mr Sinclair, however, alone acted.

When Mrs Frazer came of age, another gentleman was appointed in Mr Sinclair's place; but no settlement of accounts appears to have been made with Mr Sinclair.

The estate was sold in 1763; and, in 1767, Mr Sinclair brought an action in this Court against Mrs Frazer for a specific sum, awarded by a judgment of the Supreme Court of Judicature in the island of Jamaica, as a balance due the pursuer upon an account current with the defender. The record produced was certified by the clerk of court; his subscription by the secretary of the island,

a notary public; and the secretary's subscription was confirmed by that of the governor; and the great seal of the island was appended. No 80.

The defender made some objections to the contents of the decree in point of form; but, when the cause went to the House of Peers, they were considered as arising entirely from unacquaintance with the nature of the English process.

An objection, however, of another sort was offered, viz. That the compearance made for the defender in Jamaica was not with her knowledge or authority. She therefore argued, that the decree was to be considered as a decree in absence, and ought to be opened up in course, as decrees of absence usually are, when the grounds of them are questioned: And she accordingly craved, that the pursuer should produce the vouchers of the debts he claimed, in order to introduce a fair count and reckoning between the parties.

'THE LORD ORDINARY ordered the vouchers to be produced.'

The pursuer reclaimed to the inner-house, and *argued*, 1*mo*, That the decree of a Supreme Court was to be held *pro veritate*; so that, if the decree he produced was not disputed to be, in fact, the decree of a tribunal over which the courts in Scotland had no jurisdiction, it was as incompetent for them to examine into the grounds of decision, as to open up a judgment *in foro*, of their own; 2*do*, That, if the decree is not to be acknowledged as a *res judicata*, it ought, at least, to throw the *onus probandi* upon those who object to it.

He particularly urged, that decrees of foreign courts of justice were every where put in execution *ex comitate*; but that, in a case like the present, where the decree was pronounced by a British Court, there was even a necessity to give it effect; since, otherwise, the commerce and due connection between the different parts of the empire could not be preserved.

The authorities the pursuer founded on were, *Voet, de re judicata*, § 41.; *Huber, in rat. ad leg.* 75. *De Jud.*; *Mynsingen observat. cent. obs.* 69.; Justice of the Laws of the Sea, p. 427.; 1. Rolls ab. 929.; *Molloy de jure maritimo, l.* 3. *cap.* 8. § 8.—Decisions, Edwards against Prescot, No 79. p. 4535.; Wedderburn against Keith in 1760;* and Laycock against Clark, No 85. p. 4554. He likewise set forth, that decrees of the Court of Session were received in the Court of Chancery in England, and execution decreed upon them. It does not appear from the appeal cases, out of which alone this report is collected, that any authorities were quoted by the defenders.

'THE LORDS unanimously adhered to the Lord Ordinary's interlocutor.'

This determination was reversed in the House of Lords; and the principle of the decision is given in the judgment; the terms of which were,

1771. *March* 4.

'It is declared, that the judgment of the Supreme Court of Jamaica ought to be received as evidence *prima facie*, of the debt; and that it lies upon the

* *See* General List of Names.

No 80. defendant to impeach the justice thereof, or to show the same to have been irregularly obtained. It is therefore Ordered and Adjudged, That the several interlocutors complained of be, and the same are hereby reversed.

Fac. Col. No 13. p. 384.

No 81. 1776. *December* 13. Johnston *against* Crawford and Meason.

The Lords found, that a decree-arbitral pronounced between parties in Holland, by Dutch arbiters, on which execution was pursued against the representatives of one of the parties in this country, was not challengeable on the head of iniquity.

See p. 669. *See* Appendix.

SECT. II.

Exceptio rei Judicatæ.

1698. *January* 27. Sir John Cochran *against* The Earl of Buchan.

No 82. A bond betwixt two Scotsmen in London, in the Scots form, and registrable in Scotland, was challenged by the granter before the Court of Chancery, and was reduced, the creditor having appeared, but afterwards withdrawn. This was not found such a *res judicata* as to

Sir John Cochran having assisted the Earl of Buchan to a great match of an English lady, who had L. 10,000 Sterling of tocher, as *proxeneta* in the case, he got a bond of L. 1000 Sterling if he were able to effectuate the marriage; and, having charged the Earl, he gave in a bill of suspension, on this reason, that finding himself over-reached, and the marriage having taken effect without Sir John's intercession, he had tabled the affair before the Judges at Westminster-hall, the debt being contracted there, and wherein Sir John had made affidavit, and deponed; so that there was not only a *litis pendentia*, but a litis-contestation there, which ought to stop any procedure intented here after it was made litigious in England. *Answered*, A pursuit in a foreign judicatory, where both parties are Scotsmen, and the bond drawn in the Scots form of securities, can never afford a declinature of the incompetency of the jurisdiction of the Lords of Session, especially seeing there is not that mutual correspondence betwixt the two supreme courts that the English regard our decreets, but on the contrary rejected them, in the case of Crichton against Murray, *voce* Fo-