

1756. January 6. ——— against ———.

[Kaimes, No. 95 ; *Fac. Coll.* No. 173.]

A MAN pursued another before the Court of King's Bench in England, to recover some wrecked goods belonging to him, that were detained by the defender under pretence of salvage. The issue of the suit was that the plaintiff was cast, and decerned to pay L.60 of costs to the defendant. Upon this decree the defender brought his action before the Court of Session for the payment of the L.60 ; and the question was, Whether this decree was to be held as a *res judicata* in Scotland, so that the judges here must give execution upon it, without reviewing it, or examining whether it was well or ill-founded ? And it carried, by a narrow majority, that the decree in England was not a *res judicata* here ; and accordingly the Lords, having entered into the merits of the cause, found that there was no reason here for giving costs, although it was admitted that, by the law of England, costs were given in every case to the winner.

The President and Lord Kaimes made a distinction betwixt a sentence absolviatory of a foreign court and a sentence condemnatory : the first, they said, by the practice of all nations, gave everywhere an *exceptio rei judicatæ*, and so the President said it had been determined by the House of Peers, in the last resort, in the case of one Captain Hamilton ; but as to sentences condemnatory, the case was different ; nor was there any *comitas* which obliged the judges of one nation to give the aid of their authority for executing the decree of the judges of another nation ; and more especially, such *comitas* in this case would be ridiculous, because there is no *comitas* but where it is mutual, and it is well known that in England they would not have the least regard to a decree condemnatory recovered against any man in Scotland.

*N.B.* The distinction betwixt a decree absolviatory and a decree condemnatory seems to be founded on this,—that to pursue before any court is a thing optional to the pursuer ; and therefore the pursuer seems to enter into a judicial contract with the defender, that if he shall be acquitted the pursuer will molest him no more before the Court of any other nation ; and it is agreed by all lawyers that execution can be sued in one country upon a contract made in another ; but on the part of the defender no contract or agreement can be supposed, that he will pay the money if he is condemned, because it is not *voluntatis* in him to be sued, but *necessitatis*. *Dissent.* Prestongrange.

[This decree reversed in the House of Peers ; and the point is now established, that a decree in England must receive execution here without entering into the merits of the cause : and, upon the Roman principle of a contract by *litiscontestatio*, I think this is good law.]