SECT. III.

Execution on Foreign Decrees.

1756. *January* 7.

JOHN WILSON Collector of his Majesty's Customs at Stockton, in the County of Durham, *against* ROBERT BRUNTON and JAMES CHALMERS Merchants in Edinburgh.

No 84.
Execution not granted upon a decree pronounced in a foreign country, it appearing that the decree was iniquitous. This sentence was reversed on appeal, the respondent failing to appear.

BY an act of the 12th of Queen Anne, cap. 18. made perpetual 4th Geo. I. cap. 12, it is enacted, 'That the Collector of the Customs, or any other person who shall be employed in preserving any vessel in distress, shall, within 30 'days after the service performed, be paid a reasonable reward for the same; and 'in default thereof, the ship or goods so saved shall remain in the custody of the 'Collector, till such time as he, or those employed by him, shall be reasonably gratified for their assistance and trouble, or good security given for that purpose.' And by the same statute it is provided, That if the owners and salvers do not agree upon what is a reasonable gratification, it shall be adjusted by any three of the neighbouring justices of the peace, and that their determination shall be binding on all parties. The statute also provides, 'That goods which are of 'their own nature perishable, shall be forthwith sold by the Collector; and 'that, after deducting all charges, the residue of the price, with a fair and just 'account of the whole, shall be transmitted to the Exchequer, there to remain 'for the benefit of the rightful owner.'

In September 1748, Brunton and Chalmers sent a ship loaded with wheat from Leith to Zealand. The ship was by stress of weather stranded on the coast of England, near the port of Stockton. Wilson, the collector of the customs at that port, upon hearing of the disaster, caused land the wheat, and put it into granaries. Chalmers having got notice of the ship's being cast away, went to Stockton to look after the cargo; and finding that the wheat was damnified by sea-water, and in danger of being totally lost if not soon disposed of, he advertised a roup of it, and offered to depositate the whole money which should arise from the sale in Wilson's hand, as a security for any demand which he might have for salvage. But Wilson would not allow the wheat to be sold, alleging, that he had orders from the commissioners of the customs to stop the sale. Whereupon Chalmers protested against Wilson, that he should be liable for all the damages which might arise by the wheat not being sold.

About six months after this, Wilson applied to three neighbouring Justices of the Peace, in order to have the salvage ascertained. It was accordingly ascertained upon notice given to the owners.

No 84. Some time in the year 1749, Brunton and Chalmers brought an action of trespass upon the case against Wilson before the Court of King's Bench; and the cause having come to trial by a jury at Newcastle, the jury returned a special verdict, finding the facts proved as above set forth, but leaving it to the Court to determine whether Wilson was guilty of a trespass or not.

The Judge at the circuit referred the matter to the Court of King's Bench at Westminster. That Court found Wilson not guilty, and awarded L. 60 Sterling of costs against Brunton and Chalmers.

Wilson brought an action against Brunton and Chalmers before the Court of Session, concluding for payment of the said L. 60 Sterling; against which it was *pleaded* by the defenders, That the decree of the Court of King's Bench could not be the foundation of any execution in this country, unless in so far as the decree was supported in equity; and that the decree pursued on was evidently iniquitous; because, as the wheat had perished through the fault of the pursuer, in not allowing it to be sold, he ought to have been found liable to them for the damage thereby sustained.

Answered for the pursuer, 1*st*, That as the defenders did not offer to the pursuer the salvage-money, he was entitled by the statute of the 12th of Queen Anne, to retain the cargo until that was paid; and therefore he was justly acquitted, and costs decreed to him by the Court of King's Bench. 2*dly*, That it could not now be enquired, whether the Court of King's Bench had judged right or not, for *res judicata pro veritate habetur*, and that not only within the territory where the judgment is pronounced, but also *ex comitate* in foreign countries, agreeable to the opinion of Voet. in his commentary *tit. De re judicata*, No 41, where he observes, that the Judge of one territory ought to interpose his authority for carrying into execution the sentence pronounced by a Judge of another territory, without entering into a thorough discussion of the judgment. His words are, 'Nec eam ad examen penitus revocet, sed pro justitia ejus ac æquitate præsumat.' From this rule he only mentions two exceptions, viz. 'Si animadvertat judex requisitus sententiam latam esse directo 'contra sui territorii statuta circa res immobiles in suo territorio sitas; eadem 'non exsequitur; uti nec si alias absque prolixa causæ cognitione constet sententiam nullam esse;' neither of which exceptions take place in the present case. A sentence pronounced by the Judges in England ought the rather to be carried into execution by the Judges in Scotland, because both territories are under one sovereign, and are but one kingdom; so that *ex necessitate* rather than *ex comitate*, the sentences pronounced in one part of the kingdom ought to be carried into execution in the other.

Replied for the defenders; The decree was most iniquitous; for that by the statute 12*mo Annæ*, the collector of the customs, or person who saves the cargo, is directed to sell such goods as are by their nature perishable, and therefore as the wheat was not only perishable, but actually perishing, the pursuer ought to have sold it, although the defenders had not required it to be sold. Further, by the statute the pursuer could only retain the

No 84.

cargo until he got security for the salvage money, which the defenders offered him, by allowing him to retain the price of the cargo until the salvage money was paid. It is highly proper, that a certain *comitas* be observed by the Judges of different countries, but the only effect of a *comitas* is to presume in favour of a foreign decree, that it was just until the contrary be shown; but where the injustice is made evident, there Judges ought not to interpose their authority to legitimate injustice done to private parties. This is the opinion of Groenewegen in his treatise *de legibus abrogatis*, *ad L.* 75. *ff. de judiciis.* The same is the opinion of Voet, who, in the place cited for the pursuer, and in his commentary upon the title *de constitut. principum*, *par* 2. only presumes for the justice of the decree. Agreeable to these principles the Court of Session have often decided; particularly Edwards against Prescot, No 79. p. 4535. where it was found, that execution ought to pass upon the decree of the Queen's Bench, 'unless something competent in law or equity could be objected against it.' Neither does it vary the case that Scotland and England are under one sovereign, and are now one kingdom; for it is a fundamental article of the treaty of union, that each of the two kingdoms should, after the union, be still governed by its own laws; and therefore a decree of any of the courts in England has no more force in Scotland than a decree pronounced in a foreign country would have.

'The Lords refused to give execution for the L. 60 Sterling of costs awarded by the Court of King's Bench.'

Reporter, *Kames*. Act. *Grant*. Alt. *Brown*. Clerk, *Gibson*.
B. *Fol. Dic. v.* 3. *p.* 225. *Fac. Col. No* 173 *p.* 256.

*** This cause was appealed.

'One counsel appearing for the appellant, who stating the case, and praying a reversal of the said interlocutor, 7th January 1756; ordered, That the said interlocutor complained of be reversed.'

*** Lord Kames also reports this case;

By a statute 12th of Queen Anne, cap. 18, made perpetual 4th George I. cap. 12, it is enacted 'That the collector of the customs, or any other person who shall be employed in preserving any vessel in distress, shall within thirty days after the service performed, be paid a reasonable reward for the same; and in default thereof, that the ship or goods so saved shall remain in the custody of the collector, till such time as he and those employed by him shall be reasonably gratified for their assistance and trouble, or good security given for that purpose.' This takes place where the merchant appears to claim his ship or cargo. But in case no person appear to claim, there is the following provision, 'That goods which are in their nature perishable, shall be furthwith sold by

No 84. 'the collector; and that, after deducting all charges, the residue of the price, 'with a fair and just account of the whole, shall be transmitted to the Exche-'quer, there to remain for the benefit of the rightful owner, and that the same 'shall be delivered to him, so soon as he appears and makes a claim.'

Brunton and Chalmers, owners of a vessel, called the Serpent's prize, loaded the same with 100 quarters of wheat for Zealand. In her voyage she was broke and stranded at a place called Redscar, near the town of Stockton. Chalmers having got notice of the accident, repaired immediately to Redscar, and found his wheat in the hands of John Wilson, collector of the customs at Stockton, part of it laid up in lofts, and part in the open field; the whole greatly damaged by sea-water. In this situation, finding it necessary to dispose of the wheat instantly, he applied to the collector for liberty to sell; offering at the same time to put the price in his hands as security for the salvage. This being obstinately refused, he took a protest against the collector, and brought against him an action of trespass upon the case before the King's Bench. And the defendant having put himself upon his country, the cause came to a trial at Newcastle, where a special verdict was returned in substance, finding, 'That 'all reasonable care was taken of the wheat by the collector and others by his 'order; that on the third of October then next following, James Chalmers ap-'pled to the collector, desiring, that the wheat being much damaged, might 'be forthwith sold; and that the money produced by such sale might be left 'in the hand of the collector to answer all charges; but did not then offer to 'pay to the collector any money for salvage; neither did the collector then 'make any demand on that account, he not knowing at that time what the sal-'vage amounted to; but then refused to deliver the said wheat, or permit the 'same to be sold, he having an order from the commissioners of his Majesty's 'customs for that purpose.' And the verdict concludes thus: 'But whether 'upon the whole matter aforesaid by the said jurors in form aforesaid found, 'the within named John Wilson be guilty of the premises within written or 'not, the said jurors are altogether ignorant, and pray advice from the Court 'thereupon.' The judge of that circuit having referred the cause to the Court of King's Bench at Westminster, judgment was at last there given on the 18th July 1751, after several continuations, 'Finding that the said John Wilson is 'not guilty of the premises, that the saids Brunton and Chalmers shall take 'nothing by their said bill, but that they be in mercy, &c. for their false claim; 'and that the said John Wilson go thereof without day, &c. And it is fur-'ther considered, that the said John recover against the saids Brunton and 'Chalmers, sixty pounds for his costs and charges laid out by him about his de-'fence on this behalf; and that the said John have execution thereof, &c.'

For this sum of L. 60 awarded to the collector for costs, he brought an action against Brunton and Chalmers before the Court of Session; and in support of his claim set forth, that is founded on the presumption *quod res judicata pro veritate habetur*.

No 84.

The defenders admitted the presumption; but insisted that the decree was highly iniquitous, as would appear by comparing it with the statute. And the following circumstances were urged, *first*, That though the wheat was in a perishing condition, the collector refused to permit the same to be sold, even contrary to his own interest, as the price to him was a better security for the salvage than the wheat. *Secondly*, When the application for sale was made, the collector was not ready to make his claim for salvage, not knowing at that time the amount thereof, and in these circumstances to forbid the sale, was not only rigorous, but a positive act of injustice: It was to abandon the wheat to destruction, without permitting the defendants to interpose. Even ready money to pay the salvage would not have availed them, seeing the collector was not in a condition to make any demand.

This case being reported by the Lord Ordinary, it occurred, at advising, that the statute provides nothing about selling perishable goods, except in the case that the merchant does not appear to claim the wrecked goods. Therefore the present case is not provided for by the statute. It is a *casus omissus* which must be supplied in equity, agreeably to the intendment and purpose of the statute.

Viewing the matter in that light, it appeared, in the *first* place, that the defendants being proprietors of the wheat, were entitled to dispose of it, provided the collector suffered no prejudice as to his claim of salvage; which he certainly did not, if the price was put in his hand. Nay, his security was improved by the sale, he having current coin for his scurity, in place of perishing wheat. It was considered in the *second* place, that this is agreeable to the intendment of the statute. For if the custom-house officer must dispose of perishable goods, when there is none to claim, much more when the owner appears and insists for a sale. *3dly*, The statute, when it entitles the custom-house officers to retain the goods for security of the salvage, undoubtedly supposes that the officer can instruct his claim, so as to put it in the power of the merchant to get possession of his goods upon paying the salvage. In this view, the conduct of the collector was altogether injustifiable. The statute gives no authority for retaining the goods as a security for the salvage, unless as a *succedaneum* when satisfaction is not offered in money; and as the collector here was not ready to receive satisfaction, it was a trespass to retain the wheat in the perishing condition it was; because the statute gave him no authority to act in so oppressive a manner.

With regard to this matter in general, one observation had great weight, that it never could be the intention of the legislature to force merchants first to pay salvage, and thereafter to take their hazard of the sale of perishable and damnified goods, the price of which possibly might not amount to the salvage. It is a rule in the maritime law, received among all trading nations, that if the goods be abandoned to those who save them, there can be no further claim for the salvage; a rule founded on the very nature of the thing, for the claim of salvage has no foundation other than the benefit accruing to the proprietor by hav-

No 84.

ing his goods rescued from the sea. Upon this footing the collector could not in common justice, demand more than the value of the goods for his salvage; and *a fortiori* could not demand any other security than that value.

'The Court accordingly unanimously refused to interpose their authority for execution upon this decree.'

Possibly after all, the judgment may be justified as being a court of common law which interpreting statutes must adhere to the letter without regarding the intention of the legislature. If so, the proprietors of the wheat chose a wrong court for their action; they ought to have applied to the Chancery, or removed their cause there by a *certiorari*. If the courts of common law in England be so confined, their constitution is extremely imperfect. But supposing the Court of King's Bench to have acted justly according to its constitution, the objection still remains good, that no court ought to give execution, upon a foreign decree which is materially unjust or contrary to equity.

An appeal entered by Wilson was heard *ex parte*, and the judgment reversed, singly upon this footing, as I am informed, that in England the decrees of sovereign courts abroad are put in execution by the courts of Westminster-hall, without admitting any objection against them.

Sel. Dec. No 95. p. 129.

1767. *July* 22.

John Laycock of Bradford, in the County of York *against* Thomas Clark Leather-Case maker in Edinburgh.

No 85.
Execution ordered for costs awarded by a foreign decree in terms of a foreign statute.

Thomas Clark, upon the supposition that he had discovered the art of manufacturing leather into sunff-boxes and pen cases, and likewise the method of preparing it so as to make it fit for these purposes, obtained a patent in 1756, under the usual condition, 'that is should be null, if it should appear contrary 'to law, prejudicial to his majesty's subjects in general, or that the said invention was not a new invention as to the public use and exercise of it in England.'

Laycock having made and sold snuff-boxes and pen-cases of the same kind with those made by Clark, Clark sued him in an action of tresspass upon the case before the Court of King's Bench; and the question having been remitted to a jury, Laycock produced evidence, that these articles had been manufactured prior to the period when Clark said the discovery was made by him, upon which the jury returned a verdict, finding Laycock 'noways guilty of the 'premises laid to his charge.'

Upon this the Court assoilzied Laycock, and also decreed, 'that the said John 'recover against the said Thomas L. 70 for his costs and charges, according to 'the form of the statute in the like cases made and provided.'