

1768. July 14. ARCHIBALD SINCLAIR *against* MRS JEAN MENZIES.

## FOREIGN.

A foreign decree, bearing to have been *in foro contentioso*, has neither the effect of a *res judicata* in Scotland, nor does it entitle the claimant under it to throw the *onus probandi* on his adversary.

[*Faculty Collection, IV. p. 384; Dictionary, 4542.*]

COALSTON. I doubt as to this being a decret in absence by the law of England. Here there is a procurator appearing in the cause, and a remit to auditors named by the parties: nay, it is more than a remit, it looks like a judicial reference; and, from the accounts, it appears that vouchers were produced. When a decret is pronounced in a foreign country, after appearance of parties, execution will follow upon it in this country, unless it can be shown to be contrary to the law of the country where it was pronounced.

MONBODDO. This is not a decree in absence, for the sum obtained by the judgment is much less than the sum acclaimed. Here there was a remit to auditors: one of them was named by the defender's attorney. The pursuer was not Mrs Menzies's attorney at the time. In support of such a decree, we have the authority of civil law, of the Doctors, and even of the English law, where there is less *comitas* than in any part of the world. There is also the authority of this Court in the case of *Edwards against Prescott*. Parties residing in a foreign country must submit to the law of that country, and a decret obtained there must be held good, unless it be shown that it was manifestly iniquitous or informal.

ALEMORE. When a jury finds a fact, the fact is understood to be so as found; but here there is nothing found by a jury: there is only a report by auditors. We must have some *vidimus* that the judgment proceeding on that report is agreeable to justice and equity, when the justice and equity of it are controverted.

AUCHINLECK. If this were a decret in absence, or a decret *in foro* upon little litigation, we might be willing to look into the decret. But here is a decret upon a long account, whereof the people in Jamaica could judge better than we can. If there had been no compearance, there might have been a suspicion. But here there was a compearance, and also a proper remit.

PRESIDENT. This Court is not merely executorial. Any objection, either in law or equity, may be proved. The mere production of a decree, without vouchers, is not enough. It is suspicious that the pursuer might have had execution in Jamaica, and yet he brings his action here. We must have a *vidimus*; less indeed than if the cause had come here originally, but still we must have some evidence of the justice of the decree.

HAILES. This is a singular case. A Jamaica factor is supposed to have super-expended; and, instead of being pursued to account, pursues for a balance.

I doubt much of this decret being *in foro* ; if it was, it is odd that the defender should never have had any demand made for payment of charges. An attorney in Jamaica would not, I presume, serve for nothing. The auditors are supposed to have taken much trouble in examining the accounts. They would expect payment for their trouble, and yet such payment is never demanded from the defender. It was an easy matter to mark the appearance of this unknown attorney, Gabriel Jones. What is it that we can learn from the decree, but that the auditors struck a balance? They say this will appear *more fully from the account*, and yet the account does no more than strike a balance. When we have a decree, which was probably in absence, upon evidence which proves nothing, and which is excepted against, we cannot give so much authority to the decree as to make it a *probatio probata*, and exclude that investigation which the Ordinary has appointed. The case of *Clark and Laycock* does not apply at all ; for *there* Clark, a Scotsman, brought an action in England against an Englishman. He failed in his action by the judgment of a jury. Instead of bringing this judgment under review in England, which it was proved he might have done, he sat with his arms across. And when Laycock pursued him in Scotland for payment of expenses, awarded in consequence of the verdict of the jury, he objected iniquity, which he could not prove from the verdict, and of which he might have availed himself in England notwithstanding the verdict.

KAIMES. The great point is, Whether was the attorney properly instructed? We are not bound to execute foreign decrees, but still there is a *comitas* due in judging upon foreign decrees. The decree must be of such a complexion as that we may *know* from it whether it is just or otherwise. Were the rule different, that decree, which had the least evidence, would be the best, because such decree could not be checked. I do not see that any vouchers were produced.

BARJARG. We must hold a foreign decree to be good, until the contrary is proved. The defender does not object any thing particular to the account. She does not deny the pursuer's management nor his remittances.

GARDENSTON. How easy will it be for a Jamaica factor to get an attorney to appear for him, and to defend *against* him, as in this cause. By means like these, a Jamaica factor may gain an estate in this country, instead of accounting for an estate in Jamaica.

KENNET. The presumption lies for a decret *in foro* : still the pursuer must produce vouchers, and deliver them up. If no vouchers are produced, how can the defender show that the decret is unjust.

On the 14th July 1768, the Lords ordained the pursuer to produce the vouchers of the articles stated in the decree, and judgment in the Supreme Court of Jamaica libelled on ; adhering to Lord Pitfour's interlocutor.

*Act.* A. Bruce. *Alt.* A. Lockhart.

*Diss.* Auchinleck, Barjarg, Coalston, Monboddo.

[Reversed upon appeal.]