

1719-20.
March 1.

“ The said report being again read by the clerk and agreed to,
“ the following order was made :
“ It is ordered by the lords spiritual and temporal in parliament
“ assembled, that the said Earl of Aboyne, his tutors and cura-
“ tors do forthwith make payment to the said Katherine Lyon of
“ the sum of 611*l.* 4*s.* 4½*d.* for her costs and expences in the seve-
“ ral suits and processses mentioned or referred to in her said ap-
“ peal, and in respect of further costs since incurred, upon her
“ several applications for obtaining relief upon the matters com-
“ plained of in her said petition.”

In the Dictionary of Decisions, vol. 1. p. 439. *Implied Discharge and Renunciation*, many decisions are stated for the doctrine, that after extracting a decret expences are not to be allowed : but that doctrine in the present appeal was reversed.

Cafe 38. John Goddard, Gentleman, - - - *Appellant* ;
Fountain- Sir John Swinton, Baronet, - - - *Respondent.*
hall,
13 July
1709.

30th August 1715.

Foreign Decree — The effect of a judgment of the Court of King's Bench, when founded upon by a pursuer against a defender in the Court of Session.

Homologation. — The defender had in England been surrendered by his bail, who were discharged ; and the defender executed an instrument, importing that the judgment should not be released by such discharge ; this instrument found not to homologate the judgment.

THE appellant's mother Ursula, as administratrix of his late father Robert Goddard, deceased, in October 1700 commenced an action against the respondent before the Court of Session for payment to her of the sum of 404*l.*, with interest since the year 1680 ; stating the circumstances of the case to be :

That in 1675, the respondent being at London and dealing as a merchant, he and the said Robert Goddard and nine other persons executed articles of agreement under their hands and seals to become partners in a ship called *The John and Thomas of London*, and her cargo, to the value of 3800*l.* on a voyage to Guinea ; and all the parties, under a penalty of 6000*l.*, covenanted to account with and pay each other for such proceeds of the cargo as should come to each partner's hands :

That by the said articles Mr. Goddard was declared to have four parts of 32 in the said ship and cargo ; and the ship, proving successful in her voyage, returned to the port of London in 1677, and the disposal of the cargo was committed to the respondent, as cashier and agent for the partnership : he received thereon to the value of 5403*l.* 9*s.* 4*d.*, whereof 675*l.* 8*s.* 8*d.* was Mr. Goddard's share ; and the respondent having paid him 285*l.* 8*s.* 8*d.*, there remained due to him 390*l.* :

That

That after Mr. Goddard's death, the said Ursula, his widow and administratrix, brought an action of covenant upon the said articles, in the Court of King's Bench against the respondent, for the said whole sum of 675*l.* 8*s.* 8*d.* received by him, setting forth in her declaration the covenant in the articles, and alleging in fact, that the respondent had been appointed cashier of the said cargo, and had received out of the same 5403*l.* 9*s.* 4*d.*, of which the said sum of 675*l.* 8*s.* 8*d.* was her late husband's share :

That the respondent demurred generally to the said declaration, thereby admitting the facts stated to be true; and after several adjournments the demurrer upon argument being over-ruled; a writ of inquiry was issued, which was executed; and the jury upon stating the account found the respondent indebted to the deceased 390*l.*, which sum they assessed for damages to the administratrix; and thereupon, in Hilary term 1680, judgment was signed and entered up for her against the respondent for the said 390*l.* and for 14*l.* costs, in all 404*l.* sterling :

That the respondent being unable to satisfy the said debt, prevailed on Mrs. Goddard not only to forbear suing to execution, but also to discharge his bail; and accordingly; on the 28th of February 1680, she, by an instrument under her hand and seal, (which was drawn and prepared by the respondent and attested by himself,) taking notice of his inability to pay the debt so recovered against him, declared that his bail should stand discharged, and that they might be at liberty to vacate their recognizance: and the respondent by a writing indorsed on this instrument, and signed by him and one of the bail, declared "that no clause or
 " expression therein mentioned is intended, or shall be construed
 " or meant to intend the release or discharge of the judgment
 " within mentioned, obtained by the within Ursula Goddard
 " against the said John Swinton; or is it intended or meant there-
 " by, in any ways or means howsoever or whatsoever, to preclude
 " the said Ursula Goddard from obtaining any advantage upon the
 " said judgment against the said John Swinton for the recovery
 " of her debt due from the said John Swinton to the said Ursula
 " Goddard :"

That the respondent being restored to his estate in Scotland (upon the prospect of which Mrs. Goddard had given him forbearance), but refusing to make payment of what was owing by him, the said Ursula's action concluded that the said judgment of the Court of King's Bench might have the authority of the Court of Session interposed thereto, and that Sir John might be decerned to pay the said 404*l.* sterling with interest, and that all execution might be directed thereon. And in this action, the said Ursula produced (what she said was) an original of the articles of agreement, with the English judgment, and instrument executed upon the discharge of the respondent's bail.

Before any determination in this matter, the said Ursula died; and the appellant having administered to her, and also confirmed the said debt in Scotland, revived the action against the respondent in 1704. Various steps were afterwards taken in this ac-

tion, and in February 1708 it was remitted to the Lord Ordinary to make a state thereof: the points then in question before his lordship were,

1st, Whether the judgment obtained in England should be taken as *res judicata*, and should be admitted as a sufficient proof of this debt without any other evidence.

2d, Whether the instrument for discharging the respondent's bail, and his declaration indorsed upon it, should be deemed an homologation of the judgment; and

3d, Whether annual-rent ought to be paid for this debt *vel ex pacto vel ex lege*. This last point did not come under the appeal.

The Court, upon a report by the Lord Ordinary, on the 13th of July 1709, "Found that the aforesaid declaration doth homologate and exclude all objections against the judgment;" to which they adhered on the 26th and 28th of July. But the respondent having presented another petition, in which he contended that former decisions of the Court were in his favour, and stated that the appellant's father had never signed the articles of copartnership; the Court allowed a re-hearing, and afterwards, in June 1710, "found that the declaration granted by the respondent did not homologate and exclude objections against the judgment;" to which they adhered on the 13th of February 1711. And on the 3d of December 1713, the Court "sustained the judgment of the Court of King's Bench, the appellant instructing that Goddard was copartner, and that Sir John was cashier and had intromission to make him liable for Goddard's proportion."

Sic in Journ.
Entered,
1 June
1715.

The appeal was brought from "several interlocutors of the Lords of Council and Session of the day of June 1710, the 13th of February 1711, and 3d of December 1713."

Heads of the Appellant's Argument.

The judgment ought to be allowed to be a sufficient proof of the matters now directed to be proved over again; and the rather since it appears from the judgment, that the respondent by demurring generally had admitted and confessed these very facts, *inter alia*, to be as they are set forth in the declaration, viz. That the appellant's father was co-partner, and that the respondent was cashier of the said cargo, and had received the proceeds of it: besides which, by the articles of copartnership produced and read at all the hearings, and admitted by the respondent to be his act and deed, it is manifest, that the appellant's father was copartner.

The instrument for discharging the respondent's bail, which is attested as a witness by himself, wherein he declared, that he was not then able to pay the said debt; and his indorsement upon the same, whereby he agrees, that nothing contained in that instrument should release the said judgment or preclude Mrs. Goddard from recovering the debt due to her thereon, are such acknowledgments of the said debt, and such an establishment of the judgment, and of the several material facts in the declaration mentioned,

mentioned, on which the said judgment is founded, as amount to a perfect homologation or confirmation of the same.

Heads of the Respondent's Argument.

The said declaration signed by the respondent was not a formal or direct covenant or deed of consent, nor can import a homologation of the judgment of the King's Bench; because it was not made freely and voluntarily, but *metu carceris*, the respondent being then surrendered by his bail, as appears from the express words of the release, and being in the power of the said Ursula Goddard and ready to be put in gaol; and by the constant practice of the law of Scotland, agreeably to the principles of the civil law, a deed made even directly confirming any judgment or covenant in such a case, could have been of no force, unless the justice and equity of such judgment otherwise appeared to the Court. It was upon representation of former decisions and a full argument on that subject, that the Court of Session were brought to alter their first sentiments, for "nihil consensui tam contrarium est quam vis atque metus; quem comprobare contra bonos mores est. Ulpianus Lex, 116. de Reg. Juris."

As this deed was involuntary, so it was not at all to the purpose that the appellant contends for: The respondent's bail having surrendered, or at least agreed to surrender him, they insisted to be released, and this the said Ursula agreed to, in consideration of the payment of 5 shillings: but she being anxious to reserve to herself the benefit of the said judgment against the respondent, she obliged him to declare, that the release of his bail was not intended to discharge the judgment or any advantage against the respondent for payment of the debt. The point in view was not to confirm the judgment, but to declare what was the intent of the release.

The validity and equity of this judgment depends upon this point, amongst others, viz. whether the said Robert Goddard was a copartner with the respondent, and others, and this point the respondent disputes, and says, that Robert Goddard never signed these articles: if this be the case, though a party may by homologation supply any defect of a deed which depends upon himself only, yet no deed of the respondent's could have made Robert Goddard a partner in the whole stock without consent of the whole partners; and it was upon this ground, among others, that the Court pronounced the interlocutor of the 13th of February 1711.

There is no law nor precedent, binding or obliging, the sovereign court of any country to put in execution the decree or sentence of any court of another country; and in the year 1680, when the judgment of the King's Bench was given, as well as in the year 1700, when the action was commenced before the Court of Session, the kingdom of Scotland was separate from England as much as any other kingdom of Christendom. Even now after the union, it remains still equally distinct in all things that concern the laws of civil right, and the limits and extent of jurisdiction

tion by exprefs stipulation; the governing maxims, therefore, *par in parem non habet imperium vel potestatem*, and *extra territorium jus dicenti impune non paretur* must take place as much as ever, and the judgment of the King's Bench can no more take place in Scotland, than those of the Court of Session can take place in England.

But even supposing the judgment of the King's Bench to have the same effect and force out of England, that the appellant contends it ought to have, yet the interlocutor of the 3d December 1713 is most just; for the appellant did not insist only upon his judgment, but likewise upon a counterpart of the articles of co-partnership which he produced. The whole cause was thereby by him submitted to the Court; and if the respondent had any thing to object to the said Goddard's being a partner, the Court ought to have received it. The appellant, even oftener than once, prayed for leave to make further probation, and insisted that his father was copartner, and that the respondent was cashier and received his effects.

It makes no difference, that the articles were in relation to English business, and executed in England by persons residing there, because, the objection in this case arises from the separation of jurisdiction, which is *juris publici*: And the only question is, whether the judgment of the King's Bench does bind the Court of Session to proceed, without enquiring into the cause, against a person and his property in Scotland, which are under the direction and protection of the law and jurisdiction obtaining there.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed this House, and that the interlocutors complained of in the said appeal be affirmed.*

For Appellant, Rob. Raymond. Sam. Mead.
For Respondent, David Dalrymple. J. Jekyll.

Judgment,
30 August
1715.