

L I S A L I B I P E N D E N S.

1681. February 4. VANLOVAN against BRUCE.

VANLOVAN a Dutchman, having pursued John Kinneir before the Sheriff of Edinburgh, did raise inhibition upon the dependance, but before sentence, he did insist in a new pursuit before the Bailies of Edinburgh, and there obtained decret. He doth now again insist in his process before the Sheriff, that he may obtain the same decret there, to make his inhibition and dependance effectual, and obtains decret against Kinneir compearing, and thereupon pursues reduction *ex capite inhibitionis*, of a disposition of a tenement in Edinburgh, by Kinneir, to Bruce of Newtoun, and by him to Atcheson, as both being granted after the inhibition. They also raise reduction of the Sheriff's decret, upon these reasons; *imo*, That Vanlovan having deserted the process before the Sheriff, and not only made *litis-contestation*, but obtained sentence before the Bailies, albeit Kinneir is made compearing again before the Sheriff, and proponing nothing, yet his negligence or collusion excludes not his singular successors to propose this relevant defence, that *litis-contestation* is a judicial transaction, importing innovation, whereby the former process before the Sheriff was cut off, much more when decret followed; and it were of very evil example, if defenders were obliged to answer in several Courts for the same cause, to their great trouble and expense, but if they were again pursued, these two are unquestionable defences *lis contestata*, and *res judicata* by a defender; *2do*, The Sheriff's decret is null, proceeding upon an execution, neither subscribed nor stamped; whereas, by the act of Parliament 1540, cap. 74. all executions upon Sheriff's precepts not being stamped, are declared to make no faith; and the general ground of an unsubscribed writ proves nothing, except the judicial minutes of clerks do fully annul this execution; and albeit executions by subscription be

No 1.
Taking decret in one inferior court hinders not taking decret for the same debt in another, the purpose of which is that the pursuer may have execution in both districts.

No 1.

sustained without stamp as a greater solemnity, if indorsation by any hand at random should be warrant for sentences, it would certainly authorise false executions, for the executor could not be called in question of forgery, having neither signed nor sealed the execution. It was *answered* to the *first* reason, That it is beyond debate that any person may pursue for the same debt in divers inferior Courts, that he may have execution in the districts of both, where his debtor may have goods in both; and though he can insist for no more by the second decret than by the first, otherwise *res judicata* would restrict him; yet here there is nothing decerned by the Sheriff, but what was by the Bailie; and as to the execution, Kinneir, who was cited, compearing, did sufficiently astruct the same; and it is the custom of this and all inferior Courts, to proceed upon such executions, which sometimes were accustomed before the Lords; and if decreets should be found null upon such executions, it would convel the decreets of most of inferior Courts. It was *replied*, That albeit where parties compear, and object not against such executions, their appearance may astruct or exclude that dilator, as competent and omitted, yet it cannot be presumed that any judge will proceed, if that objection be made; and therefore the hazard can only be as to decreets in absence, which thereupon will be sustained as a libel; but it would authorise a most pernicious practice against an express act of Parliament, if the Lords should sustain it; and though indorsations have been used before the Lords upon first summons, yet even when false they did bear the solemnity of affixing a stamp; but in this case where the decret is made use of to reduce the dispositions of singular successors, where a full price is paid, Kinneir's appearance imports nothing.

THE LORDS found, that the purchasers of these dispositions, though they were not called in the first instance, had good interest now to quarrel the Sheriff's decret, and found their reason of reduction relevant, that it proceeded upon executions, neither stamped, nor subscribed, nor judicially attested upon oath, and therefore reduced the decret, and in consequence the inhibition, and assoilzied from the reduction *ex capite inhibitionis*; but the LORDS did not find that reason relevant, that taking decret in one inferior Court hindered the taking the like in another.

Fol. Dic. v. 1. p. 550. Stair, v. 2. p. 853.

* * See Fountainhall's report of this case, No 129. p. 3778. *voce* EXECUTION.

No 2.

The exception of *lis pendens* in an English Court not sustained against an action for the same debt in the Court of Session.

1705. February 27. Colonel JOHN CUNINGHAM *against* The LADY SEMPLE.

BRIGADIER RICHARD CUNINGHAM having married the said Lady Semple, in 1693, he makes very liberal provisions to her by their contract of marriage; thereafter, in 1696, he makes an ample disposition to her of all he then had, or afterwards should purchase or acquire; and in his last sickness, a little be-