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defendant to impeach the justice thereof, or to show the same to have been irregularly obtained. It is therefore ORDERED and ADJUDGED, That the several interlocutors complained of be, and the same are hereby reversed.

Fac. Col. No 13. p. 384.

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1776. December 13. JOHNSTON *against* CRAWFORD and MEASON.

THE LORDS found, that a decree-arbitral pronounced between parties in Holland, by Dutch arbiters, on which execution was pursued against the representatives of one of the parties in this country, was not challengeable on the head of iniquity.

See p. 669. See APPENDIX.

SECT. II.

Exceptio rei Judicatæ.

1698. January 27. SIR JOHN COCHRAN *against* The EARL of BUCHAN.

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A bond betwixt two Scotsmen in London, in the Scots form, and registrable in Scotland, was challenged by the granter before the Court of Chancery, and was reduced, the creditor having appeared, but afterwards withdrawn. This was not found such a *res judicata* as to

SIR JOHN COCHRAN having assisted the Earl of Buchan to a great match of an English lady, who had L. 10,000 Sterling of tocher, as *proxeneta* in the case, he got a bond of L. 1000 Sterling if he were able to effectuate the marriage; and, having charged the Earl, he gave in a bill of suspension, on this reason, that finding himself over-reached, and the marriage having taken effect without Sir John's intercession, he had tabled the affair before the Judges at Westminster-hall, the debt being contracted there, and wherein Sir John had made affidavit, and deponed; so that there was not only a *litis pendentia*, but a *litis-contestation* there, which ought to stop any procedure intended here after it was made litigious in England. *Answered*, A pursuit in a foreign judicatory, where both parties are Scotsmen, and the bond drawn in the Scots form of securities, can never afford a declinature of the incompetency of the jurisdiction of the Lords of Session, especially seeing there is not that mutual correspondence betwixt the two supreme courts that the English regard our decreets, but on the contrary rejected them, in the case of Crichton against Murray, *voce* Fo-

RUM COMPETENS.—THE LORDS wished that the *auctoritas rei judicatae* of sovereign courts might be such as did make faith in other kingdoms; but, in this case, repelled the reason, and found a *lis pendens* in the Chancery of England did not stop procedure here.

1698. February 24.—In the action, mentioned 27th January 1698, Sir John Cochran of Ochiltree against the Earl of Buchan; it is now *alleged* for the Earl, that he now reformed his defence, and alleged not *lis pendens*, but *lis finita* by a sentence obtained against Sir John before the Chancellor of England, declaring his bond void and null, as granted *ob turpem causam*, and for an unlawful paction, to exact money for his assisting him in a marriage; so that now he founded on a *res judicata*, which ought to assoilzie him. *Answered*, No regard to the decret produced, for it was not a definitive sentence, but only an interlocutor. *2do*, The sentence is long after the affair was tabled and in agitation before the Lords in Scotland. *3tio*, No respect to their sentences; because the English judicatories do not regard the decreets of the Session when founded on before them; and they reject authentic extracts under the clerk-register's hands; and find nothing probative but the principal writs themselves, though by a Latin *Senatus Consultum*, recorded in the books of sederunt in November 1599, the Lords have recommended to all foreign judicatories the validity of these extracts; and, by the 124th act of Parliament 1429, we are to observe the law of shipwreck to all these countries who restore our goods, and to confiscate such as use that barbarous custom with them; even so, in sentences, the balances must be kept *lege talionis*, and there can be nothing more just than *quod quisque juris in alium statuerit ut ipse eodem utatur*. *4to*, This decree is not so irreversible, but the Chancellor of England would yet hear Sir John Cochran against it, if he should apply by a bill to be reponed; and if it be reviewable there, then the Lords cannot be denied the same power; and whatever be the English forms, yet our law could never have declared his bond void and null, when it was not produced, but only would have given certification against it. And as to the finding it *turpe lucrum*, this differs from the customs of other nations, and the common law, where *proxenetica jure licito petuntur*; and Sir John does not seek it as a *praemium* for his pains, but restricts his bond to L. 600 Sterling as his true expense in attending that affair. *Replied*, Though, in the beginning of the decree, there is only an interlocutor by way of injunction, and their writ *noli prosequi*, which is equivalent to our suspension, sisting execution till the reasons be considered, yet, in the end, there is an ultimate and definitive sentence. And, for the *2d*, The *initium negotii* must be considered; and the affair was first tabled, and litiscontested in England, and Sir John subpoena'd, and gave in his answers without a formal declinator, before the registration and charge of horning raised in Scotland. To the *3d*, We are not to imitate our neighbours in what is unneighbourly and ill; neither is it made appear that they have either a law or custom rejecting our decreets, and what one froward

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bar the creditor from pursuing for the debt in Scotland.

Dalrymple, who reports this case,

p. 4547. remarks, that if the creditor had provoked to judgment in Chancery, it is likely the Lords would not have found the decree reviewable.

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surly Judge may do, is not to be drawn into example; and therefore we are to use their sentences with the same deference and respect we would give to the proceedings of the Parliament of Paris, the Rota, or other foreign courts in Holland or Germany. To the 4th, *Non constat*, that the Chancellor of England can review his own decreets after they are extracted. The Lords laid aside that point of treating their sentences as they do ours, as too national, but fixed on this, that the decrees of Chancery not being tied to law, but founded on the Judges' own conscience, these are alway reviseable; and that all foreign courts allow a review *per modum querelæ et supplicationis*, as *Bouritius de officio advocati, cap. 34.* shews, is practised in Frizeland, and *Petr. Rebuff. ad constitutiones regias Franciæ*, only, *quod non datur revisio revisionis*, they review but once.—THE LORDS found this decree of the Chancery was not such a decree, or *res judicata*, as stopped their procedure and cognition of the cause; and so found it reviewable by them.

1698. *June 22.*—In the action, mentioned 24th February 1698, betwixt Sir John Cochran of Ochiltree and the Earl of Buchan, the LORDS having found the English decree of the Chancery reviewable here, the debate arose, by what law it could be reviewed, whether conform to the English or the Scots law, or by the common law of nations, or by conscience and equity; and the LORDS found it behoved to be by our own law. Then they *insisted* on this ground of iniquity, That the Chancellor had declared the bond null, as being without any valuable consideration, or for a cause *contra bonos mores*, to carry on a marriage; whereas, with us, a bond, though for no onerous cause, yet is obligatory as a donation against the granter; and Sir John did not claim it as a gratification for his making the marriage, but for his expenses, which certainly is a valuable cause; and, by his oath and declaration given in England, he had restricted it to his charges, extending to L. 600 Sterling; and seeing they founded on that restriction, they could not divide it, but take it as it stood; nor could they crave the same to be modified, else he behoved to be at liberty to insist for the whole L. 1000 Sterling contained in his bond. *Answered*, The narrative of the bond, bearing borrowed money, being now convelled by his oath, and acknowledged to be a gratuity for his charges, this comes to be an extrinsic quality, and must be proven, as was found in a like case, 23d June 1680, Hamilton against Borthwick, *voce PACTUM ILLICITUM*, where a bond given to a step-father, for promoting his step-daughter's marriage, was only sustained for his expenses, and he put to condescend and give such evidences and probation as he could.—THE LORDS, before answer, thought it not reasonable to give Sir John Cochran L. 600 Sterling, if he staid but a few months attending my Lord Buchan's affairs at London, or had other business to detain him there however; therefore they ordained him to give in a condescendence how long he staid at London on this account, and if he had any other business to detain him save this, and if he was at any extraordinary expenses, by journies to the country, or the like, in managing it; and the LORDS afterwards would consider if they

would take his oath upon the verity of the condescence, and if they would modify the same, or discern my Lord Buchan in the full extent of what he has deponed ; seeing though writ may be taken away by witnesses in England, yet it must be only *scripto vel juramento* by our law. See LIS ALIBI PENDENS.— PACTUM ILLICITUM.

Fol. Dic. v. 1. p. 323. Fountainball, v. 1. p. 816, 828. & v. 2. p. 5.

* * Dalrymple reports the same case :

SIR JOHN COCHRAN having charged the Earl of Buchan, upon a bond of borrowed money, to pay L. 1000 Sterling, he suspended, and *alleged res judicata* ; and, for instructing his reason, produced a decree of the Chancery of England, *parte comparente*, finding, that the bond was granted for no valuable consideration, and therefore discharging all execution thereupon for ever.

In this process there was formerly a debate anent the competency of the Chancery, in which it was *alleged* for Sir John, That the bond being granted by one Scotsman to another, after the Scots form, it could not be rendered ineffectual by any decree in England. And the Earl having *answered*, That England was *locus contractus*, and that both parties had resided a considerable time there before commencing of the process : ‘ THE LORDS found the judicatory was competent.’

Upon this interlocutor the Earl resumed the defence of *res judicata parte comparente*, by a competent judicature. Sir John *answered*, That, though the cause was judged, yet the decree of the Chancery was reviewable in Scotland. ‘ THE LORDS found, that the decree of the Chancery was reviewable.’

The Earl reclaimed ; and, having obtained a hearing *in presentia*, *alleged*, That, in as far as the Lords had found the Chancery to be a competent judicatory, it necessarily followed, that the sentence should be final and unquarrelable ; because the Chancery was a sovereign judicatory, and what was competent to be judged there and determined, could not be reversed by the decision of any other judicatory, except the Parliament of England.

It was *answered* ; *imo*, *Esto* that the Lords’ interlocutors, sustaining the Chancery of England as a competent judicature, and finding the decree reviewable, were not consistent, he would not be concerned, seeing the last did derogate from the first. *2do*, The interlocutors did very well consist ; for, suppose the Chancery had become a competent judicatory by the parties’ abode some time in England, yet, if the decree had past in absence, or had been pronounced down right contrary to the laws of this kingdom, as if a bond of borrowed money was taken away by witnesses, or that there had been no full debate ; in these cases the decree would be reviewable in Scotland, which is most reasonable and just in this particular case, wherein Sir John did only give in a declaration, in answer to the Earl’s allegations, for avoiding a penalty that is imposed

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It was *replied* for the Earl ; That *esto* the decree could be reviewed, the same behoved to be reviewed, either in England, or according to the laws of England, where the jurisdiction being once established, the law of that nation behoved to regulate the sentence ; and the Earl would not decline that the sentence should be reviewed, and any new allegation judged according to the laws of England.

It was *duplied* ; That the Lords could only judge according to the laws of Scotland ; especially in a case that had been stated before the Chancery, which is judged according to the rules of equity, in which the Lords could not be regulated by the opinion or apprehension of the Chancellor of England.

' THE LORDS adhered to their former interlocutor, and found the decree of the Chancery reviewable.' In which it is specially to be noticed, that the complaint before the Chancery was raised at the instance of the Earl, granter of the bond, after the Scots form, and bearing registration here ; and it did not appear reasonable that the Earl could deprive Sir John, the creditor, of the benefit of the law of this nation, notwithstanding that he did once compear ; but, if Sir John, the creditor, had provoked to judgment before the Chancery, it is like the Lords would not have found the decree reviewable at his instance, who had made election of the judicature. And the interlocutor did very well consist ; for the residence of both parties in England, above a year, did establish a competency, yet the debtor's provoking to judgment in England was not found to exclude the creditor from the benefit of the law of this nation.

Dalrymple, No 1. p. 1.

1731. July 24. HAMILTON *against* DUTCH EAST INDIA COMPANY.

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CAPTAIN HAMILTON having arrested the effects of the Dutch East India Company *jurisdictionis fundandæ gratia*, brought an action against the Company for damages alleged sustained by him, through the violent seizure and confiscation of a ship and cargo belonging to him in the East Indies. The defence was, that the ship and cargo in question were, in due course of law, condemned, and confiscated in the council of justice of Malacca, which, upon Captain Hamilton's appeal, was confirmed by the council of justice at Batavia ; and, therefore, they are safe *exceptione rei judicatæ*. Which exception the LORDS sustained. See APPENDIX.

Fol. Dic. v. 1. p. 323.