1711. *July* 24. URSULA GODDART *against* SIR JOHN SWINTON.

SIR John Swinton, John Goddart, and several other Englishmen, *anno* 1680, entered into a written copartnery for carrying on a trade to Guinea in Africa: And the voyage proving lucrative, Ursula Goddart, relict administratrix and executrix confirmed to her husband, pursues Sir John Swinton before the King's Bench, as he who was cashier and manager for the company, and to whom the effects and price were consigned; and obtains a judgment againt him for £390 sterling, as her husband's share and portion. And she being now dead, Goddart, her son, as assignee, pursues Sir John before the Lords of Session for payment, he having no estate in England they could affect. And *first*,—they insisted against him, as he who had homologated and acknowledged the debt, by a declaration he gave for obtaining his liberation from an arrest. Which, at first, was sustained to bind the debt upon him, as mentioned *supra*, 13*th July* 1709: But afterwards, on a reclaiming bill, was repelled.

Then Goddart and his factor recurred to this ground in law, That Sir John must still be liable; because it being a judgment of the Supreme Court at Westminster-hall, and has no superior but the legislative lodged in the House of Peers; which remedy he had not made use of: and so being *res judicata*, and a final sentence, the Lords cannot enter to examine the grounds of that decreet, or the merits of the cause, but only to interpose their authority, and to make it effectual against him and his estate here, as a full probation of the debt.

ALLEGED for Sir John,—This decree cannot so much as found a title or claim against him here; for though it be libelled, that Goddart was a partner, and Sir John cashier, and that the effects came to his hand, and that Goddart's part was £390 sterling, and that Sir John had money of the society to that value in his hands, yet none of thir four points of fact (on which the whole relevancy of the libel stands) seem to be proven.

ANSWERED,—This mistake arises from our ignorance of the English style of their judicial writs: for they neither contain the debate nor probation; and when facts are libelled, they are holden as confessed, if not denied, the defences being given in upon oath. But, if need were, both Goddart's interest, and Sir John's intromission, could be instructed to a demonstration; but they'll not enter into that minute detail, seeing they are secure by the sentence given by a supreme court, the Queen's Bench: and to subject them to review in Scotland, were to imply a subordination; which cannot be pled. And this rule, that the sovereign judicatories of one nation cannot cognosce on the decrees of another, is founded on great necessity and expediency, for the facilitating of trade and commerce, and for keeping up a good correspondence amongst independent nations; which all the lawyers writing on the *Jus Gentium* make absolutely necessary: and particularly Huber, *ad tit. D. de Legibus et Senatus Consultis*, makes a learned digression, entitled, *De Conflictu Legum in diversis Imperiis*, *sect.* 6; who first lays it down, that *contractus valent ubique secundum jus loci in quo celebrantur*, and then adds, *idem tenet in rebus judicatis et criminum remissione, nam ubique habent effectum:* and so determines P. Erodius, *Pandect. Rerum Judicat.*—and holds only with this exception, unless it clash with a positive municipal statute of that country where it comes to be objected; otherwise the justest decrees, by a fraudulent changing of his domicile into another kingdom, may be

frustrated and eluded: and therefore, with us, the English double bonds, their contracts, and testaments, receive full execution, unless they convey heritage; which their law indeed permits, but ours repudiates. Yea, their forms are so regarded, that payment of an English bond was sustained probable by witnesses, contrary to our law, because consonant to theirs: 28*th June* 1666, *Macmorland* against *Melvill.* And Sir John, by the *postnati* law, must be reputed an Englishman, and enters into a contract with others of that nation, about an English trade, the product coming to his hands while he resided there; all which, conjoined, makes it equivalent as if Sir John had given his obligation to pay; judiciary sentences by litiscontestation having the force of a novation and *quasi* contract.

REPLIED,—It can never be a *res judicata,* which is only to be understood *de sententia indubitata, quæ nullo remedio attemperari potest; l.* 23, *sect.* 1 *D. de Condict Indeb.* But this judgment was not only subject to a review by the House of Peers, but there also lies an appeal to the Chancery: and so, not being final, may be reviewed by the Lords of Session. And they did so lately, in a cause pursued by *Sir John Cochran* against *the Earl of Buchan,* for a *proxeneticum* and reward in procuring his marriage. And though the judges in Ireland sustained a decreet of the Session betwixt *Sir Robert Murray,* alias *Crichton,* against *Murray of Broughton,* as a *res judicata,* yet it being carried to the House of Peers, they reversed it. And Huber, in the foresaid place, allows no other authority to these sovereign courts, in a foreign nation, but only *ex comitate,* that is, to treat them with respect and civility, but not as excluding review: And he adds two restrictions; 1*mo.* That such decrees be founded on principles consonant to the law of nations; 2*do.* That they contain nothing contradictory to the particular laws of that country where it is craved to be put in execution. And thus the accurate Sande, *Decis. Fris. lib.* 1, *tit.* 12, states it in the case of an arrest of the court of Holland, brought before them: which they in civility remitted back; but they declining to cognosce any farther on it, the court of Friseland judged it. And though, in some places, the proponing a defence in law is held an acknowledgment of the libel, and the facts therein contained; yet this maxim has not its rise from the *jus gentium,* as appears from the learned Gudelimus, *de Jure Novissimo, lib.* 4, *cap.* 9, and is conform both to the civil law, *l.* 9 *D. de Except.* and to the canon law, *Capitul.* 63, *X. de Reg. Juris.* And, therefore, the facts laid in Goddart's libel against Sir John, *viz.* of his being a partner and cashier, and having the money in his hand, not being proven, it were absurd to sustain it for execution, till the whole matter be tried, and the facts proven; the common principle, *actore non probante, absolvitur reus,* taking place here. And it were both unequal and absurd to make the English decrees executive and terminative here, when the Scots sentences are not held as such there; but, on the contrary, our registrate writs make no faith there till the principals be produced. It is true, there is an elegant Act of Sederunt, made by the Lords, on the last of July 1596, but not recorded till 1599, made in Latin, called *senatusconsultum supremæ curiæ juridicæ in Scotiâ,* arising from a complaint made by the royal boroughs, that when they send their registrate extracts to England, France, or Holland, they are only regarded as copies: Therefore, it craves, that foreign courts may look on them as probative and authentic; promising the same credit shall be given to their notorial doubles. But we do not find this act produced the correspondence designed. And yet

there can be nothing more rational than the method laid down by that noble statute of Parliament, Act 124th, 1429, assuring those countries and states that shall restore shipwrecked goods broken on their shores, they shall meet with the same justice and restitution if their ships break on our coasts. So, if the courts at Westminster shall sustain our decreets as final, we ought to do the like to theirs. But it is known they do not.

Some were for trying if this decreet against Sir John was final by the laws of England. And, *2do.* What authority the decreets of the session had in England and their judicatories. *Vol. II. Page* 663.

1711. *July* 25. MRS LYON *against* The COUNTESS of ABOYNE and LORD KINNAIRD.

MRS Lyon got summary execution against Aboyne and Kinnaird, on the discussing of her appeal; but, there, the Peers had expressly taxed her expenses to £40 sterling; so there was nothing left to the Lords, but the application and executive part, by giving horning on fifteen days thereon.

Vol. II. Page 665.

[See the Reports of the Case between these parties pointed out in the Index to the Decisions.]

1711. *July* 27. DAVID SOMERVELL *against* ROBERT SOMERVELL.

DAVID Somervell protested against an interlocutor, in favours of Robert Somervell, who had bought some houses at 2500 merks; and David CONTENDED, That, after his disposition consigned was delivered, the price was still unpaid.

Robert ALLEGED,—That the disponer had possessed and uplifted the rents; which must compense the price *pro tanto.* Which the Lords sustained.

Vol. II. Page 667.

1711. *November* 6. THOMAS MACKIE *against* The TOWN of EDINBURGH.

THOMAS Mackie, a Popish priest, being apprehended, and their mass-vestments, altars, and crucifixes, being found in his house, the magistrates imprisoned him; and, on a probation, ordained him to remove out of Britain betwixt and a prefixed day; of which sentence he presented a bill of suspension, on thir reasons: 1*mo*, That the town were not competent judges to such an extensive penalty; for they could only banish out of their own liberties and jurisdiction, and *extra territorium jus dicenti impune non paretur.* And by the Acts of Parliament against seminary priests, trafficking papists, and Jesuits, they are only accountable to the Privy Council and Criminal Lords of Justiciary; and not