

APPENDIX.

PART I.

LIS ALIBI PENDENS.

1803. December 13. SHAW against ROBERTSON.

LIEUTENANT ALEXANDER SHAW of the 36th regiment, being indebted to James Robertson of Panton Square, London, in the sum of £123. 2s. an action was brought against him (13th November 1799) for payment; in which, after some procedure, an interim decree for £40 was obtained, and the money paid. A condescence was ordered and given in, which was followed by answers for Shaw. Replies were ordered (29th May 1800), and this order repeated (21st May 1801.)

Shaw being ordered to join his regiment abroad, having gone to London, Robertson arrested him there (11th March 1801) on a writ of *capias*; in consequence of which, he was detained several days before he could find bail for the debt sued for in this country.

Against this proceeding, Shaw presented a petition and complaint, on this ground, That he had met the pursuer, and pleaded before the Court which he himself had chosen; that it was his own fault that this process was not sooner terminated; that he was not flying from justice, but obeying the order to join his regiment; that, finally, it was a contempt of the authority of Court, for litigants are not merely under the controul, but under the protection of the Court; that during an action before any court, the parties mutually bind themselves to abstain from any proceeding. except what is authorised by the judgements pronounced.

The petition was followed with answers, when the Court (30th June 1803) “sustained the competency of the complaint; and found James Robertson “liable to the complainer in damages.”

No. 1.

When an action has been brought before the Court of Session, if the pursuer uses the diligence of the law in a foreign country unnecessarily against his debtor, the Court will award damages.

No. 1. Robertson reclaimed, and.

Pleaded : It is not doing injustice to sue a debtor in the courts of the country where he may happen to reside at the time ; he has this advantage, that he is on the spot to conduct his own defence. A decree in this Court was advisable, to obtain diligence against the debtor or his property in this country, while its effects could reach no farther ; so that decree and execution in England might also be necessary to affect his person or his property in that country ; otherwise, when a debtor has been sued here, he has nothing to do but to retire with his effects to another country, and live unmolested as long as he can prevent decree from being pronounced. The plea of *lis alibi pendens* can apply to independent countries, as little as it does to independent and inferior jurisdictions in the same country : The object in both is the same, that the creditor may have execution in both ; *Coutts and Company against Callin*, 8th March 1769, No. 5. p. 8292. When it is thus held, that a pending suit in a foreign country is not to be regarded in this country, upon the enlightened principles of reciprocity, which form the foundation of international law, the same consequences should be given when the pending suit is in this country, and the second steps of diligence take place abroad.

Answered : It is no doubt competent to cite a debtor in two different courts, in order to recover the same debt, if one of these processes be insufficient for the purpose of obtaining payment ; or, again, by passing from one, he may insist in the other ; *Bankton*, B. 4. Tit. 25. § 14. But in the present case there was no inadequacy in this Court to do justice, and the action was still in dependence. It was obviously a contempt of the jurisdiction of the Court of Session to proceed also in a foreign court ; and it was unjust and oppressive to the debtor, who had agreed to meet the pursuer in the place he had himself chosen.

The Court (13th December 1803) “ adhered.”

The conduct of the pursuer had been evidently oppressive, as he had employed the diligence of the law in a manner more calculated to gratify resentment than to obtain justice. His backwardness to proceed in this country, and his rigorous and unwarrantable pursuit of his debtor in England, when he had answered, and was willing to answer here, required the interposition of the Court.

For Complainer, *Gordon*.
Scotland, W. S.

Agent, *Ja. Robertson, W. S.*
Clerk, *Pringle.*

Alt. *Baird.*

Agent, *Tho.*

F.

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