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 decreet 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 decreet 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 decreet, 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 decreet, and in consequence the inhibition, and assoilzied from the reduction *ex capite inhibitionis*; but the LORDS did not find that reason relevant, that taking decreet 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-

fore his death, he, by his testament, makes her his executor and universal legatar. Colonel John Cuningham, elder brother to the Brigadier, finding these deeds made in favour of the lady prejudicial to indentures entered into betwixt the two brothers in 1686, by way of mutual covenant, in the English form, whereby it was provided, that failing heirs of their own body, the survivor should enjoy the hail estate, heritable and moveable, pertaining to the first deceaser, allowing either of them to provide a wife to the liferent of a third of their heritable, and to the fee and property of a third of their moveables; whereupon the Colonel raises a reduction and improbation against the Lady Semple, of her contract of marriage, disposition and testament, on this ground, That they are fraudulent, and *inter conjunctas personas*, and done *a non habente potestatem*, after he stood obliged to the Colonel by the foresaid indentures, which convey his estate to him, he having left no children of his body; and therefore her jointure and interest ought to be restricted to the third allowed by the said indentures, and no more. It was first *alleged* for the lady, That besides the suspicion of forgery these indentures lay under, they were not legal, formal, nor probative deeds, even by the law of England, where they were made, and conform to which they were drawn and framed; for they neither designed the place where signed, nor contained the witnesses names and designations, and were not signed on the body of the parchment, but on a loose tag appended thereto, and were not signed by John, but only by Richard; and Bartolus, *ad l.* 6. § 6. *D. De edendo*, reckoning up the necessary requisites to a valid and authentic writ, he mentions the *locus contractus*, and makes it as essential as the day, month, and year; and it cannot be otherwise, for, by omitting either the place or date, you deprive me of a mean for discovery of its falsehood; seeing if the place were named, I could offer to prove I was *alibi*, at a great distance, at that time. *Answered*, This indenture was exactly conform to the laws and customs of England in every point, which do not require the mentioning the place, nor the designations of the witnesses. It is true the want of these are nullities by the Scots law, but that is by virtue of positive special statutes requiring these formalities; but the English law enjoins no such solemnities, but only that the witnesses compear before a judge, and make affidavit to verify and recognise that the subscription is theirs; which being done, it becomes a valid and authentic writ; and if the Lords will grant a commission to the judges of the Queen's Bench at Westminster, they offer to prove by their declarations, that these indentures are legal, conform to the English stile, and are probative writs there, and such as would afford action to quarrel posterior deeds; and that there used to be two duplicates, which are interchangeably signed only by one of the parties, so that each has the double subscribed by the other party contracting with him, it not being judged necessary, the double he is trusted with bear his own subscription, seeing his having and using of it implies his consent, and sufficiently binds him to all therein contained. The *second* point in this

No 2.

No 2. debate was, *esto* these indentures were a valid, legal, and binding deed by the laws and customs of England, whether they are sufficient by the law of Scotland to carry heritage, or sums heritably secured in Scotland? It was acknowledged by the Lady Semple's lawyers, that as to personal bonds, contracts, and obligements, anent moveable sums and goods, they may be conveyed and be effectual against the debtors obliging themselves therein, and their estates, though framed and drawn conform to the laws and practice of the place where they reside for the time; because moveables *sequuntur personam*, and are presumed to be where their owner and master is, and are regulated *jure gentium*; but they *alleged*, it was quite otherwise in the conveyance of heritage and tailzies of succession, *de rebus immobilibus et feudalibus*, and that they behoved to be conceived in the form and style of the place, *ubi res sita est*; and therefore if these two brothers intended a legal settlement of what heritable rights either of them should purchase in Scotland, they should have done it conform to the Scots law, by way of mutual tailzie, with a prohibitory clause to alter without mutual consent, bearing the two exceptions of endowing and providing a wife, and of their nullity in case of heirs procreated of their own body; and if they have done it by way of English indentures, *fecerunt id quod jure nostro non possunt*, thinking to convey Scots lands by an English writ, *et sibi imputent* that they did it not in the forms prescribed by our law; yea the Lords went that length in 1683, that when Monsieur Somerdyck Van Arsen was pursuing a poinding of the ground on an infeftment of annualrent out of his brother-in-law, the Earl of Kincardine's estate, they looked upon him as an alien and foreigner, and demurred to sustain process till he got himself naturalized as a subject of this realm, No 1. p. 4635.; and thus in the case of Colonel Henderson's Children, No 40. p. 4481. a testament made by the Colonel, disponing heritage lying in Scotland, was found null, though by the law of Holland, where it was made, heritage is so transmissable; and sicklike 18th Feb. 1631, Houston, *voce* PROOF; and Shaw *contra* Lewis, No 47. p. 4494. a nuncupative testament made in England (where they are sustained), was rejected above L. 100 Scots, *quoad* goods lying in Scotland. See Lamb against Heath, No 22. p. 4812; and Melvin *contra* Drummond, No 41. p. 4453.; Stair's Institutions, *lib.* 1. *tit.* 1. Nicolaus Burgundus *ad consuetudines Flandriæ*, and P. Christin. *Decis. Belgicæ*, *et ad leges Mechlinienses*, who all agree, that as to personal actions and moveables, the *locus contractus* is followed in the matter of the solemnities of the writ; but as to feus and immoveables, writs in a foreign style disconform to our law, have never been regarded. *Answered* for Colonel Cunningham, That the form and style of English writs is become frequent, and well known in Scotland, and there is no reason for the distinction made, confessing them to be probative in personal rights, but not in real, and the Lords every day now sustain process on English and French bonds, conceived in their forms; as Master of Salton *contra* Lord Salton, No 4. p. 4431. where the Lords sustained a

bond in the French form, as a title to adjudge Salton's estate; and lately, Andrew Crawfurd was put to find caution *judicio sisti et judicatum solvi*, on an English bond granted by him to Carruthers; and the learned Joannes a Sande, *Decis. Fris, lib.* 4. *tit.* 1. *definit.* 14. tells us, that senate sustained a testament made at Boisleduc in Brabant, for lands in Friseland, though only made before the *parochus* and two witnesses, whereas the Frisian law following the Roman, requires seven witnesses; and Vinnius, *select. quæst. lib.* 2. *cap.* 19. is of the same opinion; and this may be farther illustrated from our King James V. his revocation, at Rouen in France, which is not so much as super or subscribed, but only attested by a notary in the French form, and yet is recorded in the 70th act of our Parliament held in 1540; and the late King William's testament, made at the Hague, conform to the custom of Holland, is probable to convey his principalities and dominions, though situated in France, Germany, and other places, who have quite different styles and customs; and it is just so with the entails of the illustrious families of Saxony, Hanover, and others; and the benefit of commerce seems to require this; the more straitened and confined a nation is in their customs, and rejecting foreign writs, the restraint upon trade will always be the greater, which is an inconvenience by all means to be shunned; see Falconer, No 52. p. 4501. and Gordon *contra* Worlie, No 23. p. 4460.; and lately the case of Lady Susanna Lort *contra* Sir Hugh Campbell of Calder; *item*, Sir John Cochran *contra* Earl of Buchan, No 82. p. 4544. THE LORDS thought this cause of more intricacy and importance than could be determined in the end and hurry of a session, and therefore delayed the advising of it till June. No 2.

1706. *July* 5.—THE LORDS advised and determined the cause pursued by Colonel John Cunningham and John Corse, and the Earl of Glencairn, his assignee, against the Lady Semple, as deriving right from Brigadier Richard Cunningham, her last husband, fully debated *supra*, 27th February 1705; and the defender having withdrawn her papers, and being absent, the LORDS found the indentures produced, made betwixt the two brothers in the English form, wanting the solemnities required to such writs by the laws of Scotland, yet were a sufficient title and foundation to sustain process at Colonel John's instance, to claim and affect the estate and succession of Richard lying in Scotland, and to quarrel and reduce any writs given by him to the Lady Semple; and repelled the allegeance of *litis pendentia* in England, proponed against the Lords' competency, especially seeing she herself had provoked to the Lords, by raising a reduction of the indentures lying before them; but superseded to give answer how far these writs were legal, authentic, and probative by the law and customs of England, or if a commission could be directed to the judges of the

No 2. Court of the Queen's Bench to try the same, seeing that was not at present insisted on and craved.

Fol. Dic. v. 1. *p.* 550. *Fountainhall, v.* 2. *p.* 273. & 340.

*** See Forbes's report of this case, No 24. p. 4462. *voce* FOREIGN.

*** A similar decision was pronounced 27th January 1698, Cochran against Earl of Buchan, No 82. p. 4544. *voce* FOREIGN.

1715. *July* 21.

WILLIAM GORDON of Campvere, Merchant, *against* WILLIAM ELLIOT.

No 3.
A suit depending in Chancery was sustained to prevent process here.

THE African Company having, in 1700, fitted out the Speedwell, in pursuance of an agreement with Sir David Nairn, and others, residenters in London, whereby the said persons were to trade in the name and under the protection and privilege of the Company; by another agreement with Robert Innes, the Company constituted him supercargo, and allowed him L. 600 Sterling, and to carry out L. 650 Sterling more in money and goods, and he was to account to the Company, and return the product of L. 11,000 Sterling, stocked in by the Company and their London partners, to Scotland. The ship was afterwards wrecked in the Straits of Malacca, but Mr Innes saved most of the cargo, and continued the trade till he died, leaving both the Company's stock and his own in the hands of Mr Bernard Wych, the English East India Company's factor, to whom thereafter the Company gave power to manage the said ship and cargo, and at the same time empowered William Elliot, lace-man, to send such further directions to Wych, as he should think most advisable, and to settle accounts with him; but withal took Elliot bound (and the English partners his cautioners) to be accountable to the Company, and in case the neat proceeds of the effects in Mr Wych's hands should fall short of any charge that might be against the Company, the English partners should indemnify the Company thereof according to their proportions, the Company being always liable effeiring to their interest. Wych accordingly remits to Elliot L. 6300, and William Gordon having assignation from Robert Innes for L. 200 Sterling of the foresaid L. 600, and being creditor to him in some more, having first arrested in the Director's hands, raises a process against Elliot before the Lords; but a little before that, another process was raised against him at the instance of the English partners in Chancery, calling for the foresaid L. 6300, in order to be divided; in which process William Gordon so far appeared that he gave in a dilatory defence, *alleging*, That the matter betwixt him and Elliot stood under arbitration.

And here it was *alleged* for Elliot the defender, That he could not be liable to the pursuer, as executor to Innes, because of the said other process in Chan-