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-

cery, which commenced before the intenting of this cause before the Lords, and therefore was a *lis alibi pendens*, and that the defender had, in obedience to an order of Chancery, lodged that money in the hands of one of the Masters of that Court; so that he cannot be convened a second time. No 3.

Answered for the pursuer; *1mo*, That though English adventurers might have an interest in the cargo by the Company's permission, yet still all was managed in the Company's name; and therefore, as any intromitters could have been prosecuted in the Company's name any where, so if they or their effects were found in Scotland, they might lawfully be pursued before the Scots Courts; and therefore the defender cannot pretend to create a Court to himself in any other kingdom, thereby to exoner himself touching a Scots subject, and where the parties chiefly interested were all Scotsmen. *2do*, Mr Elliot received the effects from Wych in right of the Scots Company's letters of attorney; and the English partners bound themselves with him, that he should be accountable to the Scots Company; so that these adventurers could not afterwards lawfully intent a process in Chancery, thereby to change the *forum competens*; since by giving bond in the Scots form, which was registrated here before intenting the process in England, they subjected themselves to the Scots Courts. *3tio*, The pursuer, long before the letters of attorney to Elliot, laid on arrestments in the hands of the Scots Directors, as creditors to Innes, whereby there being a *nexus realis* on the subject, which could only be prosecuted in Scotland; as the Directors themselves could not dispose on the subject, so as to evacuate the pursuer's arrestment, so far less could their factor commence a process in England, thereby to evacuate the pursuer's diligence.

Replied for the defender; *1mo*, That Mr Elliot being a residenter in London, and having received the effects of the cargo there, which belonged to the proprietors, whom the Scots Company had reinvested; could any thing be more competent than for them to pursue him where he lived, and where the effects were? *2do*, The pursuer compeared in the Court of Chancery, as appears from his answer given in there, long before any citation at his instance against the defender in Scotland; so that it were ridiculous to pretend that the defender should be obliged to answer in a process before the Lords, for a subject taken out of his hands by order of a sovereign court in England where he resides, and where the pursuer was compearing and founding upon his right; for so he might come to be liable in double payment, by answering a trust whereof he is already exonered.

Duplied for the pursuer, That the answer put in by him in Chancery is no more but dilatory, bearing that he could not answer to the charge of the bill, by reason that the cause was standing under arbitration betwixt the plaintiffs and him; and after this dilatory defence was overruled, the pursuer never gave in any peremptory one. And though the process proceeded betwixt the plaintiffs and Mr Elliot, and was brought to a hearing, yet it proceeded against

No 3. Mr Gordon only in default of compearance, which is no more than a decreet in absence with us.

THE LORDS found no process, and sustained the dilator of *lis alibi pendens*.

Act. *Graham.* Alt. *Sir John Ferguson.* Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 551. *Bruce, v.* 1. *No* 123. *p.* 159.

1728. *January* 2.

Sir JOHN MERES *against* The COMPANY of UNDERTAKERS for raising the Thames Water in York Buildings.

No 4.
Found in conformity with Cuningham against Semple, No 2. p. 8284.

SIR JOHN MERES, in order to recover payment of certain great sums alleged due to him by the York Buildings Company, who have a considerable estate in Scotland, that could not be affected by legal diligence, but in consequence of a decreet obtained in the courts there, brought an action against them before the Court of Session, concluding for payment of these sums. Against this action, the dilatory defence was objected, of a *lis alibi pendens*, *sciz.* in the Court of Chancery in England.

And, in fortification of the objection, it was pleaded, 1*mo*, That every *litis-contestation* is a judicial contract, or *quasi* contract at least, whereby parties mutually submit the validity of their claim to the determination of that judge before whom the cause is brought, and of those who, by appeal or otherwise, have a power of reviewing his sentence; which more especially holds with regard to the pursuer or plaintiff; for it is of necessity that the defender submits, in all cases where the jurisdiction is competent; but the plaintiff brings his case before the Court out of choice, which is as strong a reference to the Court as can be devised. And truly this defence of *lis alibi pendens* is better founded than ordinary in the present case, where the Court of Chancery is the proper court for trying the cause; for England being both the *locus contractus* and place of residence of the defendants, it is the place where the jurisdiction is originally and primarily founded; and that the defendants have a *forum* here, is *ex accidenti ratione rei sitæ*; a *forum* where execution only falls to be sought, in so far as the action is directed against the effects; and is not a *forum*, where the validity of the debt falls to be tried, except by way of incident, in order to explicate the power of giving execution against the *res sita*; and therefore where the question as to the existence of the debt is pendent in that place, where the only radical and original jurisdiction (if we may so speak) lies, and that no other court has power to try the subsistency of the debt but by way of incident; it seems pretty reasonable, that the incident jurisdiction stop, until the original court give judgment on the principal question that is before them, to wit, the subsistency of the debt. 2*do*, The defence is also founded in com-