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-

mon equity, that a defender may not be distracted and annoyed, by being carried from one court to another, and obliged to have his evidences, whether witnesses or writs, necessary for his defence, in different places, yea different kingdoms; yea, in all the kingdoms of the world, where he may happen to have effects, at one and the same time; a thing which is naturally impossible, and which of itself shews the necessity, as well as reasonableness of the defence and rule, and shews, that this defence does not arise from the municipal laws of any country, but hath its foundation in the law of nature and nations, and therefore proponable every where, though the suits be pendent in different kingdoms, except it plainly appear, that the foundation of the defence to be made use of in one suit or kingdom is not necessary for opposing or defending against the suit carried on in the other. No 4.

Answered to the *first*; It is true, lawyers sometimes speak of a litiscontestation, as a contract or *quasi* contract; but that is no more but a sort of *fictio juris* in certain cases, used to explain some effects of a depending process, but is never looked upon as having the true effects of a real or *quasi* contract; for then the judgment pronounced behoved to be final, and the *res judicata*, as an award of arbiters, would bar appeal, and be a good exception over all the world, which was never pleaded. The true ground of the objection, *lis alibi pendens*, is this: 'When a pursuer chuses a court, before which to bring his action, 'wherever the sentence of that court will be *res judicata*, and be put to ready 'execution; in every such place he is understood to have given up his privi-'lege of intenting over again the same action, and reasonably, since the effect 'could only be to distract the defender by different pursuits, without doing the 'pursuer any possible service, one decreet being as effectual wherever it reaches 'as many.' Whence it follows, that notwithstanding an action already intented the pursuer may begin his cause over again, wherever the force of the sentence upon the first process reaches not; and that wherever the exception of *res judicata* is not competent, neither is that of *lis alibi pendens*, which is plainly the case here; for however out of *comity* the Court of Session may give countenance to English decrees, and interpose its authority, to make them effectual in this country, it must not from thence be imagined, that English decrees make a *res judicata* here, more than the decrees of France or Spain. All the effect *comity* has, is to introduce a presumption in favour of foreign decrees, that they are just and right; but still there is access to show the contrary, which must necessarily bring on a new process, and subject them to the review of our judges; and when at last sentence is given in favour of the decree, the decree is not ordered to be put to execution, but the sentence of our own judges upon the decree. So that in no shape does an English decree make *res judicata* in Scotland; nor, of consequence, ought a depending process there, to support an objection of *lis alibi pendens*, when the same process is intented here. To conclude with a general view of the matter, a creditor is entitled to recover payment out

No 4. of his debtor's effects, wherever they can be found. A decree of the Court of Chancery cannot avail Sir John, to charge the real estate of the Company in Scotland; a decree of the Court of Session is necessary to that end, and both actions may regularly be carried on at the same time. Allowing, therefore, the Court of Chancery to have the radical and original jurisdiction, with respect to this process, and that it can only come before the Session by way of incident, which yet needs not be granted, because *locus rei sitæ* is as proper a foundation of a jurisdiction as *locus contractus;* allowing all this, still what good reason can be assigned for delaying Sir John's incident process here, till the event of that before the Chancery; when, after all, whatever be the judgment of the Chancery, in this country it will neither be a liberation to the defenders, nor a decreet to the pursuer. To the *second* argument, The difficulty of answering to the same process in different countries at the same time, will have thus far an effect, that the defender will be allowed reasonable time to transport the materials of his defence from one place to another. No doubt this creates trouble, but parties must be disquieted till they pay their debts. The argument is of that kind, that by proving too much proves nothing at all; for if that kind of disquiet were a good foundation for the exception of a pendent suit in another kingdom, it ought to be good, not only where a suit was depending in another kingdom, betwixt the same parties in the same cause, but where the defendant was sued upon any ground, or indeed by any person, because it is troublesome to attend suits in different kingdoms; only with this difference, that the same writings, if the subject was the same, and the same witnesses, cannot indeed attend at one and the same time in different kingdoms. But this makes no substantial difference, because this can be supplied by commissions, excerpts, or exemplifications; or, at most, have the effect to procure some reasonable delay, if proof be brought that it is impossible instantly to produce the writs or witnesses before the Court.

"THE LORDS repelled the defence."

Fol. Dic. v. 1. *p.* 551. *Rem. Dec. v.* 1. *No* 101. *p.* 193.

1709. *March* 8. COUTS and Co. *against* CALLIN.

No 5. AN action, for payment of a debt, was brought before the Chancery Court of the Isle of Man, against a person residing there, but who afterwards resided in the kingdom of Ireland.

Having occasionally come into Scotland, the defender was compelled to find caution upon a summary warrant from the Court of Admiralty, and an action brought against him in the Court of Session for the same debt.

Against this action he pleaded the exception of *lis alibi pendens*; in answer to which, reference was made to various cases marked in the Dictionary under