forms, without enquiring nicely whether they allow of writs according to our forms, the same ought to hold in the judiciary proceedings aforesaid; because, by so observing the law of nations, we sustain no prejudice, but do rather find it an advantageous mean to facilitate commerce. No 78.

Duplied for the defender; The opinions of the Doctors concern only sentences in the last resort, which the judgment of the Court of Queen's Bench is not; therefore the case must be tried upon the merits of the cause, without respect to the judgment. Nor doth Huber allow any farther authority to decrees pronounced in the last resort in foreign courts than *ex comitate*, and with two qualities, viz. That they be founded on principles agreeable to the law of nations, and contain nothing contrary to the particular laws of the place where they are craved to be put in execution. We have two instances of this kind in *Sande, decis. lib.* 1. *tit.* 12. *def.* 5.; and so a decree of the Chancery of England against the Earl of Buchan, No 82. p. 4544, founded on before the Session, was reviewed and restricted by the Lords.

THE LORDS sustained the decree of the Court of Queen's Bench, the pursuer instructing that his father was a partner, and that the defender was cashier or intromitter, to make the defender liable to the pursuer for his proportion.

Fol. Dic. v. 1. *p.* 323. *Forbes, MS. p.* 7.

1720. *December* 29.

HELENOR EDWARDS, Merchant in London, *against* KATHARINE PRESCOT of London, now Residenter in Kelso.

No 79.
The Lords allowed execution to pass upon a decree of the Court of King's Bench against the defender residing in Scotland, unless something competent in law or equity could be objected against it.

KATHARINE PRESCOT being lodged in the house of Helenor Edwards, a fire broke out (as was alleged) in Mrs Prescot's chambers upon the 15th October 1706, by which the house, *&c.* was entirely consumed. By the common law of England at that time, the person in whose house or chamber a fire happened, was obliged to make up the damage done in or upon the said house, without burdening the plaintiff with a proof of the defender's fault or neglect; the law presumed, *Incendium culpa inhabitantium fuisse ortum.* Upon this law, Mrs Edwards brought an action against Mrs Prescot before the Court of Queen's Bench, as she in whose chambers the fire broke out; and issue being joined upon the fact, the jury brought in their verdict for the plaintiff; and accordingly a decree was pronounced against her for L. 240 Sterling. To evade the effect of this decree, the defender retired into Scotland; but the pursuer having also laid an action against her here, founded upon her English decree, the question occurred, 'If an authentic extract of a decree of the Queen's Bench, ought 'to be sustained as *probatio probata* in Scotland, upon which execution must 'be decerned, unless it be shown contrary to the law of England; or if it is 'only to be sustained as a libel?'

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The pursuer *insisted*, That the vouchers produced being found probative of the judgment, it was competent for her to plead the same as *res judicata*; the merits whereof could not again be canvassed by the Lords of Session. The Court of Queen's Bench is so far supreme, that the judgments or decrees thereof are subject to no review, but of the House of Peers; and not of that neither, in what concerns the proof of matters of fact; no record being kept by which the Lords can judge of it; therefore the decrees of that Court, as being the final sentences of a supreme judicature, whether taking the case upon the general foot, as the decree of a supreme court, of however a distinct and separate nation, or more especially, as the judgment of a supreme and independent court under the same Sovereign and Legislature, which affords some separate views, to be hereafter noticed; the Lords ought to sustain the same as a valid ground of debt upon the person now under their jurisdiction, and without any review (which implies a subordination) decern upon it for execution. In support of this it was *urged*, That where any person comes under an obligation, valid and binding by the laws of the country where it is contracted, whether the same was by voluntary contract, or by the final judgment of a supreme court in the jurisdiction in which it was pronounced, the supreme court of any other, however distinct and independent country, is by the law of nations obliged to interpose its authority for making the same effectual, either against the effects of the person which may be found under their jurisdiction, or against both person and effects, where it happens, as in the present case, that he withdraws himself from the place, by the laws of which he had become bound, and where execution against him must have been unavoidable, under this limitation always, 'Provided no prejudice did thence arise to the jurisdiction, privileges 'or laws of the place where performance of the obligation is pursued, or the 'decree craved to have execution.' That this rule holds universally in obligations is beyond question; nor is any country more observant of it than ours: A bond or contract granted in France, England, or any where else, liable to no exception from the law or forms of that country, is sustained with us, however defective in those solemnities that our customs require: Executors are allowed to confirm English testaments, and the like; instances whereof are so frequent, that to mention particular cases were unnecessary. Nor can this be founded upon any principle of law or reason, which will not equally plead in support of the final decree of a supreme court of a distinct country, 'at least in civil cases,' as inferring a valid debt upon the party against whom it is pronounced; which will be otherwise evident from this consideration, that litiscontestation is in effect a contract, by which parties do agree, that if the fact shall be proved, the defender shall subject himself to the conclusion of the libel; and upon that ground, the decree here founded on, may justly be considered the same, as if the party had granted his bond for the sum therein decerned; and therefore execution falls to be given upon it by a new decerniture against the defender for the sums therein contained, without any re-examination of the merits of

the cause, which can be competent to none, but such as are of a superior jurisdiction to the court that pronounced it. If now the foundation of this law of nations be enquired into, it will be found to be the expediency of the thing, and the common conveniencies that arise to nations, as they are distinct people, by the observance of it: Mankind being so far bound together, as into one society, that they ought to be assistant to one another in such things as do not hurt or prejudge their own rights and privileges; from whence it is, that what we call the law of nations does arise, where by a tacit consent, implied in mutual advantage and expediency, nations become mutually engaged to perform these offices to one another. The doctors, particularly the practical writers, have most of them treated this question of the effect of decrees of different jurisdictions, and upon the very reason now given, generally agree, that the same obtains in both contracts and decrees; but carrying the matter still thus much further in the case of decrees, that the court from whom execution of them is demanded, ought not to examine into the merits of the cause; but that *pro justitia sententiæ et conformitate ejus cum legibus loci ubi pronunciatum est, præsumendum sit.* It is true, where they treat the question as betwixt two nations absolutely distinct, they seem to require the *literæ rogatoriæ*, or *requisitoriæ* as they call them; but which cannot be necessary in an united kingdom, such as Scotland and England, as we shall prove by and by: See *Faber's Rationalia, ad l.* 75. *de jud. Mynsinger. Observat. cent. obs.* 69. *Gail Obs. l.* 2. *obs.* 130. *n.* 12. *et* 13. *et l.* 1. *obs.* 113. *n.* 8. These authorities do indeed carry the point further than the pursuer has occasion in the present case to plead, *sciz.* That the Lords in such a case are without enquiring to presume for the conformity of the sentence to the law of the place: She has all the assurance can be had, that her decree is without fault, when the Lords shall please to examine it by the laws of the country, and forms of the court where it was pronounced, and has occasion to plead no further, than that supposing her decree to be unexceptionable conform to the law of England, it ought here to be sustained as a valid ground of debt; which the aforesaid authorities do *a fortiori* conclude. Indeed in all these cases, the limitation above allowed is still to be taken alongst, 'That there do not thence arise any prejudice to the laws or jurisdiction of the distinct people;' and as this will obviate any authorities that may be adduced for the contrary of what is here pleaded, it is likewise evident, this action does noways tend to impinge upon this limitation. The pursuer does indeed agree, that no law of England, or any other country that is inconsistent with the law of Scotland, can by virtue of the decree of any court take effect in Scotland; but is quite a different thing, where only the law of England statutes what is not provided by the laws of Scotland; for a decree upon such a law may very well take effect here, and yet nothing follow inconsistent with our constitution, or encroaching upon our jurisdiction. The thing will be plain by an example: Suppose a sentence was pronounced in England, upon a testament which contained lands and heritages in Scotland; no such decree could

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No 79. be effectual here, with relation to these subjects which by the law of Scotland cannot be conveyed by a testamentary deed; for that would be an encroachment upon our constitution: But where only the law of England provides what is not provided by the law of Scotland, there is no reason why a decree on such a law should not be sustained in Scotland, more than an English bond, which is null by the Scots form. Again, suppose by the law of England, tacks clad with possession are not good against singular successors, and that by a decree obtained in that country at the instance of the purchaser, the tenant had been decerned to remove, and pay costs of suit; to be sure this would be a decree proceeding upon a law not agreeable to the law of Scotland, and yet it could not with any propriety be pretended, that the giving authority in Scotland for putting the decree in execution for these costs, were any encroachment upon the laws and constitutions of this country.

The pursuer, in the *next* place, endeavoured to lay down the speciality of the case betwixt Scotland and England, in questions of this kind. The Union, he urged, has in this matter made a great alteration: While there was only an union of the Crowns, and the nations only united *ad fidem*, they were still as foreigners with respect to one another, and cases between them regulated by the laws of nations; which, though they are binding, (as above is proved) that obligation is rather *comitatis* than *necessitatis*; and so the *literæ requisitoriæ* are used among distinct nations; but now that we are not only united *ad fidem*, but come under the same legislative, and have the same ultimate resort of justice; the mutual assistance of the several supreme courts, who have jurisdictions independent of one another, is become *necessitatis*, and so needs not be requested as a favour; seeing, if such mutual assistance were not given, the affairs of the subject would be inextricable. And thus the case is now become the same, with respect to this mutual assistance betwixt the supreme courts of England and Scotland, as it always was in Scotland betwixt two of its supreme courts, *viz.* of Session and Admiralty: Should the executorial of poinding, or the like, be directed against a subject lying within the Admiral's jurisdiction, upon a decreet of the Lords of Session; it seems to be plain, that the poinding could take no effect against the subject upon the Lords authority, which extends not to the sea; but needs the interposition of the Judge-admiral to make it effectual, and this is notour to be done every day there is occasion for it; nor is it thought the Admiral can refuse it upon application of the party; not that this anyways flows from his being subject to the Lords jurisdiction, of whom, being a supreme Judge, he is independent; but, from the nature of the thing, being absolutely necessary for explicating the affairs of the subject; which, upon the precise same reason, is no less necessary to be observed amongst all the independent courts under the same Legislature; still under the above limitation, That the laws peculiar to these independent jurisdictions be not encroached upon. The case of Holland may here not unfitly be applied: *Voet*, § 41. *ad tit. Re judicat.* states the difference betwixt the case of

distinct nations and these under the same Legislature, That in the first, the mutual assistance of one another is *comitatis* only; but in the last, that it is *necessitatis*; and that particularly it is so in Holland, enjoined by order of the States. To conclude this head, the pursuer shall endeavour to set forth distinctly the necessity she is pleading for, by an example: Let it be supposed, one should obtain a decree in England, before the Court of King's Bench, (from which Court there is no appeal, but to the Parliament of Britain;) the person against whom the decree is obtained, withdraws to Scotland with his whole effects; suppose the pursuer's mean of proof, upon which he obtains his decree, be lost, perhaps by the death of witnesses, by which a new suit commenced before the Session should be fruitless; a process therefore is commenced before the Session upon the decree, as in the present case, as a ground of debt, which the Lords of Session find not probative; this decree of the Session goes to the Parliament by an appeal: It is very certain by the rules of the House of Peers, that had the original decree been appealed from to their Lordships, they would not have overturned it, for the reason already said: How then is it to be supposed, that they can support a decree of the Lords of Session, when gone before them by way of appeal, rejecting, and in effect overturning a decree of a court in England, which the House of Peers could not by their own rules have overturned, had the appeal been directly lodged before them against the English decree itself? This, and other views which have arisen from the late change in our constitution by the Union, by which we are come to have the same legislative and ultimate resort of justice, must necessarily put us upon a different footing from that of perfectly distinct nations. As the law of nations, properly so called in contradistinction to the law of nature, had its rise by degrees, as experience discovered the common expediency of things; so the present circumstances of our constitution discover so much reason for what the pursuer now pleads, that it is hoped the Lords will be of opinion it ought now to take place, whatever had been the former custom. No 79.

In answer to this pleading, it was *observed*, in the *first* place, for the defender, That the constitution, the laws and judicatures of the two nations have no authoritative force in the other, no more than a judgment of any supreme court of France or Germany has in Britain. In the *next* place, Though a judgment recovered in one nation, has no authoritative force in another; yet sometimes it happens *ex comitate*, out of that respect which nations by common consent entertain for decrees pronounced in the sovereign courts of each other, that a judgment recovered in one kingdom, may create a debt which may be prosecuted in another. But then it was observed, that as this custom of nations was introduced purely on account of equity, and for the encouragement of commerce, that a person who justly was debtor, and so found to be by judgment in his own country, might not with impunity defraud his creditors by retiring to another; wherever equity and justice did not support the judgment, so as upon the claim judgment might have been recovered in the country where the party

No 79. was attached, the comity or respect to the foreign judgment ceased, and there followed no interposition of authority on it for execution. Hence, when a sentence is pronounced for punishment of a crime in one country, it cannot be put to execution in another; and for the same reason, when a statutory penalty or mulct is by judgment of one nation awarded for a fact, which is not of its own nature penal or criminal, no execution can be had on such judgment in another nation. To apply this, it was observed, that the foundation of the judgment in England, was a particular law in that country, penal in itself, and which had no effect in Scotland. That a person who is undone by fire, should be punished with the losses of other people, purely because this fire casually broke out in his house, is a penal severity, legal indeed where the law so provided it, but without any foundation in the law of nature or nations; because common equity does not inflict a punishment where there is not fraud, or gross faultiness equal to it; and this the English themselves were so sensible of, that this very decree gave occasion to an act of Parliament, the 6th of the Queen, abolishing that law; and as it is not the law of nature or nations, it is not the law of Scotland. Let it then be supposed, that Mrs Prescot had, before the judgment recovered against her in the Queen's Bench, retired into Scotland; and let the question be put, Whether a suit carried on against her for the same facts for which she was prosecuted in the Queen's Bench, could have produced a decreet? It is plain it could not; her defence would have been this, That no law in Scotland supported the pursuer's conclusion: And unless it shall be imagined that a penal law, peculiar to England, and contrary to the constitution of the law of Scotland, could have effect, and be put to execution in Scotland, the libel could not possibly be so much as sustained; and if a libel could not be sustained in Scotland on this claim, it seems to be destitute of all foundation, to imagine that the claim should grow better, because a judgment was recovered upon it in England. As this is an obvious objection against this decree in particular, so it tends to shew in the general, that foreign decrees ought not to be put to execution without looking into the merits of the cause; for besides the limitation allowed of by the pursuer, That they contain nothing contrary to the constitution and laws, the Judge ought likewise to examine that nothing is decerned contrary to the universal law of equity, which should reign over all. But, in the *second* place, There is this particular objection against the decrees of the Queen's Bench, That they keep no record of proof led before them; which makes a strong argument why such a decree should never be put in execution; for it cannot be controverted, but that if the Lords saw the evidence upon record, and saw the verdict unjust, they would refuse to interpose their authority: Can then the Lords give execution to any decree, where the form deprives them of an opportunity to judge whether the evidence was good for any thing or not? It is apprehended, in such a case, justice does require, that such decrees ought not to be regarded, since the Lords are to judge with knowledge, not in utter darkness upon the word even of a jury. And

what the defender truly at the bottom complains of is, That the verdict was in reality iniquitous, supported by the single testimony of a maid, the pursuer's servant, who was piqued for having been accused justly of robbing the defender; and that in contradiction to the testimony of another person perfectly unbiassed, who swore that the fire began in one Mrs Fincham's apartment, and not in the defender's. Now, if the judgment be turned into a libel, and the ground thereof yet to be instructed by evidence, the truth of this objection will clearly appear. In an argument of this kind, it cannot have escaped, what was found in the late case betwixt Sir John Swinton and Goddard, No 78. p. 4533. Goddard insisted on a decree of the King's Bench, in which Sir John Swinton, as cashier, was ordained to pay to Goddard, as partner, a considerable sum: That judgment was in a case of civil debt, in which the laws of all civilized nations are almost the same: The Lords sustained the judgment; but with a quality, that the pursuer should still prove that he was partner, and Sir John cashier: From this sentence, as not respectful enough to the King's Bench, the pursuer appealed to the House of Lords; but, after hearing counsel on that point, the Lords affirmed the decree of the Court of Session. No 79.

Replied by the pursuer to the *first* part of the defence, What might be the case of a sentence upon a crime, there is no occasion to dispute, her action not being for the penalty of a statutory crime, or founded upon a penal custom; but arising plainly *ex tacito contractu:* For where, by the particular custom of a country, any man who hires a house, is liable to make up the damages happening in his house by fire, without burdening the setter to prove it was by his fault, which is the whole meaning of this custom, the conductor is supposed in law to paction with the setter in these terms, and the decree for damages that ensues, is not properly a decree upon a penal custom, but a decree actually upon a contract, which, upon the footing of the established law of the place, is supposed to have been entered into betwixt parties. Taking it in this view, there is nothing in the law contrary to equity; it is even at this day a question not agreed amongst lawyers, whether that very custom is not agreeable to the Roman law, and several of the first rank hold that it is. The question they state is this, Where fire happens in a house, upon whom lies the burden of proof? Whether upon the inhabiter to prove his diligence, or upon the setter to prove the inhabiter's fault? And a whole tribe of lawyers agree that this burden lies upon the inhabiter, because of the presumption that the law has laid down, That *incendia plerumque fiunt culpa inhabitantium;* such as *Fachineus Contrav. l.* 1. *c.* 87. *Mollerus Semest. l.* 4 *c.* 31. *Sande, l.* 30. *t.* 6. *def.* 9. & *Vinn. Select. Quest. lib.* 1. *c.* 33. Now, there being nothing contrary to equity in this claim, it follows, That an action upon it originally intented in Scotland must have been sustained, although no part of our law, yet as noway contradictory thereto, but falling to be determined by the law of the place where the fire happened, upon the same principle, that the Lords determine upon bonds or contracts made abroad according to the law of the place. Here then the

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fender's first argument falls at once to the ground: And, as to the *second*, comity, if it has any effect at all, must infer a presumption that all things are fairly carried on, and that the decree is just and equitable, unless the contrary appear from the decree itself: This matter is fully handled above, and it is particularly taken notice of, what confusion it must occasion in the way of an appeal, if the Lords should refuse their authority to an English decree, because the proof is not recorded. As for Goddard's case taken notice of in the last place, it comes noway up to the present; for there the Lords were of opinion, that the same relief was competent to the party in England which they gave him here; which, if the defender could here pretend, she should have been admitted in the terms of the decision in the same way to plead that relief; but that there is no foundation for, the decree being in every point unexceptionable according to the English forms; for here the argument from the decision is directed against the evidence upon which the decree proceeded, which having been by witnesses in a court which keeps no record, it is impossible that any relief could be had in that point, not even were the question before the Parliament; whereas, in Sir John's case, the evidence was by writ; in which case the law of England would allow relief, were there any thing overlooked.

'The Lords found, That execution ought to pass on this decree of the Queen's Bench, unless something competent in law or equity be objected against it.'

Against which a reclaiming petition was offered, but one of the parties dying in the interim, the cause was never further insisted in.

Fol. Dic. v. 1. *p.* 323. *Rem. Dec. v.* 1. *No* 21. *p.* 43.

1768. *July* 14.

Archibald Sinclair of the Island of Jamaica, and William Sutherland his Attorney, *against* Mrs Frazer, and her Husband Alexander Frazer, Younger of Strichen, Esq.

No 80.

Found, that a foreign decree, bearing to have been *in foro contentioso*, had not the effect of a *res judicata* in Scotland, but entitled the party claiming under it, to plead that the *onus probandi* rested on his opponent.

Mrs Frazer having succeeded, when under age, to an estate in Jamaica, her tutors appointed Archibald Sinclair, and one Mr Archdeacon, attornies for managing it. Mr Sinclair, however, alone acted.

When Mrs Frazer came of age, another gentleman was appointed in Mr Sinclair's place; but no settlement of accounts appears to have been made with Mr Sinclair.

The estate was sold in 1763; and, in 1767, Mr Sinclair brought an action in this Court against Mrs Frazer for a specific sum, awarded by a judgment of the Supreme Court of Judicature in the island of Jamaica, as a balance due the pursuer upon an account current with the defender. The record produced was certified by the clerk of court; his subscription by the secretary of the island,