SECT. III.

Proceſs in Scotland upon foreign Deeds.

1702. *January* 10. CHATTO *against* ORD.

No 21.

IN a purſuit in Scotland, upon an English bond, the defender denied the ſubſcription, and inſisted, upon the law of England, that the bond was not probative, unleſs the purſuer would prove by the witneſſes inſert, that it was *factum*. THE LORDS found this impracticable at this diſtance, and therefore repelled the allegeance.

Fol. Dic. v. 1. *p.* 319. *Fountainhall.*

See this case, No 13. p. 4447.

1739. *July* 12. KINLOCH *against* FULLERTON.

No 22.

BY the laws of England, the heir is not liable to pay his predeceſſor's debts, unleſs where the predeceſſor expreſſly binds his heirs as well as himſelf. In a process againſt the heir who ſucceeded to his eſtate in Scotland, for payment of a promiſſory note contracted by the predeceſſor, in England, where he had long reſided, and made his money, it was *objected*, That the heir was not bound in the promiſſory note; that the *locus contractus* muſt be the rule; and that if the obligation was ſo limited, as to be good only againſt the executors in England, it would be abſurd to give it a ſtronger effect when purſued in Scotland. It was *anſwered*, That whatever peculiarity may be in the practice of England, we follow the law of nations, which makes people's effects liable for payment of their debts; and therefore, provided a foreign deed be habilely executed, according to the forms of the place, we give it all effects that such a deed can have, executed in Scotland. THE LORDS ſuſtained process againſt the heir.

Fol. Dic. v. 1. *p.* 318.

*** C. Home reports the same case:

THE deceaſed Dr Fullarton, a Scotsman by birth, reſided moſt part of his life in London, and died there. Some time before his death, he contracted ſeveral debts, particularly a promiſſory note of L. 100 to Hugh Fraſer, and ſome book-accounts to perſons at London, who aſſigned their reſpective claims to

Mr Kinloch; on which he brought a process against the Doctor's children, as representing their father, for payment; and insisted particularly against William, the eldest son, on the passive title of charged to enter heir, who, as heir to his father, had right to an heritable debt for L. 2000, on an estate in this country, upon making up a title thereto. No 22.

Pleaded for William Fullarton; As the debts pursued for were contracted in England, they behoved to be regulated by the law of that country, by which the heir could not be reached for bills, promissory notes, or book-debts, but only the executors or administrators; that the heir could only be liable for such deeds of his ancestor, where heirs were specially expressed, viz. such obligations, where one binds himself, his heirs, executors, or administrators; and, as this is an established point in the law of England, the present question comes to this, If it is just or reasonable that these debts should produce any action here against him? In order to clear this point, it was *observed*, That it is but *ex comitate* originally that debts, contracted according to the law of the place where the deeds are executed, though disconform to the law of the place where they are sued for, are sustained at all. It is very true, it has in a manner become the law of nations, that deeds executed conform to the law of the place where they are granted, shall be sustained every where; hence it is, that such deeds granted abroad, as they receive their binding force from the law of the respective countries, so they can have no further effect, or produce any stronger action, than is allowed by the law of the place where they are granted; as the measure of the obligation must be taken from thence, so must the effect and extent of the action thereon, either against the obligator or his successors, *unumquodque eo modo dissolvitur, &c.* The creditors in the debts sued on must be presumed to have conformed themselves in their contractions to the law of their own country; and, as they did not take a proper obligation, binding the Doctor and his heirs, how can they expect action shall be sustained against his heirs any where? They have contracted upon the faith of the Doctor himself, and his executors only being liable, and therefore cannot sue the heir any where, who is entitled to a liberation by the form of the contraction; in the same manner as the Doctor himself would have been free, and all his representatives, if the obligation had been void by the law of England; and would have been assoilzied from any action sued against them in any other part of the world, as well as in England, *quod juris in toto idem in parte.* Further, foreign bonds are taken away in the same manner as is allowed by the law of the place where they are granted. *E. g.* Payment of an English bond will be sustained to be proved by witnesses, or the oath of the cedent, in prejudice of an onerous assignee. Thus likewise the limitation of actions introduced by the statute 21st *Jacobi* I. takes place here with respect to debts contracted in England. Now, by the same rule, every just exception that lies against debts contracted abroad, by the law of the place, is receivable against them every where, whether such defence tends to a total absolvitor of the debtor himself, and all his represen-

No 22. tatives, or in favour of his heirs, in contradistinction to his executors. By the law of England likewise, if one binds his heirs and executors, without binding himself, the obligation is void; and yet, with us, such obligation has been found effectual to produce action; would it not be absurd to suppose, that a bond of that tenor, granted in England, should be sustained here; that a deed, originally null, should become good by change of the place of action? If such bond could not be sustained here, is it not a natural consequence, that, where one binds himself, without mentioning his heirs, the contraction should be void as to the heirs, conform to the law of the place where the debt accrues. From all which, it is plain, that, as the defender could not be liable by a direct service, so neither can he by a charge to enter heir.

Answered for the pursuer; Whatever may be the law of England with respect to the defence now insisted on, it is believed the same can be no bar to the action brought here for attaching the debtor's estate, in the way and manner as allowed of by the law of Scotland, where such estate is situated; for, as lands and other heritable securities, *nullam habens sequelam*, they must be regulated *quoad* their constitution, transmission, &c. by the laws of that country where they are situated; thus, heritage in England is conveyed by testament, and a death-bed disposition will be an effectual conveyance there, liable to no reduction; yet in both these particulars the law of Scotland stands quite otherwise. It has been stated as a doubt, how far an obligation, or other deed executed according to the rules and forms of the country where it received its being, could be available to force execution in another country, where different forms and solemnities were required? And the general solution, as founded on principles, seems to be, That, whatever effect they are allowed to have, it is but *ex comitate*; as no law can be of force *extra territorium*. So far the practice has prevailed by the custom of nations, and *ex mutua comitate*, for one nation to give execution upon obligations, or other deeds regularly completed, according to the solemnities of that country where they are granted; especially where the like debts or deeds, if contracted or constituted in that country where execution is demanded, would have been obligatory and available to the creditor, in the same manner as demanded upon the like debts contracted in foreign parts. And, *a fortiori*, where execution is sought against an estate in Scotland, upon debts contracted by a Scotsman residing in England, the Judges of our law are not called upon to examine whether these debts would have received the like execution against an estate of the same kind, in that place where the debts were contracted. If it is a just debt, such as would have been available against every estate belonging to the debtor, had it been contracted in Scotland, no good reason can be assigned why such debt, though contracted in England, especially by a Scotsman, subject to the laws of Scotland, *tam ratione originis quam rei sitæ*, should not receive full execution against against every estate in Scotland belonging to the debtor. Agreeable to these principles, the

practice has always been, with respect to debts contracted in foreign parts, to give execution thereon, if constituted in the manner prescribed by the law of that country where they received their being, though they would not have been good if contracted here; so far the *comitas* has gone, to regard the law of that country where the debts were contracted, as to the solemnities required to make them effectual, even in other countries, where different forms were requisite; but, where the question is not as to the forms of the constitution, but as to the effect that these deeds ought to have in transmitting of property, neither the *comitas*, nor the practice of the Court, has gone so far as to admit of these relevant to transmit or affect an estate in Scotland by any way or manner, but according to the rules prescribed here. In short, there is neither law nor reason to restrain one nation from enforcing, by legal execution, deeds regularly constituted in another country, though these would not have been available to the same purpose in the place where they are constituted. If a contrary doctrine were to take place, many absurdities would follow: *e. g.* There is no such thing as arrestment or adjudication of the debtor's effects or estate known in England; but to pretend that therefore none of these diligences could be used here, upon a debt contracted in England, would be attended with many inconveniences; consequently, as he has not renounced, he ought to be found liable for the debts sued on. No 22.

The authorities adduced for the defender, were Coke upon Littleton, *lib.* 3. § 337.; Jacob's Law Dictionary, word Heir, last column; Voet. in his title *De statutis*, § 19.; January 18. 1676, Cunninghame against Brown, *voce* PROOF.

For the pursuer Jacob's Dictionary, word Heir; Chanc. rep. 280. and rep. 74; 9th December 1623, Colonel Henderson's Children, No 40. p. 4481.; Jacob's Dictionary, word Mortgage.

THE LORDS sustained the passive title of lawfully charged to enter heir; found the defender liable in the L. 100 Sterling, contained in the above-mentioned promissory note; and found the other book-debts relevant to be proven by witnesses.

C. Home, No 125. *p.* 203.