No 24.
A mutual contract executed in England between two brothers, whereby they became bound, that failing heirs, the surviver should enjoy the other's estate, was found effectual at the surviver's instance to reduce a gratuitous disposition of lands, granted by the defunct in prejudice of the contract, though it was pleaded that the contract not being according to the forms of the law of Scotland, could not carry an estate situated in that country.

1706. *July* 5. Colonel John Cuninghame *against* The Lady Semple.

Colonel John Cuninghame having raised reduction and improbation against the Lady Semple, of a disposition granted by the deceased Brigadier Cuninghame his brother, in favours of the defender, and also the contract of marriage passed betwixt these parties, upon this ground, That long before granting the said disposition, or entering into the contract, mutual indentures were passed and perfected betwixt the pursuer and the brigadier, whereby they mutually bound themselves, that the surviver should succeed to the other's estate, failing heirs of his own body; reserving power to the first deceasing party to provide his wife in the property of a third of his moveable estate, and the liferent of a third of the heritage; to which indentures the foresaid rights in favours of the defender are prejudicial;

Alleged for the defender; The indentures are not formal according to the laws of Scotland, and therefore can be no title to claim succession to heritage or real rights here, or to quarrel and impugn the conveyance thereof; for, our practice sustains writs solemn after the form of other countries only as to moveables, *quæ sequuntur personam*, and personal contracts that are *juris gentium*, but not as to testaments or the conveyance of heritage, January 19. 1665, Schaw *contra* Lewis, Div. 6. Sect. 2. *h. t.*; Feb. 18. 1631, Houstoun *contra* Houstoun, *voce* Proof; December 9. 1623, The Children of Colonel Henderson *contra* Debtors, No 40. p. 4481.; March 11. 1624, Lamb *contra* Heth, *voce* Forum Competens; July 3. 1634, Melvill *contra* Drummond, Div. 6. Sect. 1. *h. t.* 2*do*, The indentures being entered into in England, produced and founded on by the pursuer before the chancery there, and quarrelled by the defender, cannot be insisted on here, until they be sustained and approved in the said court of chancery, where they were impugned and rendered litigious.

Replied for the pursuer; The indentures are formal according to the law of England, where they were entered into; and the form and stile of English writs are now frequent and probative, and afford action in Scotland. Yea, the granters of bonds after the English form, have been thereon summarily secured until they found caution, *judicio sisti et judicatum solvi*; as was done to Andrew Crawford at the instance of Carruthers. So a bond granted by Lord Saltoun to a Frenchman, after the French form, was sustained as a title to adjudge the granter's estate, July 5. 1673, Master of Saltoun *contra* Lord Saltoun, No 4. p. 4431.; Dec. 11. 1627, Falconer *contra* Heirs of Beattie, Div. 6. Sect. 4. *h. t.* The distinction betwixt *mobilia* and *immobilia*, used by the defender's lawyers, takes no place where the question is only in relation to the solemnities of a writ and conveyance habile to convey the subject disponed, if it were made conform to the laws of the place where it is to be cognosced and the subject lies, by a person having power to convey; and not about deeds which, of their own nature, are simply inhabile by our law to transfer heritage. *V. G.* As none

with us can alienate heritage upon death-bed, even by a deed *inter vivos*, nor transmit it by testament in *liege poustie;* neither can a Scotsman in England dispose upon his death-bed of heritage in Scotland, or convey it by testament; because, these deeds are not quarrelled upon the score of local solemnity different from ours, but because utterly inept by our custom to transmit heritage. This is consonant to the opinion of lawyers and practice abroad, *Vinn. Select. Quæst. lib.* 2. *cap.* 19.; *Sande Decis. lib.* 4. *tit.* 1. *def.* 14., and may be confirmed from the revocation made by King James the V. at Rouen after the French form; by King William's testament at the Hague, wherein he legated the territories belonging to him as Prince of Orange; and by the mutual tailzies of succession betwixt the great families in Germany: Deeds solemn according to the custom of the country where they were made, and sustained even as to feus and *bona immobilia.* As to the decision betwixt Schaw and Lewis, the reason why the Lords did not sustain a nuncupative testament in England, as valid to convey even moveables in Scotland, was not because the solemnity thereof differed from what is observed in testaments in Scotland, but because our law allows not of probation by witnesses where writ uses and ought to be adhibited; and particularly rejects their testimony of a legacy above an hundred pound. Meantime, the pursuer does not pretend, that his indentures are such as give him immediate right to infeft upon in the brigadier's lands, but only that they are a sufficient title to pursue the brigadier's heirs to implement and denude in his favours; besides, there is something special in the pursuer's case; that he and his brother, though come of Scottish parents, had never been in Scotland before the making of the deed; and it did not concern any Scottish heritage acquired at the time, but only the expectation of uncertain conquest in the wide world. Now, if the defender's reasoning were good, the brethren could not predetermine the succession to their conquest, without making as many contracts as there were nations wherein they had a prospect of pushing their fortunes. 2*do*, In the case of Sir John Cochran against the Earl of Buchan, both dependance before the chancery of England, and a decree thereof, though instantly verified, was not sustained to exclude process here. It is in vain to pretend that this was because the Earl's bond bore a consent to registration in Scotland; for, the clause of registration did only afford the creditor his election, which might have seemed cut off by his pursuing in England.

No 24.

Duplied for the defender; The Lords never sustained such a title as this of the pursuer's, to reduce real rights of heritage, or to regulate and convey them: All the decisions hitherto have been in the matter of personal contracts, and about moveables, except only personal contracts of marriage which are *juris gentium* and favourable. As to the instance of the Master of Saltoun, it doth not meet the case in hand; for it was founded on an obligement to pay a liquid sum of money, and did not principally and immediately concern heritage, was pursued against my Lord Saltoun in his own lifetime, and proceeded upon some onerous and common cause of the regiment, not without some previous trial

No 24. concerning the verity of the bond. As to the opinion of Vinnius and Sande, the same are overruled by Cujacius, Donellus, the lawyers at Altorf, Oldradus, Car. Molinæus, Tuldenus, Buzius, and especially Nicolaus Burgundus in his Consuetudines Flandriæ, and P. Christenæus in the 2d volume of his decisions Curiæ Belgiæ, and in his book ad Leges Mechlinenses, tit. 17. N. 10.; nor is there any ground for the distinction used by Vinnius and Sande; for why should the law of death-bed, requiring the circumstance of *liege poustie*, be more binding than the statute requiring the writer's name with his and the witnesses designations and subscriptions. The instances of King James the 5th's revocation, King William's testament, and the mutual tailzies in Germany, are nothing to the purpose. For King James's revocation was made long before the act of Parliament requiring the name and designation of writer and witnesses, when our laws and the French were the same as to the solemnities of writs, and the mutual entails among the German princes are of the nature of treaties of peace and alliance. His late Majesty's testament can afford as little argument; because, the testaments of princes having something of legal authority, are ruled after another manner than those of private men, and the solemnities used at the Hague are the same with those observed in most of the places where his Majesty's territories lay; upon the whole, it is absurd to impugn a contract of marriage, or rational deeds in favours of a wife, upon pretence of latent indentures, framed as it were by prophecy, to evacuate the just effect of such settlements.

The Lords found the indentures, though not made according to the forms and laws of this kingdom, may be the title and foundation of a process for claiming a succession of heritage or real rights here, and to quarrel and impugn deeds in prejudice thereof; and repelled the second defence of *lis pendens* before the chancery of England.

Fol. Dic. v. 1. *p.* 319. *Forbes, p.* 116.

1729. *February.* Earl of Dalkeith *against* Book.

No 25.

A disposition of an heritable jurisdiction in Scotland, made in England after the English form, was not sustained even against the granter, to oblige him to grant a more formal disposition; though it was *pleaded*, that such a disposition must at least have the force of an obligation good against the granter and his heirs, though it would not avail in a competition with a more formal right; and, if such a disposition would produce action in England against the granter, to renew a more formal right, it might be also a good ground of action in Scotland, seeing obligations of whatever nature, executed *secundum consuetudinem loci*, are effectual in Scotland. *See* Appendix.

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