

same effect here. As to the decision cited on the other side, if they should endeavour to take away this bond by witnesses, the decision will be a standing rule against them; from this principle, whoso subjects himself to an obligation to be performed in a certain place, is *eo ipso* understood to subject himself to the laws of the place, with relation to that obligation; which is, in other words, *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit*. And it is indeed plain enough, the laws where the contract is entered into, and where performance is designed, being repugnant, since both cannot take place, that the laws where performance is designed, should prevail: But upon the first reflection, this will be found to have no relation to the case in hand; for though this bond cannot be liable to be taken away by witnesses, and not taken away at the same time, nothing in nature hinders it, as it truly was designed to be at the same time a binding obligation both in England and Scotland.

'THE LORDS found, That this bond is null by the law of Scotland; but that a bond granted in England, according to the laws and forms there, is effectual to produce action in Scotland, albeit by the tenor of the bond it does appear that the payment and execution was intended to be in Scotland.'

*Fol. Dic. v. 1. p. 318. Rem. Dec. v. 1. No 23. p. 51.*

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DIVISION IV.

The Laws of a foreign State have no coercive force *extra territorium*. Diligence in Scotland upon foreign deeds will be regulated by the Law of Scotland.

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S E C T. I.

Foreign Assignation.

1708. July 22.

The EARL of SELKIRK *against* GRAY.

THE Duke of Hamilton being debtor by a double bond, in the English form, to Captain Alexander Gavin, in L. 1030 Sterling, he assigns this to Sir James Gray, by a writ of attorney *in rem suam*, in the English manner; whereon Sir

No 19.

In a competition between an arrestment and assigna-

## No 19.

tion after the English form, which requires no intimation, the Lords preferred the arrest, because, though a deed established according to the forms of a foreign country may be effectual here, yet with regard to all steps of diligence in Scotland, the law of Scotland must be the rule. This judgment was reversed, on appeal.

James writes to the Duke, acquainting him of his right; who returns an answer promising payment; but after this, Charles Earl of Selkirk being creditor to Captain Gavin he arrests this money in the Duke his brother's hands; and a competition arising, it was *alleged* for Gray, the assignee, That he was not bound to debate any preference, but insisted against the Duke on his letter promising payment, which was as sufficient to make him liable as if his assignation had been formally intimated, seeing this assurance given him made him forbear any further legal intimation, and was as good as if he had given a bond of corroboration. *Answered* for the Duke, There never was a more extravagant notion pleaded, than to assert, that because the Duke promised payment, therefore, though a better right supervene before payment, which the Duke could not foresee, yet he must pay it to both; which shocks common sense, and is destitute of all foundation in law; and Stair, *lib. 3. tit. 1.* condemns it. See both Stair and Dirleton, 11th December 1674, Elphinston, *voce* PROOF; as also Spottiswood, page 229. THE LORDS found this superveniency could not involve the Duke in double payment, and therefore found him only once liable. Then Gray *pleaded* this second ground, I must be preferred to your posterior arrestment, for my assignation needed no intimation, because, being in the English form, it summarily transmits the property, without any such solemnity as an intimation. *Answered, non constat* this is the law of England, which being matter of fact to us, must be proven by a declaration of their judges; but *2do, esto* it were, it cannot regulate this case, which is betwixt Scotsmen, and pursued before a Scots judicatory. THE LORDS repelled the allegiance, and found it behoved to be regulated by the law of Scotland, which requires intimation as a necessary solemnity. *3tio*, It was *contended* for the Earl of Selkirk, That the holograph missive letter founded on, could not prove its own date, against an arrestment, bearing a date posterior thereto, as was found, 14th Jan. 1662, Dickie, *voce* PROOF; 21st Juno. 1665, Braidy, *IBIDEM*; and 5th February 1678, Mackenzie, *voce* PERSONAL AND REAL. *Answered*, This brocard, that *holographa non probant datam*, holds as to heirs, that they are presumed to be on death-bed, unless it be proven they were read and seen before; but in matters of common business, letters are probative without the solemnities of witnesses, and are amongst the strongest of writs, as Stair observes, because most difficult to be imitated; and as such writs would not militate against a donatar of escheat, so neither can they against an arrester, a third party, however pregnant and probative they be against the party writer, betwixt him and the receiver, to whom it was directed. THE LORDS found it could not prove against the arrester, and so preferred my Lord Selkirk to the money. It was likewise *alleged*, That after Gray's assignation, Gavin, the cedent, received two years annualrent, which seemed to presume the assignation was not onerous; but the LORDS abstracting from this, decided on the above mentioned grounds.

\*.\* This case was appealed :

THE HOUSE OF LORDS ORDERED, that the judgment should be reversed.

*See Journals of the House of Lords, v. 18. p. 660.*

No 19.

S E C T. II.

English Act of Curatory.

1624. November 12. NASMYTH *against* NASMYTH.

CURATORS given to a minor in England, were found sufficiently qualified to authorise a minor in a pursuit carried on in Scotland; and the LORDS refused to compel the minor to name curators again; by the law and form of Scotland; and yet an act of curatory is a judicial act, and the curator has his powers from the judge, not from the minor.

No 20.

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

*See this case, No 2. p. 4046.*

\*.\* Kerse reports the same case :

Act of curatory of minors, Scotsmen resident in England, sustained to authorise the minors in Scotland, being made according to the custom and laws of England.

*Kerse, MS. fol. 150.*

\*.\* This case is also reported by Spottiswood :

AN act of curatory made and conceived after the form of England, sustained for a sufficient authorization, as if it had been made according to the act of Parliament 1555. C. 35.

*Spottiswood, (TUTOR.) p. 344.*