leave the father at his freedom to dispose upon the superplus at his pleasure.' No 41.
See PROVISION TO HEIRS AND CHILDREN. *Dalrymple, No* 10. *p.* 13.

1709. *July* 13. GODDART *against* SWINTON.

No 42.
A party, who had been pursued in the Court of King's Bench, found bail. The pursuer granted a discharge to the cautioner, upon the defender declaring that the pursuer's granting that discharge, was nowise meant to exclude him from any advantage he had by the decree of the Court of King's Bench for recovery of the debt. It was found, that by this declaration, the defender ratified the said decree, and passed from any defence competent to him against it.

SIR JOHN SWINTON of that ilk, while a merchant at London, enters into a copartnery for a trading voyage to Guinea and the West Indies, with nine other merchants, whereof Mr Goddart was one, and the ship returning with profit, Ursula ——, relict of the said Goddart, as administratrix and executrix to him, pursues the said Sir John, as cashier to the company, before the Court of Queen's Bench at Westminister, for L. 390 Sterling as his share in the copartnery, and obtained a decreet; and he having found one Benjamin Mould to be his bail and cautioner, the relict gives a release and discharge to the said bail, on Sir John's giving a declaration that her giving the said discharge was nowise meant to preclude her from any advantage she had by the said decree and judgment against Sir John, for recovery of her debt due by him to her. And John Goddart, her son and assignee, pursuing Sir John Swinton before the Lords, he alleged nothing was produced to instruct Goddart as a partner in that society, or that Sir John was cash-keeper.—*Answered*, Though Sir John's double of the contract bears not his subscription, yet they produce another signed by him according to the English custom, whereby every one signs their neighbour's double, but not his own. 2*do*, They oppone the decree, where when all things were fresh and recent, these points were not so much as denied, which certainly they would, if there had been any ground for them; and the decree being the sentence of a Supreme Court upon compearance, it must have the strength of a *res judicata*; seeing Sir John had three remedies, either by applying to the Exchequer, or carrying it by an appeal to the Chancery, or the House of Peers, yet he made use of none of them, but to get his cautioner relieved, gave the declaration foresaid, which in their style is equivalent to a ratification, and a renouncing of any power or interest he had to quarrel the said decree.—*Replied* for Sir John, That an English judgment or decree can never have the strength and effect of a *res judicata* in Scotland, whatever force it may have in England; for the Queen's Bench there and the Lords of Session being not subordinate, but co-ordinate courts, *par in parem non habet imperium, et extra territorium jus dicenti impune non paretur*; and though much respect is to be paid to the sentences of foreign sovereign courts, yet that is not *ex necessitate*, but only *ex comitate*, from decency and honour. And there were no reason to sustain their decrees here, till the English pay the same respect to ours, which they do not, but rejected a decreet of improbation obtained by Sir Robert Crichton *alias* Murray against Richard Murray of Broughton.* Yea, they do not regard our very extracts under the Clerk Register's hand, but require the principal to be produced, though we have

* See No 18. p. 4799.

No 42. a Latin *senatusconsultum* in November 1599, desiring foreign courts to hold our extracts of writs as authentic, and promising to give the same authority to those coming from them, when produced before the Session. Yea in the Roman Empire itself, where there was but one authority, law, and jurisdiction, the sentences pronounced at Rome could not be executed in the provinces *sine novo jussu*, *l.* 15. § 1. *D. De re jud.* which the Doctors now call *literas requisitorias*; and Voet *De statutis* wishes there were such a reciprocal correspondence settled for executing the decrees of one another. But for the two united kingdoms of Britain, this will require an act of Parliament.—*Duplied*, Sir John Swinton can never decline the force of this decree, being subject to the jurisdiction of the Queen's Bench, both *ratione domicilii*, being then *incola* at London, *et ratione loci contractus*, *et ratione comparationis*, having owned and prorogated the jurisdiction by his compearance, and by his acquiesence, in neither taking out a writ of error nor an appeal; and that contracts are valid and sustained by us, if made *secundum consuetudinem loci*, and the solemnities of the place where they are made.——THE LORDS abstracted from that nice point, whether the English decree might have the strength of a *res judicata* with us; but went upon the ground of the homologation, and by a scrimp plurality found his declaration on Mrs Goddart's releasing his cautioner, was a ratifying of the decreet, whether defective or not; and was a passing from any pretence he had to quarrel the same.

Fol. Dic. v. 1. *p.* 434. *Fountainhall, v.* 2. *p.* 514.

*** See No 78. p. 4533.

SECT. VIII.

How far Conventional Provisions imply Discharge of a Wife's Legal Provisions.

No 44. 1663. *June* 24. SCRIMZEOUR *against* MURRAYS.

A BOND being granted to a husband and wife, the longest liver of them two, and the heirs procreated betwixt them, without clauses of infeftment or annualrent, it was found that the relict might have the choice of the liferent, or of half of the sum, being moveable *quoad relictam*; but that she could not have both.

Fol. Dic. v. 1. *p.* 434. *Stair.*

*** See this case, No 7. p. 464.