No 63.

fence can scarce be reared up into the shape of a presumption, in this case, where the defender retired soon after the date of the furnishing, and has continued here ever since, and doth not so much as pretend that he has made any satisfaction or payment.

For the defender, the decision, Rae *contra* Wright, No 59. p. 4506., was quoted; and, for the pursuer, Thomson and Hay *contra* Earl of Linlithgow, No 58. p. 5404.

The Lords found, That Sir James Campbell not having lived six years in England, from the date of the last article in the accompt, the pursuer's action does not fall under the act of limitation.

N. B. It appears, from a memorial in this case, That it occurred as a doubt to the Lords, at advising, whether the statute of limitation could have place in this case, though the action had been laid in England; seeing the defender did not continue there six years after the furnishing; and, upon this head, it was observed, that, by the above statute, if the plaintiff be beyond seas, the prescription runs not against him; but that there is no exception therein, with regard to the defendant; which, however, was altered by the act *quarto Annæ*, *c.* 16. § 19.

C. Home, No 92. p. 144.

No 64.

Against a suit here for payment of a promissory note contracted in England, the defence was sustained that the debt was extinguished by the English prescription of six years.

Foreign statutes have no statutable authority *extra territorium*.

What effect is given here to foreign statutes.

1740. *November.* Samuel Grove *against* John Gordon, Esq.

Grove brought a process against Gordon, for payment of L. 160 Sterling, in a holograph promissory note, granted by Gordon to Sir Archibald Grant, dated London, 11th November 1730, to which the pursuer had right by indorsation. The defender did not pretend the debt was paid, nor extinguished by any transaction; nor did he state any particular fact to show that it was an unjust debt, but rested his defence upon the statute of limitations in England; insisting, the claim was extinguished by prescription; that no action would be sustained in England; and that if the claim was voided in the *locus contractus*, it could not be revived by bringing the action in another country. This defence was endeavoured to be supported by analogy, 1*mo*, Of a Scotch bond informal by the act 1681, and therefore null, which it was averred would not produce action in France, nor in any other country where the law of nations is understood. 2*do*, Of an usurious bond in Scotland, stipulating more than the legal interest, which would not produce action in a foreign country, even where the legal interest is equal to that stipulated in the bond. And 3*tio*, Of the *exceptio rei judicatæ*, which can never be stronger than an exception founded upon a statute, and yet is sustained in all countries.

In answering this defence, it was premised, that foreign statutes have no coercive authority *extra territorium*; and therefore, that they cannot be pleaded to any effect here, other than to furnish arguments from equity, or from any

other solid foundation, such as ought to be regarded in the judgments given by all courts. Upon this principle it was maintained, that a Scotch bond informal by the act 1681, ought, notwithstanding, to produce action in England or France, being good evidence of the debt *jure gentium;* admitting the defender to make any just defence against the claim, and to verify his defence. But it was yielded, that an usurious bond ought not to produce action *extra territorium*, more than *intra territorium;* because the transgressing the laws of a society, is a wrong which ought to be discouraged every where. Upon the same principle, it was also yielded, that if a claim be extinguished in England by the statute of limitations, or in Scotland by the triennial prescription, a good defence lies against the claim in every other country; upon this rational presumption, that the claim must have been satisfied, or somehow extinguished, since the claimant suffered the door to be shut against him in his own country by prescription; and that this defence ought to be sustained unless taken off by some stronger presumption. No 64.

These things premised, the pursuer, to make his answer the more distinct, suggested the following point, Whether the defence was to be considered as a statutory defence, or only a defence in equity? He observed, that it could not be a statutory defence, because the statute founded on was not a Scotch statute; and therefore, could have no authority *qua* such in Scotland. He admitted the defence to be relevant as a defence in equity, upon the presumption that the debt was extinguished; but then contended, that the defender could not avail himself of this presumption, considering his acknowledgment that he had not made satisfaction, and considering that he does not state any fact to show that the debt is unjust.

With regard to the argument drawn from the *exceptio rei judicatæ*, the pursuer observed, that a judgment has, in all countries, the effect of voiding a debt as much as voluntary payment; and therefore, that an exception effectual in all countries must arise equally from each; but that a statutory exception is in a very different case: it has no stronger effect in any country than compensation has with us, which is, that it does not extinguish the debt till it be pleaded by the party, and applied by the judge. For this reason, if a defender omit a statutory defence, and suffer judgment to pass against him, upon which the money is recovered, he will not have a *condictio indebiti*. The statutory defence is barred as competent and omitted.

In this case, the defender had resided in Scotland some part of the six years; but it was thought, that this circumstance could afford no separate answer to the pursuer upon the statute of the 4th of Queen Anne; both because the defender was in England when the cause of action accrued; and also, because the statute of limitations is only suspended while the debtor is 'beyond seas,' which are the words of the statute.

'The Lords, notwithstanding, sustained the defence, and assoilzied.'

No 64.

Upon the plan of the pursuer's pleading, which appears just and solid, the statute of limitations, when pleaded in England, has an effect different from what it has when pleaded in Scotland. In England it is calculated to bar action; and therefore, in England, action could not have been sustained upon this promissory-note. But in Scotland, where the statute can only be considered as an argument, not as a law, action ought to have been sustained upon the promissory-note, being a good evidence of the debt *jure gentium*. The defence upon the presumed extinction ought to have been found relevant at the same time; but that it was elided by the answer, to wit, that the defender did not so much as say, Satisfaction was made.

Rem. Dec. v. 2. *No* 16. *p.* 29.

1742. *December* 2. Simon Lord Lovat *against* James Lord Forbes.

No 65.

A promissory note granted in London by a Scotsman residing there to another, and payable on demand, falls under the English statute of limitation, if no action be brought within six years.

Lovat, happening occasionally to be at London in August 1720, lent William Lord Forbes L. 100 Sterling, for which he took his promissory note, 'obliging himself to pay the said sum on demand;' and, upon William's death, he brought an action against James, as representing his brother William, for payment.

The *defence* was, That, for some years before the date of the note, William Lord Forbes resided constantly in London, and, before that period, had never fixed his domicile, or place of residence, in Scotland; that soon after the 1720, he married an English lady by whom he got a considerable fortune, and was thereby in a condition to have repaid this money, which it is presumed he did, as the defender never heard of this claim until the date of this summons. Further, from the time of the debtor's marriage he had a fixed residence in London with his family, until the 1728, save once that he was occasionally in Scotland for a few weeks; and that London being the *locus contractus*, the security payable on demand, which behoved to be the debtor's dwelling-house, or place of residence, and no demand having been made within the years of prescription, the same was cut off by the statute of limitation.

Answered; The defence resolved in the negative prescription, arising from the laws of a foreign country, to which the pursuer could not be subject, but during the period of his residence there; which never happened for any space near equal to the number of years required by the statute to establish a prescription; therefore there were no *termini habiles* for prescription in this case, which could never commence against the pursuer so long as he remained under the authority of the law of Scotland; neither could he be reckoned negligent, which is the foundation of the negative prescription within six years, as ordained by the statute of limitation, when he did not reside there. Further, this doctrine is agreeable to the principles of most lawyers, That all personal claims are subject to that jurisdiction where the creditor has had his residence; and, it