No 65. England, would be absurd. In a word, it is not to be doubted, that if the obligation is released *quocunque modo*, according to the law of the country where the debt was contracted, and where payment fell regularly to be made, but that discharge must meet the obligation in any part of the world, where it is made the ground of action. As to the pursuer's argument, that prescription must be regulated *secundum leges fori actoris*; it is plainly inconsistent with the first principle of law, *actor sequitur forum rei*, as well as the opinion of the doctors; besides, the form of the note shows, it was not intended for a permanent security, as it was made payable on demand; and as that behoved to be personally to the Lord Forbes, or at his dwelling-house for the time, it must have been in the eye of parties, that the money was to be repaid at London, which therefore was both the *locus contractus*, and the *locus solutionis*. See Huber in his *prælect. de conflict. leg. divers. Voet, lib.* 1. *tit.* 8. § *ult.* 16th November 1626, Galbraith, No 10. p. 4446.; 21st February 1633, Balbirnie, No 11. p. 4446.; 7th February 1634, Hyde, No 12. p. 4447.; 10th January 1702, Chatto, No 13. p. 4447.

The Lords found, That the statute of limitation governed this case; but remitted to the Lord Ordinary to hear parties, whether the pursuer's residence in Scotland stated him in the case of the exception from the act (beyond seas?)

C. Home, No 210. *p.* 350.

1742. *December* 9.

Colonel James Cathcart, Pursuer, *against* George Middleton of London, Banker, Defender.

No 66.
Case undecided relative to the statute of limitation, James I. of England, *anno* 21. *cap.* 16.

The pursuer brought a process against the defender, the scope whereof was, that he, *anno* 1720, put into Mr Middleton's hands, at London, L. 3000 Sterling, to be employed by him in purchasing South-sea company stock, sold by the company, by the third money subscription; and the defender having undertaken that office, in which he failed in the due execution, therefore he was liable to repay the same to him with interest and damages.

The defender denied the fact charged in the libel, and *pleaded*, That the negotiation being averred to have been entered into and transacted in England, all demands arising, or supposed to arise upon it, must be governed by the *lex loci* where the transaction was had; and, by the above statute, actions of debt, actions upon the case, and actions of account, are to be commenced within six years after the cause thereof accrued, and not after; and therefore, since the date of the transaction is said to have been in the famous year 1720, and no action brought, or even demand made, till after more than twice six years were run, the same is barred by the statute.

Answered for the pursuer; That the suit being brought in Scotland, the limitation introduced by the law of England could not bar or stop the same, since no such prescription was known in our law, of which the rules could alone

govern the procedure in this Court. To enforce this, the case was figured of an action brought in this country, at the instance of one Scotchman against another, (the present case), upon a contract, which is determined by a shorter prescription in Scotland than in England; and that the Scotch prescription, suppose the triennial, is expired before the process is commenced; it is believed the Scotch prescription would be sustained, because our statutes so direct. Now, if this is our law, in the supposed case, there is surely no reason why it ought not likewise to be the rule where the prescription happens to be longer; besides it is believed, that, even by the law of England, nothing which comes under the nature of a trust, or an equitable demand against a trustee, who has not performed the trust he has undertaken, falls under this statute. 2*dly*, Supposing the statute of limitation was to govern this matter, yet it contains an exception, that it does not run if the plaintiff is beyond sea, or, which is the same thing, without the jurisdiction of England; and the pursuer having been, ever since the negotiation libelled, in Scotland, except for a year or two, he falls under the exception of the act; and therefore the prescription cannot take place against him. *See* Executors of Hay against Earl of Linlithgow, No 58. p. 4504.; Sir Peyton Ventry's Reports, Part II. p. 345. Siderfin's Reports, p. 453. Modern Reports, p. 71. and 376. Salkeld's Reports, v. 1. p. 421. and the late case, Captain Rutherford against Sir James Campbell, No 63. p. 4508. No 66.

Replied; That, by the opinion of all lawyers, in the matter of the prescription of actions, the law of the place where the cause of it did accrue or rise, must govern the same; and, if it were otherwise, as a defender may be sued in different countries, this absurdity would ensue, that he might be justly condemned in one, and absolved in another, whereby the time of prescription would be absolutely uncertain; therefore the true rule was, to follow the law of the place to which the negotiation belonged; more especially as the defender has constantly resided in England ever since. And that this case is comprehended under the statute, cannot be disputed, as it enacts, that all actions of trespass, &c. excepting as is therein excepted, shall be commenced and sued within the time and limitation there expressed; that is to say, actions upon account, and actions for debt, within six years next after the cause of such action or suit. Here the cause of action is pretended to be the giving of money on the part of the pursuer, and the undertaking, on the part of the defender, to buy South-sea subscription, and the action thereon not brought till twice six years posterior thereto.

To the 2*d*, it was *answered*, That the pursuer was not within the exception of the act, which goes only in favour of a plaintiff beyond sea, when the cause of action does accrue, who has indeed liberty at his return to bring it; but, if he was not beyond sea when the action arose to him, his turning his back upon the kingdom and the cause, did not take him from under the sanction of the law. However, giving, but not granting, that the pursuer's being beyond sea would have stopt the prescription, yet as it is acknowledged he was not, he

No 66.

cannot plead from equipollents, that though he was not beyond sea, but in Scotland, the being without the jurisdiction of England entitled him to the benefit of the proviso. Further, it is obvious, that beyond seas, and without the jurisdiction of England, are manifestly different; but, supposing for once there might be a *par ratio* for supporting this addition to the statute, yet it is possible, that, after the union of the Crowns, when this statute was made, the legislature did not think it necessary to make absence in another part of the island sufficient cause to stop the prescription, when absence in common cases of prescription was no sufficient plea to defend against it. If it had been intended to take in all who were without England, dominion of Wales, and Berwick upon Tweed, these words, very familiar in acts of Parliament, would have been used, and not have had recourse to the words 'beyond seas,' improper to express such intention. *See* Rae against Wright, No 59. p. 4506.; Assignees of Fulks against Aikenhead, No 61. p. 4507.; Elliot *contra* Duke of Hamilton *.

THE LORDS ordained both parties to adduce what authorities they could upon the construction of the statute of limitation by the courts in England, with respect to the several clauses whereof the meaning is controverted.

N. B. It is informed, this cause was allowed to sleep since that time.

C. Home, No 215. p. 356.

1755. *July* 7. TRUSTEES of THOMAS RENTON *against* ROBERT BAILLIE.

No 67.
The statute of limitations was not found to run in favour of a person who had removed to Scotland immediately after granting the note pursued on, and continued there.

SIR THOMAS RENTON, a Scotsman, went to reside at London in the end of his life; and having large sums lying at interest in Scotland, he granted a factory to James Baillie writer to the signet to uplift his interests for him.

Baillie was occasionally at London in the year 1733, when he made up, along with Sir Thomas, an account of his intromissions, and of the payments he had made; at the foot of which account there was a docquet signed by them both, in which Baillie acknowledged himself debtor in the sum of L. 108 : 16 : 10 Sterling; and, of the same date, he granted a promissory note, payable in London a short time after to Sir Thomas for the said sum, bearing to be for the balance of accounts fitted betwixt them of that date.

Immediately after, Baillie returned to Scotland, and was never in England again, nor had he any further clearance of accounts with Sir Thomas.

In the year 1751, the Trustees of Thomas Renton, son and heir of Sir Thomas, pursued Robert Baillie, son and heir of James Baillie, for payment of the above promissory note.

Pleaded for Robert Baillie; As both the *locus contractus* and the *locus solutionis* was in London, the note falls to be regulated by the law of England; in which light, the six years prescription, contained in the English statute of limitations of the 21st James I. cap. 16. is a bar to the action.

* *See* General List of Names.