

No 69. lawyers, particularly Bacon, title Limitation of Actions, Salkeld's Reports, vol. I. p. 28, 29, &c. revived the debt, even after the years of prescription were run; and if so, *multo magis* if within the years of prescription.

*Answered*, That although the English lawyers lay it down as a principle, that a promise of payment, if proved, bars the defence founded on the statute, yet none of them insinuate that such promise can be proved by witnesses; and, therefore it was rather to be presumed that such proof was not competent, which is undoubtedly the case, by the Scots law, and ought to be held as law in the present question, more especially as the promises are said to have been made in Scotland, where an allegiance of this sort can only be proved by writ or oath of party.

'THE LORDS remitted the cause to the Sheriff, with an instruction to allow a proof of the defender's promise of payment, by witnesses.'

Act. Dickson.

Alt. P. Murray.

*J. S. tertius.*

*Fac. Col. No 60. p. 104.*

1768. July 13.

JOHN RANDAL Taylor in Woolwich, and CORNELIUS ELLIOT Writer to the Signet, his Attorney *against* ALEXANDER and GEORGE INNES, Executors of the deceased Captain PETER INNES, late of the Train of Artillery.

No 70.

A person to whom furnishings were made in England came immediately thereafter to Scotland, where he resided till his death. In an action against his representatives, the defence of triennial prescription was sustained.

CAPTAIN Peter Innes of the royal train of Artillery, in the course of his service, frequently resided at Woolwich in England, particularly he was there in the years 1757, 1758, and 1759. He came to Scotland in October 1759, where he resided till his death, which happened in March 1765.

After Captain Innes's death, John Randal, taylor in Woolwich, brought an action before the Court of Session, against Alexander and George Innes, as executors to Captain Innes, for payment of an account, commencing the 8th January 1757, and ending 22d March 1760. Against this claim, the defenders objected prescription, both upon the English statute of limitations, and upon the triennial prescription introduced by act 83d, parliament 1579. Lord Auchinleck reported the question to the Court, when additional memorials were ordered, a doubt having arisen how far the triennial prescription could be applied to a debt contracted in England.

*Pleaded* for Randal; Though it, in general, is true, that municipal laws are only binding within the territory of that state by which they are enacted; yet, in particular cases, the law of foreign nations is received, and deeds, executed in other countries, are sustained, if executed agreeable to the law of the country where dated, though defective in the solemnities required by the law of the country where they are made the ground of action. And, in Scotland, deeds exe-

cut in England, agreeable to the law of that country, have always been considered as effectual in the courts of this country, though defective in the formalities required by the law of Scotland; and such being the rule, with regard to the constitution of obligations, it seems to follow, that, when questions occur as to their subsistence, the law of the country where they were executed, should be the rule for determining. By the law of Scotland, payment of a bond cannot be proved by witnesses; yet the payment of an English bond has been proved by parole-evidence in this court; M'Morland *contra* Melvill, 28th June 1666, No 14. p. 4447; and several other decisions, to the same purpose; *voce* FOREIGN.

Agreeable to the principles upon which these cases were determined, every question relative to the endurance of obligations must depend upon the *lex loci contractus*; and, unless the law of that country has imposed a limitation which would bar action in the courts of that country, the debtor, by retiring to another country, cannot benefit himself by any prescription established there. Limitations, or prescriptions of actions, are derogatory to the common law of nations, and ought not to have effect against strangers who must be ignorant of them. In this case, Randal contracted with Captain Innes at Woolwich, who, at the time of the furnishings, had no *forum* in Scotland; and, by afterwards retiring into Scotland, he could not defeat the action now brought, as he or his administrators are, at present, unquestionably liable for the debt by the law of England. And, although a creditor must follow the *forum* of his debtor, as no man can be sued in a court, to the jurisdiction of which he is not subject, it does not follow, that the creditor's right must depend upon the particular laws of that country to which the debtor has retired.

The laws of every country is a matter of fact, and capable of proof when controverted. In the case of Cuninghame *contra* Brown, 18th January 1676, *voce* PROOF, the Court allowed a proof to ascertain what was the law of England; but, in the present case, there can be no dispute as to the law of England; and, therefore, it ought to be the rule of determining, which is agreeable to the opinions of our lawyers; Dirleton's Doubts, *voce* Process against Strangers; Bankton, vol. I. p. 32.; and the decisions of the Court, Phillips *contra* Stamfield, No 57. p. 4503.; Assignees of Faulks *contra* Aikenhead, No 61. p. 4507.; Rae *contra* Wright, No 59. p. 4506.; Grove *contra* Gordon, No 64. p. 4510.; M'Neil *contra* M'Neil, No 68. p. 4517.; and, therefore, the *lex loci contractus* ought to be the rule of judging.

*Answered* for the defenders; The laws of England have no more force in Scotland than the laws of any other foreign country; and it is a maxim in law, that, *extra territorium jus dicenti impune non pareri, l. ult. ff. de jurisd.* And this Court, in its decisions, has always held that rule in view; Savage *contra* Craig, 27th January 1710, No 76. p. 4530; Bains, &c. *contra* Earl of Sutherland, 21st June 1749, Div. 9. Sec. 7. *b. t.*; and, in a number of questions between assignees under a commission of bankruptcy in England; and creditors in Scotland; Assignees of Dunlop, 6th March 1759, Div. 9. Sec. 4. *b. t.* And this ge-

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neral principle, that the law of the country, where the action is brought, must be the rule of judging, is particularly applicable to the plea of prescription; *Voet. Lib. 1. tit. 8. § 30.* and *Lib. 44. tit. 3. § 12.* and has been so determined by this Court, as appears from various decisions, *voce* FOREIGN.

The defenders have no occasion to dispute that the *lex loci contractus* regulates the constitution of the contract; and, of course, a bond executed in England, agreeable to the English form, will be a good ground of action in this country; and a proof of payment made in England will be allowed by witnesses; but which would not be the case, even of an English bond, if payment was made in Scotland; because such proof is not admitted by the law of this country. When an action is brought in this country, prescription is an exception, which being competent by the law of this country, must be received; for, in such cases, it is not the *lex loci contractus*, but the *lex loci*, which is the law of the place where the action is brought, that must be the rule; *Huber de conflictu legum diversarum in diversis imperiis.* And, as the pursuer has brought his action in this country, and the prescription known in the law of this country is pleaded in bar of that action, that plea must be sustained or repelled by the rules of the law of Scotland.

‘THE LORDS having advised the report made by the Lord Auchinleck, upon the 27th January last, with the memorials *hinc inde* given in, in obedience to the last interlocutor, they sustain the defence of the triennial prescription, *assozie* the defenders, and decern.’

For Randal, *Alex. Wight.*

For Defenders, *Cosmo Gordon.*

A. E.

*Fol. Dic. v. 3. p. 220. Fac. Col. No 70. p. 310.*

1771. February 20.

MRS JEAN KERR *against* ALEXANDER EARL of HOME.

No 71.

Triennial prescription applies to debts contracted in England.

THE pursuer let her house in London to the deceased William Earl of Home, the defender's brother, who possessed it from Midsummer 1752 to Lady-day 1756.

Earl William went abroad and died in the year 1761, being then due Mrs Kerr a considerable sum of money as arrears of rent. The pursuer in 1767, having brought an action in the Court of Session against Alexander Earl of Home, as representing his brother, for payment of the balance of rents due, his Lordship stated in defence, that the claim was cut off by the triennial prescription of the statute 1579, c. 83.

The cause being reported to the Court upon informations, the pursuer *pleaded,*

It was a rule and principle of law, both with regard to the constitution and subsistence of obligations, that the law of that country only where they were executed should be regarded, however different it might be from the practice