1786. *March* 9.

ABRAHAM DELVALLE, and Others, *against* The CREDITORS of the YORK-BUILDINGS COMPANY.

No 73.
It was objected to bonds in the English form, that they were cut off by the Scottish prescription of forty years. The Lords sustained the objection; but the judgment was reversed on appeal.

THE Undertakers for raising Thames Water in York-buildings, a company of English merchants erected by letters patent in the reign of Charles II, were afterwards incorporated by an act 2d and 3d of William and Mary.

So early as the year 1719, they purchased landed property, both in England and Scotland, to a great extent. They issued a variety of bonds, which were conceived in the English form; but before 1732, their estates were covered in such a manner with annuities preferably secured, and other real incumbrances, that their bonded creditors were unable to recover payment.

At length, about the year 1777, most of the annuities having terminated by the death of those to whom they were due, a sale of the lands in Scotland belonging to the Company, and a competition of its creditors took place.

The vicennial limitation of the law of England, arising from the silence of the creditor for so long a period, was first urged, and repelled; 'in respect, 'from the special circumstances of the case, there was no room for a presump-'tion of the debts having been paid by the Company.'——It was next questioned, how far the Scotch prescription of forty years could be applied to debts like the present, contracted in England, by an English company, and due to Englishmen.

The creditors, to whose debts the objection was made,

Pleaded; The municipal laws of Scotland, in relation to contracts, are not applicable, in any shape, to those which have been entered into in a foreign state. Hence bonds completed after the English manner, though destitute of the solemnities requisite in Scotland, are every day sustained in this country. So also as to the transmission of obligations: Thus bonds, and other written documents, though incapable of being transferred in Scotland by blank indorsation, may yet, where the parties reside in England, be held effectually conveyed in that manner. In the extinction, too, of obligations, the same maxim prevails. In this country, a debt constituted by bond cannot be discharged without writing; but with regard to such a debt, contracted in England, witnesses will be admitted, even in the Scotch courts, to prove payment. *See* 31st January 1783, Ranking of the York-Buildings Company, No 31. p. 4472.

The propriety of those decisions is evident. All agreements ought, according to the dictates of natural justice, to be binding and effectual, where they have proceeded from the deliberate will of the parties, and have been proved to the conviction of the judge before whom action is brought. As this, however, would give rise to an infinity of frauds and disputes, the use of particular solemnities has been made necessary; and where those forms have been intro-

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duced, a person living under the same government, who afterwards neglects to frame his stipulations in a legal manner, has himself to blame if his purpose is frustrated. Nay, since parties are always understood, in their agreements, to have regard to the law of the country in which they reside, it is reasonable enough to presume, in the case of formal deeds, that a more effectual obligation was not intended. But it never could be in the view of any legislature to regulate, by enactments of this sort, the proceedings of men not subject to its authority. And it would be the source of manifest injustice; for as the solemnities of contracts are every where various, a debtor might thus elude, by mere change of place, the best founded claims.

The same reasoning ought to be decisive of the present question. The supreme power of a state may require creditors to make their demand within a limited time, otherwise to be forfeited of their right. This is founded on expediency, and many equitable considerations unite in supporting it. In countries where such limitations have been introduced, they may well be deemed, after the expiration of the statutory period, to operate on the part of the creditor as an implied renunciation of his claim; but to extend such a rule, prescribed for the subjects of one kingdom, to those of another, would be tyrannical and unjust. It would be to bind men, under a heavy penalty, to the observance of a law of which they are altogether ignorant. The prescriptions especially, of the law of Scotland, the effect of which is not merely to preclude action, but to produce a total abolition of debt, can never be enforced with regard to contracts which are still obligatory in the country where they were originally constituted. No determination of a Scotch court can procure such a release to an English debtor, whose person and estate in England must still remain liable to attachment. It would only prevent his effects situated in Scotland from being applied to their first and most equitable use, the payment of his debts, or enable him, by a fraudulent removal, to defeat the just demands of his creditors.

In particular cases, indeed, the limitations imposed by our law may with propriety be extended to foreign contracts. Where a person, having his domicile in Scotland, has entered into obligations, while occasionally in England, or where an Englishman, after contracting debt, has retired to this country with his whole effects, little hardship can arise from sustaining the prescription of Scotland, at least as a strong presumption of payment or dereliction, even against English creditors; because the situation of the debtor must have led them, if their claims were well founded, to make these effectual according to the law of the place where alone they could expect payment. And on this principle the decisons which have rejected foreign claims on account of the Scottish limitations, must have proceeded. It also might be admitted, that in the direct transmission of property, as well as in the forms of proceeding for the recovery of debts, either by attachment of the person or estate of a debtor, the law of the place where the property is situated, or where execution is de-

manded, is to be strictly observed. But the obligation itself, or the right of action, stands on a footing extremely different. No 73.

Answered for the Creditors in general; Proceedings in courts of justice must ever be governed by those rules which have been established by the power from whence the judges derive their authority; which alone they are bound to know, and to which every party who commences a suit before them, must be understood to submit the trial of his claim. *Voet. lib.* 1. *tit.* 4. *pars* 2. § 5. 8. *De statutis.*

One restriction only of this general principle occurs with regard to the solemnities of contracts, whether for originally constituting obligations, for transferring them when constituted from one person to another, or for finally extinguishing them. In order to preserve an equal intercourse between the individuals of different nations, it has been determined in Scotland, as well as in all other civilized states, that the want of those forms which are required in the country where execution is demanded, shall not render invalid an agreement which would have been effectual in the country where it was entered into.

But in every other question, either with respect to the efficacy or extent of covenants executed in a foreign country, the law of Scotland has been in our courts invariably followed. Thus, where a bond had been granted in Ireland, containing an obligation to pay interest at the rate of ten per cent. as allowed in that kingdom, our Judges gave decreet only for those sums which could have been legally stipulated for the use of the money in Scotland. So likewise, where it was pleaded, in the case of an English debt, that it could not in that country have affected the heir, but the executor alone, judgment was nevertheless pronounced, finding the heir liable; Fountainhall, 27th January 1710, Philip Savage *contra* Mr Robert Craig, No 76. p. 4530; 10th July 1739, Kinloch *contra* Fullerton, No 22. p. 4456.

The Scottish constitutions in particular, which limit the endurance of actions, have been uniformly extended to claims founded on contracts executed in foreign countries. It would indeed have been singular, if regulations intended to repress frauds in the raising up of forged and antiquated claims, should be altogether ineffectual when they were most wanted; when to the difficulty of detecting offences of this sort, arising from distance of time, that of place was superadded; Voet. lib. 1. tit. 8. § 30.; Erskine, book 3. tit. 7. § 48.; Principles of Equity, p. 125. 283.; Trustees of Renton *contra* Baillie, No 67. p. 4516; Randal *contra* Innes, No 70. p. 4520; Ker *contra* The Earl of Home, No 71. p. 4522; Barret *contra* The Earl of Home, No 72. p. 4524.

It is of no consequence that in this manner the effect of contracts will be different in different countries. This occurred in all the cases above referred to; and must unavoidably happen in those of infinitely greater moment, unless all nations were to agree in one common system of jurisprudence. Till that period arrives, it is enough that deeds executed in a foreign kingdom, are, in Scotland, sustained in the same manner as those of the like nature framed ac-

No 73. cording to the rules prescribed in this country; and in the circumstances of the present case, where the the debtors, during the statutory period, not only had a proper *forum* in this country, in which they might have been sued, but were all the while possessed of large estates in Scotland, which might have been attached by their creditors, every plea of hardship which might occur in particular instances seems altogether precluded.

The Court were very much divided in opinion on this point. After a judgement had been pronounced, sustaining the objection, the cause was for some time delayed, in expectation of the Creditors obtaining decreets in England against the Company; by which, it was admitted, the plea of prescription would be removed. In this, however, the Creditors failed; for which it was given as a reason, that the distribution of the Company's funds having been by an act of Parliament intrusted to the Court of Session in Scotland, the English courts declined to interfere.

Upon advising a reclaiming petition, therefore, with answers, the Lords adhered to their former judgment. See a case between the same parties, *voce* Fraud.

Lord Ordinary, *Monboddo.* For Abraham Delvalle, *Lord Advocate, Wight, Craig.*
For the Creditors in general, *Mackintosh, Buchan-Hepburn, Elphinston, Blair.*
Clerk, *Colquhoun.*

C. *Fol. Dic. v. 3. p. 221. Fac. Col. No 264. p. 402.*

This cause having been appealed, (March 12th 1788,) counsel were called to be heard; and no counsel appearing for the respondents, the appellant's counsel were heard to state and argue the case; and being withdrawn, 'ordered, That the interlocutors complained of be reversed, in so far as they 'sustain the objections to the bonds claimed by the appellants, that the same 'are not entitled to a place in the ranking, in respect they are cut off by the 'negative prescription of the law of Scotland.'

1792. *February* 14.

The York-Buildings Company *against* Richard Cheswell, and Others.

No 74.
The Scottish prescriptions not pleadable by debtors domiciled in England.

In the ranking of the creditors of the York-buildings Company, claims having been made by Cheswell and others, upon bonds granted by the Company, on which no document had been taken for upwards of 40 years, prescription was objected by the Company.

The very same question formerly occurred between different classes of the creditors, when it underwent a very complete discussion, both in writing and in a hearing in presence. The Court then sustained the objection; York-buildings Company *contra* Delvalle, No 73. p. 4525. That judgement, however,