the parties will then return to the Court of Session and settle the quantum of demurrage, in terms of the interlocutor of the Lord Ordinary of 11th December 1792.

"It is necessary for me to state, however, respecting that interlocutor, that though it is perfectly correct in finding that the demurrage ceases on the day of sailing, and the detention was a *casus fortuitus*, which must fall upon the owners, yet his Lordship was mistaken in resting this judgment upon the opinions of the merchants examined in this cause, and not, as it ought to have been, on the foundation of general law."

After hearing counsel, it was

Ordered and adjudged that the several interlocutors complained in the appeal be *reversed*. And it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of the 11th December 1792, be affirmed: And it is farther ordered, that the cause be remitted back to the Court of Session in Scotland to proceed according to the said interlocutor of the 11th December 1792.

For Appellants, *J. Adair. Wm. Adam.*

For Respondent, *Sir J. Scott, R. Dundas, Geo. Ferguson.*

CHARLES FERGUSON, JOHN FORDYCE, WM. GEMMELL, and DUNCAN DAVIDSON, Esqs. of London, Trustees of the late Andrew Grant, Esq. of Granada, . . } *Appellants;*

DOUGLAS, HERON & Co., and their Factor, *Respondents.*

House of Lords, 11th November 1796.

SEXENNIAL PRESCRIPTION—INTERRUPTION—FOREIGN ADMINISTRATORS.—FORUM.—(1.) Held, in counting the six years of the sexennial prescription, that the *terminus a quo* in reckoning the period, is from the last day of grace after the bill falls due. (2.) Also held, in the special circumstances of this case, that English administrators residing in England, acting under an English will, proved in the Prerogative Court of Canterbury, in reference to an estate in Granada, and beyond the jurisdiction of the Court of Session, were not liable to be called to account in the Supreme Court of Scotland, reversing the judgment of the Court of Session; but opinion expressed, that the Court of Session were quite competent to judge in a case where either the persons of the executors, or the effects of the deceased, are within their jurisdiction, no matter where the

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will was made or proved. And opinion indicated, that the present question, and the justice of this case, lay in these executors having nothing to do with Baron Grant, the debtor in these bills; and until a connection was established between him and Andrew, no claim could lie against the latter's executors.

Baron Grant accepted two bills for £500 each, to John Fordyce, Esq., which bills being indorsed by Fordyce to the respondents, bankers in Ayr, were protested when they fell due, on 23d July 1772, (being the third day of grace), for nonpayment.

Baron Grant having died without paying these bills, action was raised on 23d July 1778, against his brother, Andrew Grant of Granada, on the passive titles, and likewise against Mr. Fordyce, as drawer of the bills. In defence, Fordyce produced a discharge, and Mr. Grant denied that he represented his brother. Matters thus stood, when Andrew Grant also died. The action was again renewed in 1790, by a summons of wakening against his widow and children, but not proceeded with, as the heir of Andrew Grant offered to renounce his succession. In 1792 the present action was raised against his trustees, the appellants, who all resided in London, and who had taken out letters of administration in the Prerogative Court of Canterbury. The defences stated were,—1. That the appellants being foreign administrators, residing in England, and acting under letters of administration obtained from the Prerogative Court of Canterbury, in regard to foreign estate situated in the island of Granada, were not liable to be called on to account for their intromissions with that estate by the Courts in Scotland. 2. The bills were prescribed. 3. They were discharged, because Douglas, Heron & Co. had ranked on John Fordyce's sequestrated estate upon them, had accepted a composition in full, and had discharged the debt. Answered: 1. It has been settled in the case of Morrison *v.* Kerr, Feb. 1790, (M. p. 4601), that an English administrator might be sued in the courts of Scotland. 2. That the bills were not prescribed. That it was sufficient to commence action *within* six years of the last day of grace, counting the said six years in terms of the statute 1772:—"From and after the terms at which the "sums in the said *bills* or *notes became exigible.*" The bills here being dated 16th May 1772, at sixty-five days date, they became due upon the 20th July 1772, and the summons being executed on 23d July 1778, that is, not till *six years* and three days after the bills had become due, it was

raised within the six years within the meaning of the statute. Besides, even if prescription applied, it was interrupted by the claim entered upon the bills in the sequestration of Mr. Fordyce's estate, in consequence of which a payment was made upon them in 1775, it being provided in terms of the act 1783, § 36: "That the making production of the grounds "of debt, along with the oath, shall have the same effect "as to interrupting prescription of every kind, from "the period of such production, as if a proper action "had been raised on the said grounds of debt against "the bankrupt, and against the trustee." 3. That the discharge by the composition paid on Fordyce, the drawer's estate, did not relieve and discharge the acceptor, against whom full recourse was reserved. Replied: 1. That though it had been decided in the case of Morrison, that an English executor might be sued in Scotland, this depends on the facts of the case; and the facts of that case are totally different from those here. Mr. Grant's estate is situated in the island of Granada, subject to the laws of England. The administrators, although they were sometimes in Scotland, their chief residence was in England, where the administration was still going on, whereas, in Morrison's case, the funds were all collected, and brought to Scotland, and the administrator was residing there; so that Morrison's case can have no application to the present. 2d. That it was by no means so clear, that in counting the running of the six years, the three days of grace are not to be excluded, because, it is obvious, that protest may be taken, and diligence raised, within the days of grace, against the acceptor, a fact inconsistent with the supposition that the contents of the bill are not then "*exigible*;" and as to the interruption pleaded, on the ground of the debt having been ranked on Mr. Fordyce's estate, it is clear that the respondents are not entitled to the benefit of this clause of the act 1783, because they had never produced their grounds of debt, or oath of verity, in terms of the statute quoted. But, supposing it to be a good interruption in any question with Mr. Fordyce, it does not follow that the interruption as to him, the drawer of the bill, was a good interruption as to the acceptor. And, 3. The payment of composition and discharge, was doing diligence certainly against Fordyce, the drawer of the bill; but diligence used against A, the drawer, is not diligence used against B, the acceptor, to whom it is *res inter alios*, and the acceptor B has, therefore, nothing to do with it.

The Court pronounced this interlocutor:—"Find that Nov. 19, 1793.

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"the time requisite for completing the prescription "in question, only began to run from the third or last "day of grace; and therefore repel the plea of prescription, "pleaded for the petitioner; repel also the objection stated "to the competency of this Court: find the defenders, who "have accepted of the trust, liable in the sums pursued for, "and decern; but, in respect it is alleged by Mr. Fordyce "that he never accepted of said trust, and not denied by "the other party, assoilzie him from this action, and "decern." * Several orders were then pronounced, of these dates, requiring the trustees to produce a state of their accounts of their intromissions with the deceased Mr. Grant's estate, but they declined, whereupon the Lord Ordinary, to whom the case was remitted, of the latter date, 22d February 1794, held them as confessed to have a sufficiency of funds to pay the debt; and on two representations his Lordship adhered.

Nov. 30, 1793.
Dec. 7, ——
Dec. 14, ——
Jan. 18, 1794.
Feb. 11, ——
Feb. 22, ——
Feb. 28, ——
Mar. 11, ——
June 14, ——

Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—The appellants being English executors, acting under an English will, proved in the Prerogative Court of Canterbury, over estates situated in Granada, are only bound to account for their actings in the Courts of England; and not liable to be called in an action regarding said estate, and administration in the Courts of Scotland. The case of Cartwright or Buroughs *v.* Sir Archibald Grant, 11th February, 1754, affirmed in the House of Lords on the cross appeal, 18th March 1755, decided the general point, that an English administrator was not bound to account in Scotland. And the case of Morrison, supposing it to have been well determined, is not applicable to the present case, because there the English administrator had recovered the whole estate of the deceased, carried it to Scotland, and had fixed his residence there; but here the appellants reside in England, and are in the course of

Vide ante, vol. i. p. 597.

Interlocutor, 19*th November* 1793.

LORD PRESIDENT CAMPBELL.—"There are two points here,—1st, Whether English executors or trustees are accountable here?

"They are accountable every where; and the only question in such cases is, Whether the Court can reach them with effect? In this case it can, some of them being not only resident, but having heritable property here.

"2d point, How the sexennial prescription of bills is counted. It ought not to begin to run till the day after the expiry of the three days of grace; and further, I think in this case, it has been interrupted."—President Campbell's Session Papers, vol. lxxi.

executing the trust reposed in them. And it does not affect this, that the trustees are Scotchmen by birth, and some of them have an occasional domicile in Scotland; because the *forum originis* has nothing to do with the question, and occasional residence cannot constitute a domicile. 2. But even if the action could be maintained at all in Scotland, the bills founded on are prescribed; the bills were payable on 20th July 1772, and no legal step was taken until 23d July 1778, that is, six years and three days after the bill became due and exigible. Besides, it is not very clear whether the action brought on the last of these three days was sufficient interruption, or whether this action brought in Scotland against Mr. Grant in Granada, whose domicile was there, and his estate there, at the time it was raised, was good for any purpose, and accordingly seems to have been abandoned for one brought in 1790, against his widow and children: And, 3d, The interruption founded on the claim lodged on Mr. Fordyce's sequestrated estate, could not have the effect of preserving the claim against Baron Grant. On the contrary, the respondents having agreed, without their consent, to accept of a small composition in full of their claim on Mr. Fordyce, have made the debt their own; and, consequently, if the action in 1778 was irregular, and the second action in 1790, also irregular, and the claim lodged on Mr. Fordyce's sequestrated estate ineffectual to preserve the claim against prescription as to Baron Grant, then there was no legal step taken, down to the raising of the present action, in order to interrupt that prescription.

Pleaded for the Respondents.—The competency of the Court of Session to try this question, cannot admit of doubt. The appellants, although English administrators, under an English will, are all of them Scotsmen by birth, and some of them have a proper domicile in Scotland; so that the Court of Session was both their *forum originis* and *forum domicilii;* and the mere circumstance of their having obtained letters of administration in England ought not to alter this fact. They are mere trustees, appointed to collect and realize his funds, and to pay his debts, and it would be somewhat extraordinary if a creditor in Scotland were not entitled to call on these administrators to pay them the debt due by the deceased, the more especially where the trustees, although chiefly residing in London, have residences in Scotland, where they occasionally reside; accordingly, in the case of Morrison and Ker, the Court of Ses-

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sion repelled the objection to their jurisdiction, stated by an English administrator, called in a suit before them. 2. The bills in question are not prescribed. They are in full force, because, as the *terminus a quo* of the sexennial prescription is counted, and runs from the last day of grace after the bill becomes "exigible," a summons for payment of the debt was executed on 23d July 1778, which was within the six years, computing from the last day of grace, which was sufficient interruption. 3. It was also interrupted by the proceedings regarding the claim on Mr. Fordyce, the drawer's sequestrated estate, where it was ranked, and a composition paid; and, according to the the law of Scotland, proceedings against one of the obligants in the debt was sufficient to interrupt prescription against the other co-obligants, and therefore excluded prescription as to Baron Grant, and preserved the claim against all concerned.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said,

"My Lords,

"This is a case in which bad premises seem to have been set up, from which no conclusion could be drawn.

"In 1772, a period of considerable distress in Scotland, this transaction took its rise. Two bills of £500 each, dated the 16th May 1772, were drawn by Mr. Fordyce, then a merchant in Edinburgh, and accepted by Mr. Grant, one of the Barons of the Exchequer, at sixty-five days' date, and, when due, were protested for nonpayment.

"It does not appear that any step was taken against the acceptor of these bills during his life. In 1773, Fordyce, the drawer, had some arrangement with his creditors, in which a sequestration took place, and in that sequestration the said bills were founded on by Douglas, Heron & Co., the respondents, then the holders of them, but of what nature their appearance was, is of little consequence to the present question. The respondents, however, received a dividend of 6s. 6d. in the pound, and thereupon granted a release as against Fordyce.

"The next move in this business is in 1778, Baron Grant being then dead. On the 23d July 1778, which was the last day of six years from the time when the bills fell due, the proceeding commences in the Court of Session, against Andrew Grant, as brother and heir to the late Baron Grant; and this is the first and only diligence against any person claiming under Baron Grant. Andrew Grant then resided in Granada, and Baron Grant had held estates there, managed by his brother. An appearance, however, was entered for Andrew, and, in a short answer given in in his name, to

was stated, that he was not heir to the baron, and would give in a renunciation; but, in respect of his residence in Granada, that he craved time for this purpose. The time was accordingly enlarged till the 10th of *December* 1779. Had Andrew renounced, the creditors in that suit would have got access to all estate of the Baron under the jurisdiction of the Court, but could attach no estate in Granada.

"No further step, however, was taken in the action, and no renunciation was made. Andrew died about this time; but the exact date of his death appears not.

"From the 10th December 1779, the last mentioned date in the chronology of this cause, it stopped for ten years, till 1790, when it was, as it is termed, wakened. It had all this while been considered as asleep, and perhaps it might have been as well had it never been disturbed. The respondents, however, now called upon the widow and children of Andrew Grant, in the action which was wakened. What was the reason of their doing so I cannot imagine. Andrew, in the former action, had been cited as *heir* to his brother the Baron, but this seemed to be going out of the line of *heirs*, as he was not the next heir to the Baron.

"The eldest son of Andrew, however, repeats that he is ready to renounce; but nothing is done in consequence. Soon afterwards, process was issued in the Court of Session, against three gentlemen in England, by a mode known and practised in that Court, and against one in Scotland, as writers and executors of a will made by Andrew Grant in Granada, which was proved by them in the Prerogative Court of Canterbury. An appearance was entered for these trustees. If these gentlemen had said,—We do not represent Baron Grant; we have no effects of his; we are ready to renounce all estate of his; take it, and welcome, and find the effects of your debtor where you can,—there must then have been an end of the action against them.

"But, unfortunately, they set up a defence, and puzzled themselves, and, as appears from the proceedings, they puzzled the Court too. Instead of showing the incompetency of the action as against them, they set up a defence of prescription, and contended that the bills were cut off by the limitation of six years, no diligence having been done in that period. The phrase "exigible" in the statute, they contended, meant not the last day of grace; but the last day specified in the bills as the term of payment.

"That argument found favour in the first instance, and the Lord Ordinary found the bills to be prescribed. The respondents brought this interlocutor under review of the Court, by a reclaiming petition, and it came to be a moot point, from what day the period of prescription was to be computed.

"While the Court is a good deal puzzled with this question, another point is suggested by the respondents, and taken up by the Court, viz, that part of the sum due on the bills, having been paid

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in Fordyce's sequestration, the prescription was interrupted. But clear I am, that the drawer of a bill is quite a different person from the acceptor, and must be sued separately, and the holder must show that he has done diligence against both. What was done, therefore, against Fordyce the drawer, never could make the case better for the respondents.

"The Court found that the bills were not prescribed, but the reason upon which their judgment was founded, was a bad one, namely, in respect of the claim entered in the sequestration of Mr. Fordyce's estate. The Court, however, afterwards corrected this interlocutor, and found that the prescription only run from the last day of grace; and in this part of their judgment I concur.

"Another point still arose in this cause, on the part of the present appellants. They said: "We prove the will in the Prerogative "Court of Canterbury, therefore there can be no process against us "in Scotland."

"We are only liable to account in the Court where we proved the will, and where we found surety. This was not rightly alleged. There could be no suit against them in the Prerogative Court of Canterbury, but in a Court of Common Law. But, I must observe, that by the manner of their argument on this point, they allowed that they were liable to be sued as executors of Baron Grant.

"There was again a moot point before the Court; Whether or not they had jurisdiction, as in this case, to call executors to account, where the will was proved in England? On the one side, it was contended, that it was a case already adjudged by the Court, and affirmed upon appeal, that an English administrator could not be called to account in Scotland; and for this a case, Burrough *v.* Grant, was

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cited. But, upon looking into this case, I find the inference made from it a mistaken one, and that it is inapplicable to the present question.

"On the other side, a case, Morrison *v.* Ker, was relied on, where the Court of Session held, that an English executor was liable to be sued for the estate and effects of the deceased in his hands in the Courts of law in Scotland. But that case also does not apply to the present question.

"But I have no doubt as to the competency of the Court of Session, in a case where either the persons of executors, or effects of the deceased, are within their jurisdiction. No matter where the will was made or proved, the Court has full jurisdiction, and could carry their judgment into effect. And this might even be where a will has reference to the law of England. It is in the power of the Courts of Scotland to procure information as to the rules of English law, in the same manner as the Courts of law here take cognizance of the laws of Scotland, and other foreign countries, and decide accordingly.

"The general question, in my opinion, and the justice of the case is, that the executors had nothing to do with Baron Grant, under

the will of Andrew. By that will Andrew makes over his estates in Granada to five trustees, one of whom does not act; thereby a trust was created for payment of debts. The trustees were first to sell one plantation, and then to stop, if the creditors would consent, if not, they were empowered to proceed. It is only by force of this will that the demand of the respondents, in this case, could be made against the estate or executors of the deceased, as lands and real estate in Granada are not subject to be sold for simple contract debts. It is only in the execution of the trusts of that will, that the respondents could have access to recourse on the executors of Andrew Grant. I mean, always if it should be found that Andrew Grant is indebted to them.

"I do not wish to state my opinion, of what was or was not competent to the Court of Session, as to bringing parties before them; but the question, Whether Andrew Grant was truly indebted to the estate of his brother the Baron, has not yet been stated to the Court. It is possible that Andrew Grant's estate may turn out subject to the payment of Baron Grant's debts.

"The first thing to be done, is to show that he was really indebted to his brother; and when this is done, the respondents will find that they are entitled to a benefit they were not aware of. By Andrew Grant's will, a trust was created for payment of debts, against which no prescription does run; and his creditors will be entitled to receive payment out of this trust, of what shall be found to be truly due to them.

"But the Court of Session, not well informed in these matters, directed payment to be made out of the trust of an individual debt; but in this decision there was, in my opinion, neither reason nor justice; it was precipitate. It might cause the trust funds to be all paid to one creditor. The cause being now remitted to the Lord Ordinary, he goes on to give decree against the executors; and they having neglected to give in a specification of the trust funds in their hands, he also finds them liable in expenses, a thing unheard of before.* These decisions (judgments complained of), in my opinion, seem to be in every way inept.

"It is not my wish to enter into any matter foreign to this cause, or which has not been agitated; but my desire to see matters put upon a proper footing, induces me to point out the mode that may be adopted. Even though a judgment were recovered in the Court of Session, no effect could be attained by it, as the effects of the deceased are out of their jurisdiction. The proper court for the respondents to bring this matter to an issue in, is the Court of Chancery, and there, I myself know, that a suit is now depending, with regard to this very estate of Andrew Grant. If the respondents make their claims in this suit, they may be certain of receiving that mate-

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* Here Mr. Robertson's light failed him, and he gives the rest from memory.

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rial justice which their case will entitle them to, in a distribution of the estate and effects of the late Andrew Grant. But it will be first incumbent on them to show the connection between Baron Grant and Andrew, which is to make the estates of the latter liable to the claims of the respondents.

"I must, therefore, move your Lordships to reverse the whole interlocutors complained of by the appellants, except so much of one of them as finds that the prescription of the bills only runs from the last day of grace."

It was ordered and adjudged that the several interlocutors complained of in the appeal be *reversed*, except as to so much of the interlocutor of 19th November 1793, as finds that the time requisite to completing the prescription in question, only began to run from the third or last day of grace; and therefore repels the plea of prescription, without prejudice to any claim which Douglas, Heron & Co. may make for payment of the two bills, out of the estate and effects of Baron Grant, or out of such part thereof, as have come to the hands of Andrew Grant, and for which he ought to have accounted in a suit for carrying into execution the trusts of the will of the said Andrew Grant.

For Appellants, *R. Dundas*, *Robt. Dallas.*
For Respondents, *W. Grant*, *John Anstruther.*

ALEXANDER MACDONALD, W.S., . . *Appellant;*
ROBERT BURT, Apothecary, Edinburgh, *Respondent.*

Et e contra.

House of Lords, 29th November 1796.

DAMAGES.—MASTER AND ASSISTANT.—DISMISSAL.—Circumstances in which the Court of Session awarded damages to an apothecary's assistant, for an illegal and oppressive dismissal from service, by the son of his employer, without the employer's sanction and authority. Reversed in the House of Lords.

The appellant's mother had carried on the business of an apothecary, assisted by her youngest son, James, and the respondent, who was an assistant under her son James.