[*26th May* 1837.]

Sir WILLIAM HENRY DON, Bart., and the Rev. ALEXANDER SCOTT, his Tutor.—Appellants.—*Sir William Follet—Smith.*

M. LIPPMANN.—Respondent.—*Dr. Lushington—Gordon.*

Foreign Bill of Exchange—Sexennial Prescription—Res Judicata.—1. A bill of exchange was drawn and accepted in a foreign country, and admitted to be payable there, though not specially bearing a place of payment, and the acceptor, who was a native of Scotland, possessing a landed estate there, returned there before the bills fell due—Held in an action brought against his representatives nineteen years thereafter (reversing the judgment of the Court of Session), that the bill was subject to the sexennial prescription, according to the lex fori, and not to the foreign prescription of the locus contractus. 2. The payee having, after they fell due, instituted judicial proceedings in the foreign country, and obtained decree against the drawer and acceptor, who was then in Scotland, and he did not receive intimation of them, nor did he appear, and was not able to appear, the two countries being in a state of war at the time—Held, that the decree was not a res judicata, and formed no interruption of the sexennial prescription as against the acceptor.

1st DIVISION.
Ld. Corehouse.

THE late Sir Alexander Don of Newton, Bart., father of the appellant, a native domiciled Scotchman, and possessing considerable landed estates in Scotland, was detained a prisoner in France during the greater part

of the last war. On the 13th of November 1809 he accepted two bills for 20,000 francs each, drawn by Charles Fagan, and payable to the respondent Lippmann at about four months date. These bills were in the following form:

Versail, le 13 9bre 1809.

Bon pour 20,000 fr.

Au premier Mars prochain paye par cette première de change, à l'ordre de M. Lippmann, le somme de vingt mille francs, valeur reçu, sans autre avis.

Bon pour vingt mille francs.

A. Monsieur, CHAS. FAGAN.
Mon. Don,
Hotel Richelieu, Rue Neuve,
St. Augustin, Paris.

Accepté pour le somme de vingt mille francs, payable le premier Mars 1810.

(Signed) ALEXANDER DON.

Versail, le 13 9bre 1809.

The Hotel Richelieu was Sir Alexander's place of residence. Soon after the bills had been accepted, and before the time of payment, he quitted France, and returned to Scotland: when they became due on the 1st March 1810 they were dishonoured, and were protested for nonpayment against Sir Alexander, and the dishonour was intimated to Fagan the drawer. Lippmann then brought an action against Fagan and Sir Alexander in the Tribunal of Commerce in Paris. Sir Alexander was not, and could not be personally cited; and the whole proceedings were in his absence, without

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his knowledge, and while those hostilities continued which prevented him from appearing in this action Lippmann obtained decree against both Sir Alexander and Fagan.

Sir Alexander continued to reside in Scotland, and died there in 1826; and nineteen years after the time of acceptance, viz. in the year 1829, Lippmann brought an action in the Court of Session in Scotland upon the acceptance and upon the French decree against the appellant, as representing his father, and he being an infant was defended by his guardian. In bar of this action the Scotch sexennial prescription was pleaded.

The Lord Ordinary on the 10th June 1835, (after ordering and obtaining the opinion of French counsel[1]) issued the following judgment and note:

"The Lord Ordinary, having considered the revised "cases for the parties, the case prepared for the "opinion of French counsel, and their opinion thereon, "together with the productions and whole process, "repels the plea of the sexennial prescription stated for "the defender, finds that the defender is entitled to "be reponed against the judgment of the Tribunal of "Commerce in France, and appoints parties to be "farther heard on the merits of the cause.

"*Note.*—This action is laid on two grounds: first, "on the bills of exchange accepted at Paris by the late "Sir Alexander Don; and, secondly, on the decree of "the Tribunal of Commerce in that city against Fagan "the drawer and Sir Alexander the acceptor, jointly "and severally, proceeding on those bills. This decree

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[1] See this opinion in the Appendix to this report.

" may be considered either as an interruption of the " prescription of the bills, or as a separate title of " pursuit.

" To decide the question of prescription as applicable " to the bills, it is necessary to inquire whether the " debt sued for is a French or a Scotch debt, and that " depends in this case on the point whether Scotland " or France was the place where the bills were payable. " If they constituted a Scotch debt, it is plain they are " subject, not to the French quinquennial, but to the " Scotch sexennial prescription; and as Sir Alexander " Don had resided more than six years after the time of " payment in Scotland, they are not actionable unless " resting owing be proved by writ or oath, or the pre- " scription interrupted by action or diligence. Action " was raised against Sir Alexander Don, and decree " obtained against him in France; but whether those " proceedings amount to an interruption of the Scotch " sexennial prescription may well be questioned, what- " ever may be their effect as a separate title. He was " not in France when the action was raised; he was " not personally cited there, nor had he any property, " either heritable or moveable, within the jurisdiction. " Farther, and what is still more, material, he was then " an alien enemy in France, and could not appear in " safety in a French court either to sue or to defend. " Considered, therefore, purely as a question of Scotch " law, it would seem that the sexennial prescription of " the bills was not interrupted.

" On the other hand, if France was the place of pay- " ment, and if the bills in consequence constituted a ' French debt, the case must be viewed in a different ' light. Our decisions have not been uniform on this

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" point, but it seems the better opinion that if a debt " be payable in a foreign country, the law of that coun- " try must apply, in so far as its extinction is concerned, " although the debtor resides and must be sued in " Scotland. On that principle the bills were subject, " not to the Scotch sexennial, but to the French quin- " quennial prescription, and every interruption of that " prescription by the law of France is pleadable against " the defender here. The bills do not specify the place " of payment, and the defender argues on that ground " that the debtor's domicile is to be held the place of " payment. This point is not decided in the law of " Scotland; but it seems well established in the law of " England, that where there is no such specification, " the place of acceptance is the place of payment; and " that is also the law of France, as is stated in the " opinion obtained. As the bills in question were " drawn and accepted in France by parties resident " there, it must be held as pars contractus that Paris " was the place of payment.

" It would follow from this that if the proceedings in " the French court were held in that country as an " interruption of the quinquennial prescription, they " must be so held in Scotland also, however anomalous " they may appear, either in respect that the debtor " was not within the jurisdiction and had no property " there, or in any other view; or if it be the law there " that a decree against the drawer is also a decree " against the acceptor to the effect of interrupting pre- " scription, the same interruption must be admitted in " Scotland.

" But the difficulty which occurs to the Lord Ordi- " nary, and which is not met in the opinion of the

" French counsel, rests upon this ground: they state " that in consequence of the lapse of five years, 'the " bill of exchange is annulled, and the bearer acquires " his redress on a new title, namely, the judgment " which remains.' This doctrine lays prescription out " of the question altogether. The only title of pursuit " is the French judgment, which this Court is called " upon to enforce, and the question arises whether it be " such a judgment as should be held as a res judicata " without farther inquiry, or whether it may compe- " tently and should in equity be reviewed on the merits.

" It appears that by the law of France a judgment in " absence prescribes in six months, unless execution " has followed upon it; but this prescription was inter- " rupted as to Sir Alexander Don, in consequence of " execution against the drawer Fagan, who was liable " with him in solidum in the bills, and against whom " the judgment also proceeded in so far as the constitu- " tion of the debt is concerned. In so far as the ques- " tion of personal execution is concerned, it was com- " petent for Sir Alexander, and it is still competent for " his heir, to be reponed, and to obtain a new hearing " in the Tribunal of Commerce, but in no other court; " but that proceeding, it is said, would now be inept, as " the representative of the deceased is not subject to " personal execution.

" But whatever may be the provisions of the French " law as to decrees in absence, the important question " arises whether, when a foreign court is called upon to " enforce that decree, it ought not in material justice " to repone the party to the effect of his being heard on " the merits? A decree sine causâ cognitâ can never " be considered in any other light, except either as a

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" compulsitor to enforce the attendance of the party " against whom it is pronounced, or a penalty on his " contumacy for not attending. In Scotland, at least " for forty years, it is held merely as a compulsitor, and " the party is entitled de jure to be reponed on pay- " ment of expenses. And therefore in the case of " Douglas v. Forrest, in the Court of Common Pleas, " cited by the pursuer, where a Scotch decree in absence " was held equivalent to a decree causâ cognitâ, it is " probable that the law of Scotland had not been fully " explained to the Court, because they gave much " greater effect to it than it would have received in the " forum where it was pronounced.

" On the other hand, although the judgment in the " Tribunal of Commerce were to be held in France as " a penalty on the acceptor for his contumacy for not " appearing to answer the citation, it cannot be viewed " in that light in this country, because he could not " have appeared in safety, being an alien enemy. " Admitting that as a private individual he had a per- " sona standi, and might have been heard by his attorney " or procurator, which may be inferred from the opinion " obtained, yet on the principles of international law, " no man is bound to answer in a court where he can- " not be personally present without endangering his " liberty, and that from no fault of his own.

" The French counsel hold, that as Sir Alexander " Don was bound jointly and severally with Fagan, a " decree against Fagan in foro contentioso is equiva- " lent to a decree in foro contentioso against Sir " Alexander Don also. That might be granted if the

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[1] Douglas v. Forrest, 4 Bing. R. p. 686.

" decree were to be used solely for the purpose of inter-
" rupting the French prescription. But as the Court
" is called upon to enforce it as a judgment upon the
" merits, it is thought no party can have a cause con-
" clusively decided against him until he has been heard
" by the Judge, or unless it be his own fault that he has
" not been heard.

" It is on these grounds that the Lord Ordinary has
" arrived at the conclusion that, while the sexennial or
" Scotch prescription is repelled as inapplicable to the
" circumstances of the case, the defender ought to be
" reponed against the French decree, and parties be
" allowed to go into the merits."

This interlocutor having been brought under review of the First Division of the Court, their Lordships, on the 20th January 1836, adhered to the interlocutor of the Lord Ordinary, and remitted the cause to his Lordship, to proceed as shall be just, reserving all questions of expenses." [1]

Against these judgments an appeal was brought.

Appellants.—This case resolves into a question of international law.

The action is laid substantially upon the two bills of exchange, although the respondent also libels upon the decree obtained in the Tribunal of Commerce.

The appellants have rested their defence mainly on the Scotch sexennial prescription. This defence has been opposed on two grounds, 1st, that the Scotch prescription is not pleadable againsta foreign contract; and, 2d, that, at all events, it has been effectually inter-

[1] 14 Dunlop, B. & M. 241.

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rupted by the decree of the Tribunal of Commerce against Sir Alexander Don.

1. The first of these objections raises the general question,—Whether the sexennial prescription is pleadable by a Scotch party as a defence against a demand in a Scotch Court for payment of a foreign bill of exchange?

In considering this, a distinction must be carefully drawn between questions as to the constitution of obligations, and as to the mode of enforcing them. In regard to the former, the law of the place of the contract must be the rule; for a court of law must always inquire whether there is a debt or not, and this necessarily depends upon the law of the place where the contract said to create the debt has been entered into. And the same rule holds in regard to the transmission or extinction of debts. But action on or execution of a contract, or, in other words, the mode of enforcing payment, and all objections to the action or the enforcement, must be according to the law of the place where the enforcement is attempted.

Accordingly, Voet and Huber[1] announce it as a general rule, admitting of no exception, that where a debt comes to be prosecuted, it must be prosecuted according to the law of the place where it is pursued for. This is founded upon the ground, that proceedings in courts of justice must 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 submit. In reference

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[1] Voet, lib. i. tit. 4. pars 2. sec. 58. De Statutis. Huber, De Conflictu Legum Divers.

to the same subject, Dirleton[1] raises the question, — "If a stranger contracts with a Scotchman abroad, "that he should pay him presently upon the place, and "the debtor, nevertheless, came away without satisfac- "tion, Quid juris as to that debt?" Sir James Stewart resolves this doubt in accordance with the opinion of the civilians, — that "the stranger may, no question, "follow the debtor wherever he can find him and his "effects; and though the constitution of the debt should "be regulated by the law of the place, yet if it have "the essentials, it will subsist jure gentium; only, when "it comes to be prosecute, it must be prosecute ac- "cording to the law of the place where it is pursued "for." The same doctrine is laid down by Mr. Erskine[2] as the rule of the law of Scotland.

As thus the lex loci contractûs regulates the constitution, transmission, or extinction of obligations, and, on the other hand, the lex fori forms the rule in all questions as to the enforcement of the obligation, and as to the efficacy or extent of it, so the law of Scotland must be followed in the present case. Indeed, the Scottish statutes and rules, which limit the endurance of actions, have been uniformly extended to claims founded on contracts executed in foreign countries; as in the cases of Randal against Innes, Barret against the Earl of Home, and Kerr against the Earl of Home.[3] In the two first of these cases Scotch parties, to whom

[1] Dirlet. 8vo. edit. p. 96.

[2] Book iii. tit. 7. sec. 48.

[3] Randal v. Innes, 13th July 1768, Fac. Coll. 4. p. 310. No. 70. Mor. 4520; Barret v. Earl of Home, 4th Feb. 1772, Fac. Coll. 4. 4. No. 3. Mor. 4524; Kerr v. Earl of Home, 20th Feb. 1771, Fac. Coll. 5. 234. No. 80. Mor. 4522; Delvalle v. York Buildings Co.'s Creditors, 9th March 1786, Fac. Coll. 9. 402. No. 264. Mor. 4525. Fac. Coll. 9. 406. No. 265. Mor. 4978. 12th March 1788, Fac. Coll. 9. App. 18. (Rever).

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furnishings had been made in England, returned thereafter to Scotland, where they resided till their respective deaths. In actions against their representatives, the defence of the triennial prescription was sustained. In the case of Kerr, the claim was for the rent of a house in London, which had been possessed by the Earl of Home's predecessor from Midsummer 1752 to Lady-day 1756. The contract was foreign, and, according to fair construction, the obligation undertaken by the Earl of Home was to pay the rent in London. Nevertheless, when the Earl's representatives were prosecuted for the arrears in Scotland, it was found that the claim was cut off by the triennial prescription. In the later case of Campbell against Stein[1] effect was given to the same prescription, as affording a conclusive defence against an action prosecuted in the Scotch courts by an English attorney for payment of an account incurred to him for conducting an appeal case in the House of Lords.

In the same way, the long negative prescription has been successfully pleaded in the courts of Scotland as a defence against a claim upon English bonds. This appears from the case of Delvalle against the Creditors of the York Buildings Company, where it was objected to bonds in the English form, that they were cut off by the Scottish prescription of forty years. The Judges were agreed that the lex domicilii debitoris must regulate the decision of the case; and a majority being of opinion that the domicile of the York Buildings Company was in Scotland, the bonds on which the action was laid were held to have fallen by the long prescription. This judgment was reversed in the House of Lords,

[1] Campbell v. Stein, Nov. 23, 1813. Fac. Coll. 17. 456, No. 124, June 5, 1818. Fac. Coll. 19. 771, (Affirmed); 6 Dow, 134.

upon the special ground that the debtors were an English company, domiciled in England, and by their charter of erection fixed down to a residence there. This decision confirms, by an exception, the general rule, because it was conceded, that if, instead of being domiciled in England, the York Buildings Company had been domiciled in Scotland, it would have been competent for them to plead the Scottish prescription, although England was the locus contractûs. These principles were accordingly fully recognised in deciding the subsequent case of the York Buildings Company against Cheswell.[1] And in the case of Richardson and others against Lady Haddington[2] it was assumed by Lord Gifford, who moved the judgment of the House of Lords, that the Russian prescription would have been available to Mr. Gascoigne had he been sued in the courts of Russia, after having resided during its currency in that country, although it was insufficient to protect him against a claim in the courts of Scotland, the law of the debtor's domicile in such a case excluding the operation of the foreign prescription.

Upon the same principle it has been found that the defender cannot plead the lex loci contractûs against the law of his domicile. In the case of Kinloch against Fullerton a claim was preferred against an heir in heritage for payment of a promissory note contracted by his predecessor in England. It was objected, that the heir was not bound in the promissory note; that the locus contractûs must be the rule; and that, if the obligation was so limited as to be good only against the executors in

[1] York Buildings Co. v. Cheswell, 14th Feb. 1792, Fac. Coll. 1C. 436. No. 207. Mor. 4528.

[2] Richardson v. Lady Haddington, 8th March 1822, 1 S. & D. p. 387, (new edit.) 362. (Reverse.) 2 Sh. App. Ca. p. 406.

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England, it would be absurd to give it a stronger effect when pursued in Scotland. It was answered, that whatever peculiarity may be in the practice of England, we follow the law of nations, which makes people's effects liable for payment of their debts; and therefore, provided a foreign deed be habilely executed according to the forms of the place, we give it all effect that such a deed can have when executed in Scotland. "The Lords sustained pro-"cess against the heir."[1] To the same purpose, in the case of Gibson against Stewart,[2] it was found, that where a party had come to Scotland within a year after the contraction of a debt under the law of England, and continued domiciled in Scotland, he could not plead the English statute of limitations. The late Lord Newton, in a very able note, fully recognised the principle, that the lex domicilii must regulate all such cases.

There is nothing peculiar in the contract created by a foreign bill of exchange, or which should make it an exception from these rules. The statute 12 Geo. 3. (1772), which establishes the sexennial prescription, does not except foreign bills from its operation. On the contrary, the prescription is made applicable to bills of exchange generally, comprehending, of course, foreign bills. This is the view taken by Lord Eskgrove in giving his opinion in the case of Delvalle, as to the application of the Scottish long prescription to English bonds. In "prescription," he says, "it is not the debt which pre-"scribes, but the action. This may be well illustrated by "the act 12th Geo. 3. It is there provided, that after a "certain term bills shall be of no force or effect to

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[1] Kinlo v. Fullerton, 10th July 1739, Elchi's Suc. No. 6. Clk. H. 199. No. 125. Mor. 4456.

[2] Gibson v. Stewart, 29th March 1831, 9 Sh. & D. p. 525. (new ed.)

" produce diligence or action. This relates to foreign " bills, as well as to home bills. The statute as to " the prescription of bills is not just the same in " England, for in England there is no proof of " resting owing allowed. There, before the statute " 12th Geo. 3, and ever since it, a debt may not " be recoverable by the English law, and yet be good " in Scotland."

Mr. Chitty, in his work upon the law of bills of exchange, views them, in regard to this matter, as simple contracts, and his authorities and analogies are generally drawn from the law of contracts.

In particular, he refers to the case of De la Vega against Viana[1], where it was found, — 1st, That in a suit between parties resident in England, on a contract made between them in a foreign country, the contract is to be interpreted according to the foreign law, but the remedy must be taken according to the law of England; and, 2d, That one foreigner may arrest another in England for a debt contracted in Portugal, while both resided there, though the Portuguese law does not allow arrest for debt. So in the leading case of the British Linen Company v. Drummond[2], where an action was brought in the King's Bench on a written engagement entered into in Scotland, and by the law of England the statute of limitations had attached, but the deed was in full force according to the law of Scotland, the Court of King's Bench thought the case must be governed by the law of the country in which the action was brought.

2. The second plea by the respondent, in answer to the de-

[1] De la Vega v. Viana, 1 Barn. & Adol. p. 284.
[2] British Linen Co. v. Drummond, 10 Barn. & Cress. p. 903.

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fence of the sexennial prescription, is, that the proceedings in France had the effect of interrupting the course of prescription. The statute (1772), establishing the sexennial prescription, provides that no bill of exchange "shall be of force, or effectual to produce any diligence "or action in that part of Great Britain called Scotland, "unless such diligence shall be raised and executed, "or action commenced thereon, within the space of "six years from and after the terms at which the sums "in the said bills or notes became exigible." This provision is in conformity with the principle inherent in the Scottish doctrine of prescription,—that its currency can be effectually interrupted, as against a debtor, only by judicial notice of the creditor's claim. But on inquiring whether there has been judicial notice, the first question is, whether the judge in whose court it is given had jurisdiction over the party. A want of jurisdiction must render the notice useless and ineffectual, for it is not a judicial notice.

This brings the case to the question of jurisdiction, on which the parties are truly at issue; and even supposing the argument of the respondent to be well founded, that the liability under the bills depends on the law of France, still that law fell to be applied by a court having jurisdiction over Sir Alexander Don.

There are various ways in which a party may become amenable to the civil jurisdiction of a court. The general rule is, that such jurisdiction can be exercised only over persons intra territorium,—whether they be foreigners or natives, the judge's jurisdiction is clear ratione domicilii. Civil jurisdiction, to the effect of attaching property, is also founded ratione rei sitæ.[1] Neither of these

[1] Ersk. b. i. tit. 2. sec. 16.

grounds of jurisdiction arise here, because it is admitted, that, at the date of the decree of the Tribunal of Commerce, Sir Alexander Don was, both in person and property, beyond the jurisdiction of the French courts. But it is said that the Tribunal of Commerce had jurisdiction over him ratione contractûs, and upon this ground it is that the opinion of the French lawyers proceeds. The contract was constituted by two bills of exchange, accepted in France, but without specifying any place of payment, in which case they are to be held as payable at the acceptor's domicile, on a demand being there made for payment. No other construction can be put upon documents which, contrary to the usual form of foreign bills of exchange, are blank as to the place of payment. It is quite settled in England, that the only way in which the payee of a note can secure payment at a particular place is by introducing a condition to this effect into the body of the bill or note. Independent of such an expressed stipulation, the debtor incurs no obligation to pay elsewhere than at the place of his domicile on demand.

The French lawyers in their opinion assume, contrary to the fact, that the bills accepted by Sir Alexander Don "were made payable in France," and upon this ground they give it as their opinion, that the citation to appear before the Tribunal of Commerce "was perfectly valid." But as this opinion proceeds upon an error in point of fact, no weight should be attached to it in deciding this case.

There is no doubt that, under certain qualifications, civil jurisdiction may be created ratione contractûs. A foreigner who contracts an obligation, either by an account, a bond, or a bill, is bound to perform while he remains within the country; but if he has removed

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both his person and his property to a different country, he can no longer be compelled to perform in loco contractûs. He cannot even be cited, as a warrant for citation can have no effect extra territorium of the judge who issues it. In such a case the creditor must follow the person and property of his debtor to the country into which they have been removed.

The French lawyers say, "It is a principle of the law "of France, that a stranger, even a non-resident in "France, may be cited before the French tribunals in "order to fulfil the obligations contracted by him "in France towards a Frenchman. Every French "tribunal is therefore competent, according to the "nature of the obligations, to exercise in such cases its "jurisdiction over a foreigner. A foreigner, on entering "into a contract in any other country than his own, "has done an act, according to the law of nations, by "obliging himself to perform in that very country an "engagement which he has contracted; he has volun-"tarily renounced, in respect to this obligation, the "jurisdiction and the law of his own country, and has "no longer the right to invoke the maxim, Actor sequitur "forum rei. It is not necessary, on that account, that "the person should still reside in France at the moment "the performance of the contract is claimed. It is "quite enough for him to have resided there when the "contract was entered into. It is that moment, and "by that very act, that the competence of the French "tribunal has been established."[1] Independent of the mistake, in point of fact, running through this passage, that Sir Alexander Don undertook to pay the bills in France, it involves some legal propositions rather of a

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[1] Appendix.

startling character. They say, that every foreigner who enters into a French contract is, quoad hoc, understood to have renounced the law and jurisdiction of the courts of his own country, and to have subjected himself at all times, whether present or absent, and even when so situated as to render his presence impossible, to the law and jurisdiction of the court of France. The question then comes to be, whether the Courts of Scotland are to adopt the same principles from comitas to the French law, and hold, contrary to their own law, to the civil law, to the law of England, to the law of nations, and the principles of natural justice, that civil jurisdiction to this extent can be founded ratione contractûs?

It may be true, that the principles upon which the jurisdiction of courts of law are founded are not common to all civilized nations; but it is a great mistake to suppose that there are no general rules recognised, as of universal application in international questions of jurisdiction; and it is equally so, to imagine that the special rules in regard to jurisdiction established in a State for the regulation of its own courts must be implicitly given effect to when the judgment becomes the subject of litigation in a foreign court.

" It is not an uncommon course for a nation," says Mr. Justice Story[1], " by its municipal code, to provide " for the institution of actions against non-resident " citizens and foreigners by citations, viis et modis " (as it is called), or by attachment of their property, " nominal or real, within the limits of their territorital " sovereignty, and to proceed to judgment against " the party defendant, whether he ever appears to

[1] Conflict of Laws, Edin. edit. p. 457.

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" the suit or not. In respect of such suits, in personam, " by mere personal citations, viis et modis, such as by " posting them up on the Royal Exchange in London, " as is done in the Admiralty in England, or by an " edictal citation (as it is called), posted up at the quay " in Leith, at the market-cross of Edinburgh, and the " pier and shore of Leith, according to the practice of " Scotland, there is no pretence to say that such modes " of proceeding can confer any legitimate jurisdiction " over foreigners who are not residents, and do not " appear, whether they have notice of the suit or not. " The effects of all such proceedings are purely local, " and elsewhere they will be held as nullities."

Nay, so far has this doctrine been carried in England, that a holder of a bill drawn in France on a French stamp was allowed to recover in an English court, though, in consequence of its not being in the form required by the French code, he had failed in an action which he brought on it in France.[1] In other words, a French decree of absolvitor was disregarded, in a question as to enforcing the obligation, because the decree proceeded on a ground purely local, and upon principles at variance with the law of England, and justice.

For the same reason, the French decree against Sir Alexander Don can have no effect in the Scotch courts. The jurisdiction ratione contractûs, which the French lawyers held to have given validity to it, is a mere fiction, peculiar to the law of France, unknown to the law of any other civilized country, and opposed to those principles of natural justice on which international law rests. To found jurisdiction ratione con-

[1] Wynne v. Jackson, 2 Russ. 351.

tractûs, the civilians required that a party should be present either in his person or his property Voet says: "Ratione contractûs forum competens sortitur "reus eo in loco, in quo contractûs vel quasi contractus "celebratus seu perfectus est; si modo reus illic "inveniatur, aut bona habeat, quæ possunt eo absenti "ibi judicis auctoritate possidere." He adds, "Cum quo et jus canonicum consentit et mores "hodierni." So deeply, indeed, did the continental lawyers consider these principles to be founded in justice, that they held it incompetent for a party who was extra territorium in person and property to prorogate the jurisdiction of a judge ratione contractûs. After announcing the rule in the passage just quoted, Voet represents it as so absolute, "ut ne ex speciali "quidem jurisdictionis prorogatione contractui addita "contrahens ibi conveniri possit, nisi ipsi aut bonis "ipsius in eo loco repertis injecta manu (arrestum "dicunt) jurisdictio stabilita sit."[1] In support of this doctrine he refers to Gayl, Sande, Faber, and other continental authorities.

The law of Scotland, as to the founding of civil jurisdiction ratione contractûs, is thus stated by Mr. Erskine[2]: "It is necessary, in order to establish "jurisdiction in this manner, that the defender be "actually within the judge's territory, and be cited by "a warrant issuing from his court, or at least that he "have effects lying there, for jurisdiction cannot have "the least operation when both the person and the "estate of the defender are withdrawn from the judge's "power." That such is also the rule of the law of

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[1] Lib. 5. tit. 1. sec. 73.

[2] B. i. tit. 2. sec. 20.

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England, may be gathered from Bingham's report of the case of Douglas v. Forrest.[1] There a Scotch decree in absence against Hunter was given effect to in the English courts solely upon the plea that he had been subject to the jurisdiction of the courts of Scotland when the decree passed, ratione originis et rei sitæ, although at the time he was personally extra territorium. In noticing this case, Story points out, as the true principle of the decision, that "the "party owed allegiance to the country in which the "judgment was so given against him from being born "in it, and by the laws of which country the property "was, at the time those judgments were given, pro-"tected." The same author goes on to notice the cases where jurisdiction is founded by the attachment of property, and observes,—"In such cases, for all the "purposes of the suit, the existence of such property "within the territory constitutes a just ground of "proceeding to enforce the rights of the plaintiff to the "extent of subjecting such property to execution upon "the decree or judgment. But it is to be treated to "all intents and purposes, if the defendant has never "appeared and contested the suit, as a mere proceeding "in rem, and not personally binding on the party as a "decree or judgment in personam. In other countries "it is so treated, and considered as having no extra "territorial force or obligation."

These principles are illustrated by the case of Buchanan v. Rucker.[2] By the law and practice of the Court of Common Pleas in Tobago, a party absent from the island, both in person and property, may be effectually

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[1] 4 Bingham, 686.

[2] Buchanan v. Rucker, 1 Camp. Rep., p. 93, and 9 East, R. 192. S. C.

cited to an action by simply affixing a copy of the declaration against him on the court-house door. Under a citation in this form judgment was obtained against Rucker for a sum of 2,000*l.* sterling. An attempt having been made to enforce this judgment in the Court of King's Bench, the objection was taken, that "it could not create any liability, or raise an "assumpsit for the defendant to discharge it," in respect "it had been given against the defendant "without his ever having been served with process, or "having had any opportunity to defend the action." This plea was answered by a reference to the law and practice of Tobago, in regard to which Lord Ellenborough, in directing a nonsuit, said, "It is contrary "to the first principles of reason and justice that, "either in civil or criminal proceedings, a man should "be condemned before he is heard. To prove the "practice, there ought strictly to be some witness "professionally acquainted with it. This, however, it is "unnecessary to consider, for if the practice were "proved, it is mala praxis, and cannot be sanctioned. "If a judgment could thus be recovered against any "one behind his back, a man would have nothing "more to do than to go to Tobago, there sue us to any "amount, and then return to this country to put his "judgment in force against us. In a case somewhat "like the present, that came before Lord Kenyon, the "defendant had resided in the island, had property "there, and had left a power of attorney behind him; "therefore he might be considered as virtually present; "but the practice here contended for is opposite to "right reason, and shall not prevail." In answer to an observation from the plaintiff's counsel, that the

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judgment or sentence of a foreign court must be received as evidence of the right it establishes, Lord Ellenborough further said, "There might be such "glaring injustice on the face of a foreign judgment, or "it might have a vice rendering it so ludicrous, that it "could not raise an assumpsit, and, if submitted to the "jurisdiction of the courts of this country, could not be "enforced. His lordship, therefore, directed a nonsuit." This case therefore settles the point, that in England no action will lie upon a foreign judgment, on the face of which it appears that the defendant, not resident within the jurisdiction of the foreign court, and having no property or effects there, was neither served with process nor appeared to defend the action; although such judgment may have been obtained according to the course and practice of the court in similar cases, and must be viewed as a direct authority against the respondent, in so far as his action is laid on the French decree. It just gives effect to Mr. Erskine's principle, that jurisdiction cannot exist where both the person and the estate of the defender are withdrawn from the judge's power. This is the rule of essential justice.

A class of cases has been strongly relied on by the respondent, in which the courts of Scotland have given full effect to foreign decrees; but these cases have no application to the present. In the first place, in all of them the object of the action was directly to enforce a foreign judgment on the merits as the sole ground of debt; and, second, the foreign decrees had invariably passed against parties over whom the jurisdiction of the courts issuing them was undoubted. Thus, in the case of Goddart, the ground of action in the Scotch court was a decree of the Court of King's Bench regularly

obtained upon discussion against the cashier of an English company trading to Guinea for his intromissions. The cashier had retired to Scotland before he came to be prosecuted, and the Court accordingly had no difficulty in allowing execution to pass on the foreign decree upon proof of the facts, first, that the pursuer was a partner of the company; and, second, that the defender was truly the cashier or intromittor against whom the foreign decree had been obtained.[1] The case of Edwards v. Prescot[2] was precisely of the same description. The defender there had joined issue with the pursuer in the Court of King's Bench, and decree had passed for 240*l.* sterling, following upon the verdict of a jury. The report bears, that "to evade the effect of "this decree the defender retired into Scotland;" and in such circumstances it is not remarkable it should have been enforced by the Scotch courts, nothing "competent in law or equity" having been objected against it. In the case of Sinclair against Fraser[3], where a decree had been obtained in foro contentioso in the courts of Jamaica, no further effect was given to it in the courts of Scotland than as entitling "the party "claiming under it to plead that the onus probandi "rested upon his opponent." The House of Lords reversed this judgment; and in conformity with the decisions in the preceding cases of Goddart, and Edwards, "declared that the judgment of the Supreme "Court of Jamaica ought to be received as evidence "primâ facie of the debt, and that it lies on the

[1] Goddart v. Swinton, 1709, July 13. Fount. 2. 514. Mor. 6445; July 24, 1711, Fount. 2. 663.

[2] Edwards v. Prescott, Dec. 29, 1720; 1713, Dec. 3, Forbes' MS. Fol. Dic. 1. p. 323, Mor. 4533; Kames' R. Dec. 1. 43, No. 21, Mor. 4535.

[3] Sinclair v. Fraser, March 4, 1771, Fac. Coll. 4. 390, Mor. 4543. (Reversed.)

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"defendant to impeach the justice thereof, or to show "the same to have been irregularly obtained." In the earlier case of Hamilton v. the Dutch East India Company[1], the exception of res judicata sustained by the Court arose out of a regular judgment of the council of justice at Batavia, obtained by the pursuer himself upon an appeal from a previous decision of the council of justice at Malacca. In Johnston against Crauford[2] the Scotch courts merely enforced a decree-arbitral, competently pronounced by Dutch arbiters between parties who had entered into a submission in Holland. The case of Findlater, which is reported in a note to the Faculty Report of the case of Leith against Hay[3], was not only "exceedingly special, and involved in cir- "cumstances," but the proceedings in the Colonial Court, to which effect was given, had taken place in foro contentioso, and between parties subject to the jurisdiction of that Court. In Brown's case[4], the American decree to which the Court and House of Lords gave effect, was pronounced after full discussion in the American courts between parties amenable to their jurisdiction. It is manifest, therefore, that all these cases are distinguished from the present by this important specialty, that the jurisdiction of the foreign courts over the parties against whom the decrees sustained in the courts of Scotland had passed was clear and undoubted.

The same remark applies to the English case of Douglas and the assignees of Stein and Smith against Forrest, on which the respondent seems mainly to rely.

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[1] Hamilton v. the Dutch E. I. Com., July 24, 1731, Fol. Dic. 1. 324, Mor. 4548.

[2] Johnston v. Crawfurd, Feb. 19, 1751, Elchies' Tutor, &c., No. 23.

[3] Leith v. Hay, Jan. 17. 1811, Fac. Coll. 16. 125, No. 35.

[4] Brown's Trustees v. Brown, 4 S. & D. June 23, 1825, p. 108, (new edit.) p. 109; 4 W. & S. Ap. C. p. 28. (Affirmed.)

There the plaintiff's plea was assumpsit on two Scotch decreets which had been obtained in the Court of Session in absence against James Hunter. The defendant pleaded the general issue, and the statute of limitations. In this way the question was raised in the English Court as to the validity and effect of the decreet. It appeared that Hunter had been in India at the date of the decreet, and had had no notice of the proceedings on which they followed; but he was a native Scotchman, and had real property in Scotland at the time. It was proved by a Scotch advocate, that by the law of Scotland the Court of Session may competently issue a decree in absence against a native Scotchman having heritable property in that country for a debt contracted there, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time, and that such decree would become final on the merits if not opened up within forty years. On the strength of this rule of the Scotch law, as just and reasonable, it was contended that effect ought to be given to the decreet against Hunter, who, though absent, was amenable to the jurisdiction of the Scotch courts, ratione originis et rei sitæ. Accordingly, in giving judgment for the plaintiffs, Chief Justice Best said, "A natural-born subject of any country, quitting that "country, but leaving property under the protection "of its law, even during his absence, owes obedience "to those laws, particularly when those laws enforce a "moral obligation." On this ground his lordship distinguished the case from that of Buchanan v. Rucker, where the English courts refused to interpose their authority to a foreign decree on the broad ground that it was essentially unjust. To entitle the judg-

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ment of a foreign court to any force or authority, Mr. Justice Story considers it "indispensable to establish "that the Court pronouncing judgment had a lawful "jurisdiction over the cause and the parties. If the "jurisdiction fails as to either, it is treated as a mere "nullity, having no obligation, and entitled to no "respect beyond the domestic tribunals; and this is "equally true whether the proceedings be in rem or "in personam." In support of this doctrine he refers to a variety of authorities, and, among others, to a decision of the Supreme Court of the United States, in which Chief Justice Marshall held, that "the "position that the sentence of a foreign court is con-"clusive with respect to what it professes to decide "is uniformly qualified with the limitation, that it has, in "the given case, jurisdiction of the subject matter."

Respondent. — It is unnecessary to inquire into the law of any other country on this subject than that of France, where the bill was made; because if, according to the law of that country, the locus solutionis was pointed out by the form in which the bill was drawn, no other meaning can be given to the obligation than that it was the intention of the parties, and the contract between them, that the bill should be paid in the place so specified. Pardessus[1] explains the law of France upon this subject to be, that where the place of payment is not specially designed in the body of the bill, that place is held to be specially pointed out by the address of the party drawn upon, stating his place of residence, which is then understood as his domicile, where payment is to be made.

[1] Pardessus, t.ii. 384.

Sir Alexander Don must therefore be held to have contracted to make payment of the bill at the Hotel Richelieu in Paris when the bill became payable. It cannot be argued, that in these circumstances the locus solutionis was to be changeable according to the choice and will of the debtor,—that the place of payment was to be in France if he resided there when the bill became due, but was to be in England, or in Holland, or in any other country to which he might think fit to proceed. The bills were drawn by a party domiciled in France in favour of a Frenchman, who advanced the contents. They are drawn in the language, according to the form, and on the paper suitable to French documents. The party drawn on was an Englishman, at a distance from his own funds, and unable to communicate with his country. He had been in France for many years, whether as a prisoner or not is of no consequence, and no party could speculate upon a speedy termination of his residence in France. It is impossible therefore to imagine that any Frenchman, advancing money in these circumstances, could have intended to take upon himself the burden of following the acceptor to another country before he could demand payment, or protest the bill for nonpayment. It was necessary that the bill should be protested for nonpayment in order to preserve the recourse upon the drawer, but if the place of payment was ambulatory along with the person of the drawee, how could that protest be taken? Above all, it is absurd to say, that the parties contemplated the Scotch domicile of Sir Alexander Don as the place of payment, when the circumstances under which the bill was granted are considered.

The locus solutionis therefore of these bills was the

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Hotel Richelieu in Paris, and this accords with the law of the Pandects as laid down by Julianus,[1] "contraxisse "unusquisque in eo loco intelligitur in quo ut solveret "se obligavit," and the French lawyers, "that the "citation of Sir Alexander Don, on account of bills of "exchange accepted by him, and made payable in "France, was perfectly valid."

In the decisions which have been pronounced as to bills of exchange, the law of the place of payment has been held to regulate the contract, both as to constitution of the debt, proof of resting owing, and extinction, whatever might be the place of the domicile of the debtor. Accordingly, it will be found that several questions have arisen upon this point, with regard to English and other foreign bills, and in all of them, the law of the place of payment, or, in other words, of the place where the contract was to be implemented, was held to govern without reference to the domicile of the debtor.

A writer[2] states the law as extracted from the decisions to this effect: "The question whether the "Scotch prescription, or the English statute of "limitations, applies to a bill or note, seems to "depend upon the fact where it is made pay-"able, as it will be presumed that the parties meant "the contract to be regulated by the law of the country "in which they wished it to be performed. Thus the "English statute being pleaded against an action "brought on a bill which had been drawn in Virginia, "but was made payable in Scotland, the Court repelled

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[1] Corpus Juris, lib. xliv. tit. vii. sec. 21.

[2] Thomson on Bills, p. 708.

" the plea, and held that the Scotch law was applicable.[1] " In another case the converse of this rule was applied " by sustaining a defence on the statute of limitations, " against an action on a note which had been granted " by the debtor then residing in London to the creditor, " who was also residing there, payable on demand, but " on which no demand had been made for six years " from its date, though the debtor remained in England, " during all that period.[2] It was argued, that as the " note had been made payable on demand, and as both " parties lived in England at the time of granting it, " they must have intended that it should be paid in " England. The English statute had been previously " found applicable in a similar case[3] of a note granted " in England, and, as is to be presumed, made payable " there, though the place of payment is not specified in " the report. Indeed the law of the place of payment " seems to be that which must regulate the performance " of any contract in all respects."

The result of these and of subsequent decisions[4] is this:—That when a contract is entered into in a foreign country to be implemented there, the law of that country is held to be embodied into the contract, and to form part of the agreement between the parties. The courts of Scotland, upon proof of the law, have invariably enforced it, because it was part of the implied contract,

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[1] Rogers v. Cathcart and Ker, 25th July 1732, Fol. Dic. 1. 280. Mor. 4507.

[2] Lord Lovat v. Lord Forbes, 2d Dec. 1742, Clk. Home, 346. No. 210. Mor. 4512.

[3] Grove v. Gordon, Nov. 1740, Kames' R. Dec. 2. 29. Mor. 4511.

[4] Asmour v. Campbell, 21st Jan. 1792, Mor. 4476; Wilson v. Renton, 21st Jan. 1792, Mor. 4582; Richman v. M'Lachlan, 24th May 1827, 5 S. & D. p. 700 (new edit.) 653. Glyn v. Johnston & Co., 8th June 1830, 8 S. & D. p. 889.

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and in doing so they have proceeded upon the soundest principles of international law.

The appellants have founded upon some English decisions, in which they state the courts of England to have refused to enforce the lex loci contractus, and to have applied the peculiar rules of their own law. It is questionable whether these cases do not fall under the general doctrine already stated, viz. that the locus solutionis is to regulate. It will be found that there was no specified place of payment, and that consequently the law of the domicile would regulate.

The most important English case alluded to is that of Wynne v. Jackson, and it is said "that a French "decree of absolvitor was disregarded because it pro-"ceeded upon principles utterly at variance with the "law of England, and with English notions of justice." On referring to the report, it will be found that the question stated seems not to have been discussed. It is mentioned in the title of the case, but there is no argument upon it in the report, and it is not mentioned by the Lord Chancellor in his opinion.

If the respondent is well founded in his proposition that the contract is to be interpreted according to the law of France, and if it is part of that law that the parties entering into it shall be amenable to the jurisdiction of the French courts, to the effect that a judgment taken in them against the debtor shall give a new title to the debt, it would seem to require only proof of the law to render it effectual wherever it may be necessary to enforce it. If the parties to a contract might, after that contract is entered into, prorogate the jurisdiction of a court, so as to give it power to pronounce a decree to which it might otherwise have been

incompetent, there is nothing contrary to the general principles of law in its being made part of the contract, that the courts of the country where the contract is entered into should have jurisdiction to the effect of enforcing that contract; nor is there any thing contrary to general law in making it part of the contract, that a decree in absence against the obligee shall have the effect of interrupting the prescription that would otherwise run upon the original obligation, and of converting the judgment into a separate document or title of debt. It cannot be denied that this might be made matter of distinct arrangement; but where the law of the place of contract so regulates the nature of the transaction between the parties, that law is in fact the basis of the agreement, and regulation of the contract. Where the law of France declares that the acceptor of a bill of exchange in France, of which the locus solutionis is in that country, shall be amenable to the jurisdiction of the French courts, although he may have left the country, to the effect that the payee shall have the power of obtaining a judgment which will change the nature of the title, and lengthen the prescriptive period to twenty years, the special law must be considered as the ground upon which the parties contracted as much as if it had been specially inserted in the contract. The debtor in such a case is bound to admit the nature of the change of title. He specially agrees to the arrangement, and it is pars contractûs, that if he leaves the country before the date of payment, it shall be in the power of the holder of the obligation to obtain a judgment, altering the nature of the debt, and converting it into one due by the decree of a competent court, in place of one due by bill. Such must be the result of the principles of in-

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ternational law, if the contract is to be interpreted according to the law of the place of contract.

There is nothing in this view contrary to the jus gentium, or repugnant to the principles of universal justice.

The law of England holds the lex loci contractûs to be so effectual, that it will allow no foreign court to interfere with the law which originally regulated the contract when entered into, and refuses to recognize any foreign decree, however pronounced, which proceeds upon any different rule. It is held therefore, by the principles of such a decision, that the parties contracting are bound by the law regulating the contract into which they have entered in England, and that no circumstances can modify or change their respective relations under that contract; and it is a good authority so far as it tends to show that the regulations of the country in which the parties enter into a contract, both as to its effect and duration, depend upon the law of that country; and there is nothing in the law of Scotland contrary to that general principle, for it recognizes the lex loci contractûs as a principle of international law.

Supposing, therefore, that the law of France is to be taken as the law regulating the contract, there is nothing in the rule as to the change of the title of the debt, or in the jurisdiction given to the French Court, which is either contra bonos mores, or contrary to the jus gentium.

But even if the question is taken as one of jurisdiction, apart altogether from the question of contract, there is nothing in the law of France to prevent its principles from being enforced.

The law of Scotland holds, that by the simple arrest-

ment of a moveable subject within its territory belonging to a foreigner, who owed no allegiance to its laws, jurisdiction is established, and that the courts of Scotland may then proceed to decide upon the foreign contracts into which the foreigner has entered to any amount.

This appears to be more contrary to general principles of justice than the peculiar law of France now in question. That law gives to the French court power to pronounce a judgment against a foreigner, as to the subject of a contract into which he has entered in France with a Frenchman, France being the place where the contract is to be performed. In this there is nothing repugnant to original principles of justice. It is the law under which the transaction was entered into, and the obligee cannot plead ignorance of it. Besides, the jurisdiction given to the courts of France, as the locus contractûs, arises from a principle known to the civil law, and recognized by many of the jurists. There are many texts in the civil law which show that the ordinary doctrine, Actor sequitur forum rei, did not always take place, and that jurisdiction was given to the forum contractûs, although the defender might be absent, and not otherwise subject to the jurisdiction. "Juris "ordinem converti postulas, ut non actor rei forum, "sed reus actoris sequatur; nam ubi domicilium reus "habet, vel tempore contractûs habuit, licet hoc postea "transtulerit, ibi tantum eum conveniri oportet."[1]

It is part of the lex loci contractûs, that a judgment taken against one of the parties to the bill should have the same effect against the whole parties, whether they appeared in the action or not. The law of France is,

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1 Codex, lib. 3. t. 13; Brunnemannus, lib. 5. t. 1. sec. 14. p. 278; Mat. Stephan Pomeran, lib. 1. cap. 29. sec. 1; Voet, lib. 1. t. 1. sec. 66.

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that where there are correi they are liable in solidum, and that the decree against one saves prescription against the whole. Now the action in this light was not an undefended one. Fagan, the drawer of the bills, appeared in court, and must be held, according to the law of France, to have appeared for the acceptor as well as for himself. The decree is effectual to stop the currency of prescription against all the parties, and there is nothing contrary to the principles of justice in this law.

The decree is good, either as a decree entitling the holder to execution against all the parties named in it, or entitling him to pursue as for a debt in which the original title has been strengthened by an accessory or supervening title. The Court below place their judgment upon these grounds,—that the prescription, which would otherwise have run upon the bill, has been interrupted by the decree to this effect, that the holder cannot be met by the plea that the bill is extinguished by prescription, although they consider that the debtor or his representative is entitled to defend himself upon the merits, in the same manner as he might have done if he had been pursued upon the bill within the years of prescription. They therefore do not hold the judgment of the French courts as a judgment at once entitling a party to execution, but as a judgment good to the effect of barring prescription, and of constituting a title upon which the party might proceed as a ground of action within the more extended period for which it is good as a title. The Court has thus given to the appellants all the equity to which they are entitled. The law of France is applied according to those principles of international law, which are universally admitted, and the judgment

is sustained as a judgment which the French Court were entitled to pronounce, to the effect of renewing the title of the respondent; but they allow to the appellants the right of proving that the debt has been satisfied and extinguished, if any such satisfaction can be proved.

In the case of Gordon v. Bogle[1] it was held that a decree obtained against one of the acceptors of a bill interrupted the prescription as to the whole. The appellants, while they admit this rule, in so far as acceptors are concerned, argue that it does not apply to the case of a drawer, who is only subsidiarie liable. No doubt, in so far as the acceptor is concerned, the drawer may be only subsidiarie liable, but in a question with the holder both parties are conjunctly and severally liable. It is true that the demand must in the first place be made upon the acceptor; but the moment that the protest is taken for nonpayment the obligation of the drawer is purified, and no further discussion of the acceptor need take place at the instance of the holder. So far as the drawer is concerned he is in fact the principal debtor, because it is to him that the money is generally advanced, and at all events, immediately upon nonpayment, the obligation of the one is as full and perfect as the obligation of the other, and the payee is entitled to recover from both conjunctly and legally.

But the decision in the case of Gordon v. Bogle proceeded upon no such specialty. It was held to be enough, under the statute (1772), that an action be commenced upon the bill against any of the parties

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[1] Gordon v. Bogle, 23d June 1784; Fac. Coll. 9. 249. No. 160. Mor. 7532.

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to it; and that this took the case from under the operation of the statute of prescription which "does not "distinguish between the commencement of it against "one of the parties only, or against the whole."[1] Still less is any distinction made in the statute whether the action is brought against the drawer or acceptor, nor does the decree of the Court take notice of any such distinction. The Lords found, "That the decree taken "against one of the correi before the six years were "elapsed interrupted the prescription as to them "all."

But even if this were not the law of Scotland, there is nothing contrary to justice in a law which declares that a decree taken against a drawer of a bill shall prevent its prescription against the acceptor. If the acceptor is primarily liable, and has failed to make payment when the bill became due, he has no right to object to the obligation against him remaining entire, so long as it remains entire against the drawer. There might be some injustice in the converse, because the drawer might not be aware of the obligation of the acceptor being undischarged, but the acceptor knows that he has not performed his obligation, and therefore has no equity to plead.

The case of Buchanan v. Rucker is quite dissimilar from the present one. From the summons in the case of Rucker, it is apparent that the defender had entered into no contract payable in the island of Tobago, and had never been within the island, so that he never could upon any principle be liable to the jurisdiction. The summons states, "George, &c. We command you to

[1] Thomson on Bills, p. 678.

" summon Sigismond Rucker, formerly of the city of " Dunkirk, and now of the city of London, merchant, " to be and appear before the Justices of our Court of " Common Pleas, to be held for our said island, on " the first day of July next ensuing, at eight o'clock of " the morning, at the town of Scarborough, then and " there to answer the action commenced against him " by Alexander Buchanan, as contained in the declara- " tion hereto annexed." To which there was the following return: — " Served by William Smith, nailing " up a copy of the declaration at the court-house door, " the 25th of June 1806, whereupon judgment was " given by default."

From the observations of Lord Ellenborough, it is plain that a jurisdiction had been assumed over a party, who had never been within the jurisdiction, and over whom therefore the Court never had any power. His Lordship puts the case of a judgment obtained in Tobago against him, and then an attempt being made to enforce it. " If a judgment could thus be recovered " against any one behind his back, a man would have " nothing more to do but go out to Tobago, there sue " us to any amount, and then return to this country to " put his judgments in force against us." If the party had ever been within the country, it appeared from the subsequent observations of Lord Ellenborough, in Cavan v. Stewart,[1] that the judgment would have been different; but it certainly would have been contrary to the first principles of justice if a party could obtain a foreign judgment without citing the defender, and upon that proceed against him as upon a judgment which had been properly obtained.

The rule with regard to foreign judgments is well

[1] Cavan v. Stewart, 1 Stark, p. 525.

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stated by Mr. Phillips in his Treatise upon Evidence.[1] He first states the case of Buchanan v. Rucker, and then he proceeds:—" It will be necessary, therefore, to prove " that the party was duly summoned, or, if he is de- " scribed in the proceedings as an absentee, that he had " absented himself from the country. With respect to the " proof of his absence, that fact might perhaps be inferred " from a return, of non est inventus, to the process issued " against him, if it be proved, that he had been in the " country." So far, therefore, from the law of England being contrary to the proposition maintained by the respondents, it is decidedly in favour of it. It would support a judgment in absence upon a return of non est inventus, and in the present instance there is a regular citation and a subsequent return that the defender had left the country.

None of the cases founded upon by the appellants are inconsistent with this doctrine. They are solely referable to the question, as to whether the prescription of the law of the domicile of the debtor, or of the place where the debt was originally contracted, was to regulate. It does not appear that in any of these cases there was any distinct locus solutionis, and therefore it might fairly be argued, that the creditor in demanding payment looked to the law of the domicile, and not to the lex loci contractûs. But without attending to this specialty, it is evident that these decisions being referable only to the question of prescription cannot affect this case. This is not a question of prescription. If the right of the respondents to recover payment of the debt due to them had depended upon the law of prescription, they admit that the bill was prescribed both according

[1] Vol. i. p. 351. 5 ed.

to the law of France and the law of Scotland. They would have had no case, because the law of either country would have applied. The whole question depends upon the effect to be given to those proceedings which took place in the French courts, and which the appellants have invariably passed over with little or no argument. Their attempt is to represent the question as one of prescription. But the specialty which takes the present case from under the effect of that class of decisions which have applied the prescription of the law of the domicile to the creditor's claim is this, that those proceedings were taken against Mr. Fagan the drawer and Sir Alexander Don the acceptor of the bill, which by the law of France were sufficient to interrupt prescription, and to afford a new title, good against the debtors, for a period of thirty years. The question is, whether the parties to the contract did not become bound to admit the efficacy of these proceedings, and it is in consequence of those principles of international law, to which the respondent has already referred, that the Court of Session, supporting the lex loci contractûs, have pronounced the judgment now brought under review.

LORD BROUGHAM.—The late Sir Alexander Don, the appellant's father, was detained a prisoner in France during great part of the last war.

On the 13th of November 1809 he accepted two bills for 20,000 francs each, drawn by one Fagan, and payable to the respondent at four months date. The place of acceptance was the hotel in Paris where he was living; no place of payment was specified; and some discussion seems to have taken place below as to where the payment in such a case is to be presumed,

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this not having been settled by any Scotch decision. However, there is no longer any question upon the matter, for it is admitted distinctly on the appellant's part that France is to be taken as the place of payment. Therefore it must be understood that the present judgment of your Lordships is encumbered with no specialty arising from this circumstance, and that we are here dealing with the case precisely as if the bill had been accepted expressly payable at Paris. Soon after the bill was accepted, and before the time of payment, Sir Alexander Don quitted France and returned to Scotland, his native country, where he possessed considerable estates, where he had his domicile before his captivity, and where he died.

The payee of the bills brought an action against Fagan the drawer and Sir Alexander Don in the French Court, but after Sir Alexander Don had left the country. He was therefore never personally cited; and though a judgment was obtained against both the parties sued, the whole proceeding was in his absence, without his knowledge, and while those hostilities continued which prevented him from appearing or taking any part in the proceedings had he known of them. After his decease, and at the end of nineteen years from the acceptance in 1809, the respondent brought his action against the appellant as representing his father, and he, being an infant, was defended by his guardian; the action was upon the acceptance, and upon the French judgment. The Scotch sexennial prescription was pleaded in bar of it. The Lord Ordinary, after inquiring into the French law upon the whole matter, repelled the defence of prescription upon the ground that the debt was a foreign debt, and that the

Scotch law of prescription could not apply to it; but, as to the French judgment, reponed the appellant against it.

To this interlocutor the Lords of the First Division adhered, and the present appeal is brought from these judgments.

Upon these short and admitted facts, and upon the further assumption to which I have adverted, that the bill being accepted in France must be held payable there, the question arises—and it is not only the principal point, but one that will be found to dispose of nearly the whole cause—Which of the two laws,—the law of France, where the contract was made, and the performance was primarily to be had,—or the law of Scotland, where the action is brought,—shall be the rule to govern the application of the remedy sought by the party bringing his suit?

This question mainly arises upon the defence of prescription. Shall the French or the Scotch law of prescription be applied to the case? The law upon the point is now well settled in this country; the distinction is taken between the contract and the remedy. Whatever relates to the nature of the obligation—ad valorem contractus—is to be governed by the law of the country where it was made,—the lex loci; whatever relates to the remedy, by suits to compel performance, or by action for a breach—ad decisionem litis,—is to be governed by the lex fori—the law of the country to whose courts the application is made for performance or for damages. This principle was the ground of the decision in the British Linen Company v. Drummond, and it has been since followed in other cases, as De la Vega v. Viana,

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and in Trimbey v. Vignier[1], and Uber v. Steiner.[2] But it had been recognized long before the case of the British Linen Company v. Drummond, particularly in Williams v. Jones[3], upwards of twenty years ago, which indeed could not well stand upon any other ground. Then, assuming this to be the settled rule, here the only question is, whether the limitation of action belongs to the contract or the remedy. But some of these cases also decide that question. It is determined affirmatively both in the British Linen Company v. Drummond and in Uber v. Steiner; it is assumed as clear in Williams v. Jones.

Consider now, whether upon principle, and without reference to the cases, both parts of the proposition are not well founded; both that the lex fori is the rule where the question arises upon the remedy, and that limitation of actions belongs to the head of remedy—ad decisionem litis, as some jurists term it, or ad tempus et modum actionis, as others express themselves.

When parties contract, they may most naturally be supposed to regard their mutual rights and obligations as fixed by the law under which they are living. If they look to that of any other country, they may well be expected to specify it and provide accordingly. The contract being silent, nothing can be more fit than the presumption that they had only the lex loci in contemplation; nor can any inconvenience arise in the vast majority of cases from holding this to be the rule. For, suppose the contract comes into discussion before the tribunals of a foreign country, the material fact can

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[1] Trimbey v. Vignier, 1 Bing, N. C. p. 151.
[2] Uber v. Steiner, 2 Bing. N. C. p. 202.
[3] Williams v. Jones, 13 East, p. 439.

be ascertained, viz. the provisions of the lex loci contractûs, and those provisions can be applied. But it is otherwise with the remedy; the parties do not necessarily look to the tribunals of the country where they contract as those alone where performance may be enforced or nonperformance complained of. They bind themselves to do what the law they are living under requires; but as they bind themselves generally, and without regard to one country more than another, they contemplate the possibility of the obligation being enforced or resisted in other countries: debitum et contractus nullius sunt loci. They may, therefore, well be supposed not to regard the modes of proceeding peculiar to any one country, but to have in contemplation the submitting to those modes by which the courts proceed where suit may happen to be brought. This, however, is the lowest ground upon which the principle can be rested. The manifest inconvenience of courts proceeding in different ways, according as the subject-matter of each suit may have originated in one country or in another, and having to ascertain in each case that comes from a foreign country the course of the courts in that country, renders it absolutely necessary that such questions of procedure should be excluded, and the rule be adopted which requires all suitors to take the law of the Court as they find it. There is not much difficulty in ascertaining what the foreign law is respecting the nature of the contract; there may be the greatest difficulty in ascertaining what that law is respecting the manner of administering the remedy.

Accordingly, there seems little disposition in cases of this description to question the principle generally; some such distinction, it is for the most part admitted, must

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be taken, and the argument is raised rather upon the direction in which the line of demarcation shall be drawn. Thus no one can contend that because a contract has been made abroad the forms of action known in the foreign courts shall be pursued, or the foreign rules of process or other preliminary proceedings imported, or those of pleading and curial practice followed. But it is said, first, that prescription and limitation fall not within the course of proceeding in courts; and, secondly, that they belong to the nature of the contract, and not to the remedy.

First, no one can maintain so absurd a proposition as that, before jury trial was extended to civil cases in Scotland, an English creditor ought upon general principles to have had the right of calling on the Court of Session to empannel a jury for the purpose of trying the action brought by him on a contract made in England, where a jury only could have decided on his rights; or, conversely, that a Scotchman ought to have been entitled to refuse the verdict of a jury, and insist upon the judges trying an issue of fact, because the contract had been made in Scotland, where the judges only could have adjudicated. Nor has any one, I think, gone so far as to contend in terms,—in substance it has not only been contended but decided, I am afraid, in some cases, but I have never heard any one go so far as to contend in terms,—whatever may have been assumed in some discussions,—that the foreign rules of evidence should be the guide in such cases; and yet it will not be found so easy upon any sound principle in this argument to distinguish the rules of evidence from those of prescription. The practice in examining witnesses or in producing written evidence is at once given

up as peculiar to and regulating the proceedings of the particular courts. But what shall be said of the rule requiring written evidence of certain contracts, and excluding all proof by parole? Or what of written instruments which prove themselves in one country and not in another? In Scotland certain instruments are probative and require no witnesses, however recent may be their date; in England, until thirty years have elapsed, no instrument proves itself except by special act of parliament; there may be some countries where forty years is the period. The argument is that a Scotchman producing a Scotch-made probative instrument (one according to the act of 1681) in our courts needs not call the attesting witness, and that the foreigner must call such attesting witness, though the writing is above thirty years old. But how shall the Scotch or the foreign law of evidence be ascertained by our court? Manifestly there must be in each case a preliminary and collateral issue of fact tried before the court can ascertain how it is to try the main issue. This then must also be given up as a question of evidence; but whether or not a parole agreement be binding, is a question which would be raised upon the admission of evidence; then that must for the like reason be tried by the law of the country where the court sits. Again, whether payment must be presumed after a certain time may be stated as a question of evidence; at least whether after a certain time parole evidence shall be competent or written evidence shall be required to prove the debt subsisting, must be admitted to be a question of evidence, and this really brings us home to the question of the statute of limitations. Till Lord Tenterden's act, by our law a parole acknowledgment took a case out of the

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statute; in Scotland nothing but a written acknowledgment or the debtor's oath could take it out. Was it ever supposed maintainable that a Scotch debt being sued for in an English court, the plaintiff could not have given in evidence the verbal acknowledgment of it by the defendant, or that the defendant could have been compelled to answer on oath at the desire of the plaintiff, whether or not the debt still subsisted?

Secondly, it is contended, however, that limitation or prescription is of the nature of the contract; and this is attempted in two ways. First, it is said that the contract is that the parties should be bound for a given time, the period of prescription, namely, which the lex loci fixes. But this is a very strained and unnatural construction of the obligation; the parties do not bind themselves with a view to that period at all. They bind themselves to do certain things either immediately or at a given day, or when certain other things shall happen, or be done. Thus in the case at bar the obligation was to pay on a certain day; then that time alone was in contemplation of the parties, and if no future day of payment had been named, the obligation would have been immediate, to pay on demand. They looked to performance only, and to the time of performance; the argument supposes them to have looked to a breach. The contract was to pay at a certain time; and if a breach was at all in contemplation, and a secondary undertaking was engrafted upon that contingency, it could only be an undertaking to answer for the consequences generally of the breach, the damage arising from the breach, and to be liable until it was made good. But nothing can be more violent than the supposition that the breach of the contract is in the contemplation

of the parties, and indeed nothing more contrary to good faith. It is supposing that when men bind themselves to do a certain thing, they are contemplating not doing it, and considering how the law will help them in the nonperformance of a duty. If the law of any country were to proceed upon the assumption that contracting parties have an eye to the period of limitation, and only bind themselves during that period, it would be sanctioning a faithless course of conduct, and turning the provisions which have been made for quieting possession after great laches on the part of creditors, and possible destruction or loss of evidence, into covers for fraudulent evasion on the part of debtors.

Next, it is said that the time of limitation belongs to the contract, because by the Scotch law it is not the remedy which is taken away, but the debt which is extinguished. Now to this view of the case what has just been stated applies sufficiently to meet it; but there seems no good ground for the distinction taken between prescription and limitation of actions in the case under consideration, at least so far as to affect the present question. The later sections of the 12 Geo. 3. c. 72. are intituled "for limiting actions upon bills and notes," and though the preamble mentions the "limiting the "endurance" of instruments, the enactment is that they "shall not be effectual to produce any action or "diligence" unless such diligence be raised or action commenced within six years. The enactment therefore strictly regards the remedy, or the force of the instrument as a ground of giving the remedy; besides, the proviso, sec. 39, reserves the creditor's right to prove by the writ or oath of the debtor that "the debt is resting "and owing." This indicates a continuing subsistence

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of the debt, and that the remedy only is barred; such proof, too, scripto vel juramento, is incompetent in the long negative prescription of forty years, which works the absolute extinction of the debt by raising a presumption in law that it has been paid. Nor can it avail against this view of the sexennial prescription that statutes giving other prescriptions, as the triennial and vicennial, are directed also to the remedy, and that some of those allow proof scripto vel juramento. It may well be maintained that these are properly limitations, not prescriptions; and the language of the statute 1469, appointing the long negative prescription, is wholly different: it declares that the rights, not the remedies, shall "prescribe and be of none avail." There is therefore no occasion, with a view to the decision in this case, to question the doctrine laid down by Dr. Story in his able work on the Conflict of Laws, and approved of by the Court of Common Pleas in Tireber v. Steiner, that if the lex loci contractûs makes the obligation wholly void after a certain time, and if the parties have resided within the jurisdiction during the whole of that period, it may be taken as the guide of the court where the action is brought. This may be true, and yet leave the present question wholly untouched.

The principle under consideration is adopted, not only by the English law, but by that of other countries. Dr. Story lays it down generally in his book; Huber and Voet fully sanction it. "Prescriptio et executio (says "Huber, De Conflictu Legum) non pertinent ad "valorem contractus, sed ad tempus et modum ac- "tionis instituendæ, quæ per se quasi contractum sepa- "ratumque negotium constituunt; atque receptum est

" optima ratione ut in ordinandis judiciis loci consue-
" tudo ubi agitur, etsi de negotio aliter celebrato
" spectetur:" and he cites Sandius. Voet excludes the law of the country where the plaintiff has his domicile, and holds that the law of the defendant's domicile is the guide, most probably with reference to the forum where the action is to be brought.

It must be admitted that nothing could be more unfortunate than to find the law of Scotland differing in this important particular from the general law of nations, and especially of the mercantile world, on a question so nearly affecting mercantile transactions; the more especially when we see that the generally prevailing law rests upon the soundest foundations of principle. Nor will one or two decisions justify us in concluding that the Scottish system presents this anomaly; although, if we found the course of authority to be clear, or nearly so, in its favour, we might be compelled to hold that the exception does exist. Some cases are certainly to be found in the books which, it may confidently be affirmed, are wholly irreconcileable to principle, and these are directly opposed to other decisions. Thus in two instances, Galbraith v. Cuningham[1], 1626, and Balbirnie v. Arkill[2], 1633, it was held that an action being brought in Scotland upon bonds executed in a foreign country, the law of that country, and not of Scotland, was to regulate the mode of proving payment; the one law allowing and the other rejecting proof by witnesses. This was decided in the former case upon the ground that the contract was made abroad, and that the fact of payment happened abroad; and in the latter, upon the

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[1] Galbraith v. Cuningham, 15 Nov. 1626, Durie 332, Mor. 4430.

[2] Balbirnie v. Arkill, 27th Feb. 1633, Mor. 4446.

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same ground, though it was urged that the place of payment—locus solutionis—was also abroad. But a contrary decision appears to have been given in 1691, in the case of Foreign Merchants v. the Marquis of Monteith; and in a later case, Grey v. Grant[1], December 1789, the same question arose and was decided the other way, that is, the Court adhered to the Scotch law respecting the evidence of payment, although the foreign law was alleged and not denied. In Muir v. Muir, 1687, a decision was given upon the same side, nor could it have been doubted that in a mere question of evidence,—of the rules by which a particular kind of evidence was to be admitted or rejected—the lex fori must govern, had not a late decision, that of Glynn v. Johnstone[2], seemed to cast some doubt upon this point, holding apparently that the foreign law of evidence may be imported when a contract comes in question which is to be performed abroad. In Gibson v. Stewart[3], the Court seems to have recognized the same rule, for though the Scotch law was taken as the guide, the contract having been made in England, yet the reason assigned was because the debtor had removed to Scotland, which was therefore deemed the locus solutionis. But his having removed to Scotland also brought the creditor after him to the Scotch Courts, and thus made Scotland the forum.

I mention these cases now, before coming to the consideration of the decisions upon limitation or prescription, because they go a great deal further than any others, and indeed go to a length quite at variance

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[1] Grey v. Grant, Dec. 1st 1789, Fac. Coll. 10. 170., No. 94. Mor. 4474.

[2] 8 Shaw & Dunlop, p. 889. new ed.

[3] 9 Shaw & Dunlop, p. 525. new ed.

with all principle. The ground upon which Glynn v. Johnstone is rested in the opinions of the learned judges is this: The action was brought by the indorsee of a bill accepted in Scotland, but payable in London. The defence set up was, that no consideration had been given, which, by the Scotch law, could only be proved scripto vel juramento; but the Court held that it might be proved in this case as it would be in the Courts of England,—by parole evidence, because a contract of deposit, on which the want of consideration turned, was made in England, and between parties relying on the English law for the means of proving any payment which might eventually be disputed. It is manifest that, according to this argument, the law of evidence of the locus contractûs must be adopted in whatever country any court is called upon to deal with any foreign contract. From this judgment Lord Craigie dissented, and observed very justly, that previous decisions were at variance with each other upon the point.

A similar remark is made by Mr. Erskine upon that class of cases to which it now becomes necessary that the attention of your Lordships should be directed,—those touching the application of prescription or limitation.

After stating, that where an English debt is sued for in the Scotch Courts the English limitation cannot be allowed, though it may be the ground of presuming payment, unless the contrary shall be proved by evidence or by stronger presumption, he adds, that it is hard to quote any decisions of our Supreme Court in support of what has been observed to which contrary decisions may not be opposed.

Before examining those cases more narrowly, it may

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be observed that the distinction taken between the locus contractûs and the locus solutionis will not carry us through the conflict of cases.

The latter seems indeed to have rather arisen out of a preference (though a preference not kept steadily in view) for the sounder principle of the lex fori; for the rule actor sequitur forum rei has probably suggested it.

Neither shall we be carried more safely through the conflict by resorting to the domicile of the debtor as the criterion, for that, too, plainly comes from a consideration of the forum; and so Gibson v. Stewart clearly held, for if the forum had been out of the question, the debtor removing to Scotland would have been immaterial, as it happened after the contract was made. Nor will that avail much more which has been attempted in some instances, as Glynn v. Johnstone, where much ingenuity was exercised, especially by Lord Gillies, in endeavouring to reconcile the cases—namely, accounting for the rejection of the lex loci contractûs in favour of the lex fori, by suggesting that the locus fori was also the locus solutionis, merely because no place of payment had been appointed, that being clearly only called the locus solutionis because it happened to be the locus fori. In truth the consideration of the forum prevails much more through the cases than any other; and domicile, solutio, and all are chiefly assumed with a view to forum.

That there is some conflict of cases, however, must be confessed; there are one or two not to be reconciled to the sound principles which should govern the question. But the authority of these, when they are considered, appears insufficient to overrule that of a much more numerous class, in which the better view was adopted. It might safely be asserted that the cases of Talleyrand

v. Boulanger[1], in the Court of Chancery, and Melan v. Duke of Fitzjames[2], in the Court of Common Pleas, furnished much better grounds for holding the erroneous opinion in this country than these cases do in Scotland.

The cases chiefly relied on to show that the foreign law is the rule, are Grove v. Gordon[3], Philips v. Stamfield[4], Delvalle v. York Buildings Company, and Rickman v. Maclachlan.[5] In Grove v. Gordon, which was an action by an indorsee of a promissory note made in England, the sole reliance was on the locus contractûs, without a word being said of the locus solutionis; and the only reason given for applying the English statute of limitations was drawn from the rule, that contracts are held valid or void everywhere, both as to their essentials and the formalities attending their execution, according as they are void or valid by the lex loci; a reason which clearly does not support the decision. Accordingly, Lord Kaimes expresses a strong opinion against the case, holding that the lapse of time and the foreign law should not have been held a bar, but only a circumstance tending to show the probability of satisfaction.

Upon Philips v. Stamfield very little reliance can be placed, when the grounds of the decision are considered. It was on a defence of the triennial prescription set up against a claim by English merchants for goods furnished to the defender's ancestor. Nothing is said of the debtor's domicile, nor of the locus solutionis; but the ground of the decision in favour of the lex loci contractûs was, that the question arose in re mercatoria,

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[1] Talleyrand v. Boulanger, 3 Ves. 449.

[2] Melan v. Duke of Fitzjames, 1 B. & P. p. 138.

[3] Grove v. Gordon, Nov. 1740. Morr. 4510.

[4] Phillips v. Stamfield, Jan. 11th, 1695, Fount. 1, p. 733, Mor. 15806.

[5] Rickman v. Maclachlan, 5 Shaw & Dunlop, 653, new ed.

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and that it would be against the faith and credit of the nation if its prescriptions could be set up against claims of foreign merchants, ignorant of Scotch customs, with whom Scotch traders contracted. The Judges were almost equally divided upon the point, and resolved by seven to six. But they were all agreed, that had the case been that of persons "not actual trafficking mer-"chants," the Scotch law must have decided it. Some of their Lordships also held (and that must mean those of the majority) that the Scotch triennial prescription did not apply to a case of wholesale dealing, like the one in question. Nothing can be less satisfactory, therefore, than this decision as an authority upon the point determined. But it is of importance to remark, that it recognizes distinctly how the decision would have been had the parties not been merchants, and that although the debtor was an Englishman, as well as the locus contractûs English; because this circumstance is at irreconcileable variance with the argument of the Bench in Glynn v. Johnstone, that where the Scotch law has been taken as the rule, it was because, no place of payment being specified, the debtor's country was assumed to be the locus solutionis.

Delvalle v. York Buildings Company arose upon the negative prescription of forty years, which, it was strongly argued, extinguished the debt, and wholly precluded its revival by any means. The defenders, too, the debtors, were entirely English, an English company established by act of Parliament, and only coming within the jurisdiction by having property in Scotland; nor must it be laid out of view that the Court of Session having decided in favour of the lex loci notwithstanding these reasons, the reversal took place in this House without any appearance being made for the respondents; the judgme

ports that the appellant only appeared. When a few years afterwards (1792), the same question arose with other creditors of the company, the Court of Session decided for the lex loci, but said, that if the debtor had come to Scotland and resided there during the years of prescription, the Scotch law must have been the rule, although England was the locus contractûs, and on the ground of the debtor's domicile being the criterion. But it is not easy to see how the debtor's domicile during the whole years of prescription can be required to let in the law of that domicile, though it is easy enough to understand how the domicile is material so far as to found jurisdiction, and so let in the lex fori. The main ground, however, of the decision in these cases is to be seen in what fell from the Bench respecting the negative prescription. "The bonds," said their Lordships, "may still be sued upon in England, and "therefore they were not, in the words of the act 1469, "obligations of none avail."

Rickman v. Maclachlan is certainly a strong case, but it seems wholly impossible to support it upon any principle. It was an action by the indorsee against the indorser of a bill drawn in Scotland upon a person in England, accepted by him there, but payable to a person in Scotland, who indorsed it in blank. The Court held it to be an English debt as being payable in England, and therefore they considered it to be clear that the English statute of limitations applied to it. But the position that the debt was English is evidently quite groundless; it is a mere mistake. One debt, no doubt, may be called English, namely the debt of the acceptor; but the action was against the indorser, not the acceptor, and upon the

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indorsement. To say that the principal debt, that of the acceptor, was English, and the debt of the indorsee only a subsidiary obligation, makes not the least difference; for surely when the question arises whether or not the debt is English, the meaning is, whether or not the debt sued for is English; not whether or not some other debt is English, on a guarantee of which the defender is sued. We might as well call the contract in an English policy upon a voyage from one part of America to another an American contract. Suppose the rule to be, that the law of the country to which the debt belongs shall govern, what debt do we mean? The debt in question beyond all doubt,—the debt sued for, and respecting which the dispute arises. Here that debt was the indorsee's, not the acceptor's. In no way, then, in which this case can be regarded is it possible to view it as otherwise than misdecided.

There are several other cases, as Fulk v. Aikenhead[1] and Rae v. Wright[2], which proceed only on the lex loci contractûs, and altogether disregard both the locus solutionis and the debtor's domicile. These are wholly irreconcileable both with the other cases now admitted to be law by your Lordships House, and with the principles on which it has been attempted to reconcile those other cases with the leading decisions now adverted to, and with the later ones of Glynn v. Johnstone and Gibson v. Stewart.

Upon the cases which recognize this application of the lex fori it will be the less necessary to dwell at length that they have to a certain extent been sanc-

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[1] Fulk v. Aikenhead, Nov. 1731, Fol. Dic. 1, 322; Mor. 4507.

[2] Rae v. Wright, July 1717, Kaimes, Rem. Dec. 1, 16, No. 8.; Mor. 4506.

tioned by a decision in this place, to an extent at least quite sufficient to overthrow most of the former cases decided below; and to this authority I have heard no objections arising out of their peculiar circumstances. But one or two of them must be noted, because of the additional argument which they afford against the attempt to reconcile them with the doctrine of the lex loci solutionis, by assuming that the debtor's domicile is chosen as the criterion only from the presumption of its being the locus solutionis where no place is specified. I allude to the attempt thus made in Lord Gillies's very ingenious argument on deciding Glynn v. Johnstone.

In Thompson v. Earl of Linlithgow[1], July 1708, the Scotch triennial prescription was held a defence to an action by creditors who had furnished goods to the defender's ancestor in London. Nothing was here said of the original debtor being Scotch, but only that the party sued was Scotch, and the action brought in Scotland.

Renton v. Baillie[2], July 1755, is the case to which Mr. Erskine refers as having settled the law after conflicting decisions. It was an action upon a promissory note made in England and payable in England; the maker was a Scotchman as well as the payee. The latter was domiciled in England; the former was there occasionally, and returned to Scotland soon after making the note. But the locus solutionis was London, and yet the English statute of limitations was not allowed to be set up

[1] Thompson v. Earl of Linlithgow, 16th July 1708, Forbes, 268; Mor. 4504.

[2] Renton v. Baillie, July 7, 1755, Fac. Coll. 1, 232, No. 156; Mor. 4516.

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as a defence to the action. Macneil v. Macneil [3], March 1761, is a case to the same effect.

Randal v. Innis, July 1768, Ker v. Home[4], February 1771, and Barret v. Home, February 1772, are all cases of the same kind with Thompson v. Earl of Linlithgow; but they are remarkable as having been expressly decided upon the general question,—what in the report of Ker v. Home is called the "abstract point." Hubert, Voet, and Lord Kaimes are cited; the law is said to have fluctuated in the earlier cases, but to have been gradually settled, and the lex fori is maintained to be the guide. An observation is made by the Bench, that when a creditor comes to sue in any country he must be able to state that his debt is subsisting according to the law of that country; and in two of these three cases the debtor, though a Scotchman, and having property in Scotland, had never returned to Scotland after the goods were furnished; the actions were brought against his representative.

It is only necessary to mention further the case of Campbell v. Stein, 6 Dow. 134, which was an action by a solicitor residing in London for his bill of costs, incurred in an appeal before your Lordships to which a Scotchman was a party. The Court below allowed the defence of the Scotch triennial prescription, and their decision was affirmed in this House. Lord Eldon, in moving the judgment of affirmance, which he did after much consideration and with great reluctance on account of the hardship

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[1] Macneil v. Macneil, March 2, 1761, Fac. Coll. 3, 52, No. 26; Mor. 4517.

[2] Ker v. Home, Jan. 16, 1611, Kerre, Fol. Dict. 2, 218; Mor. 12301.

of the case, stated, that it "had been ruled where "a merchant creditor residing in England sued "his debtor in Scotland that the latter may plead "the triennial prescription." This is no doubt in direct contradiction to some of the earlier cases to which I have adverted, as Fulk v. Aikenhead and Rae v. Wright, but it is in accordance with the current of later authorities. With the doctrine of the locus solutionis it cannot be reconciled, except upon the supposition that the domicile of the debtor is to be taken as the place of payment. But why is it to be so taken? Only because it is the place where the creditor must follow him and sue him. His domicile determines the forum, and the locus solutionis is the place where he can be compelled by law to pay. In this sense, therefore, there is no difference between the lex loci solutionis and the lex fori. Where, however, the debt is made expressly payable in the locus contractûs we have seen that the lex fori prevails; nor does it make any difference that in those cases the lex fori is also the lex domicilii, for the opposite argument assumes the domicile to be taken as the criterion because payment is supposed to be intended there. But here this supposition is excluded by the place of payment being specified, so that those cases furnish a test for trying the validity of that argument; the only one on which the case of Glynn v. Johnstone can rest consistently with Campbell v. Stein. I am here supposing that there were no further objection to Glynn v. Johnstone than the admitting the lex loci contractûs generally; it is open to the other objection of extending that doctrine to the rules of evidence, and importing these rules from the foreign country, contrary to all sound principle.

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The result of an examination of the cases, then, is by, no means adverse to the principle on which questions of this kind ought to be decided — the principle stated in express terms by Sir J. Stewart in his answers to Dirleton's Doubts, and sanctioned by Mr. Erskine and Lord Kaimes, — the principle upon which the foreign jurists proceed, and which has been held clearly to be the law in this country, that the lex fori must govern. Considerable discrepancy exists among the earlier Scotch decisions; but the exclusion of the lex loci contractûs is upon the whole the prevailing rule, and this has been finally and authoritatively established by the judgment of this House. The law of the domicile is only adopted (when the cases are rightly considered) with a view to the jurisdiction, that is, to the forum. The lex loci solutionis apart from the domicile and forum, while it is excluded by clear and weighty decisions, will only be found supported by one or two cases of recent date, which are exceptionable authorities on other grounds, proving a great deal too much, as Glynn v. Johnstone, or proceeding upon a manifestly incorrect view of the matter in dispute, as Rickman v. Maclachlan. If a contract be made in one country to be executed in another, and is sued upon in a third, where the defendant has no domicile at the time of the action, and had none at the date of the contract, it is not contended that any authority exists in any case for admitting the law of the second country. Taking the exclusion of the lex loci contractûs as settled law, where the locus contractûs and locus solutionis are the same, no reason can be given for admitting the law of that place which is not at variance with the cases where the locus solutionis was disregarded. It may be ad-

mitted, on the other hand, that no precise decision is to be found where the contract, the execution, the domicile of the debtor, and his forum originis are all foreign, and action is brought in Scotland. But some of the cases approach very near to this, and are not on any intelligible principle to be distinguished from it. Either by residence, origin, or property, or credits, which are quasi property, there must be jurisdiction, and the rule which admits the lex fori, to the exclusion of all other laws, fully recognizes this.

Where it became necessary to overrule some decisions, and to shake some doctrines which have been perhaps incautiously assumed, or hastily ventilated in dicta, rather than formally laid down as the grounds of adjudication, yet have proceeded from quarters most justly commanding the highest respect, it was impossible to recommend such a course to your Lordships without an anxious examination of all the authorities, and this must be my excuse for having gone so minutely into the question. It is to be understood that, in reversing the most material part of the interlocutor appealed from, your Lordships are not introducing into Scotland the law of England, or the general law of the commercial world, but only sanctioning a return to the principles which, after some fluctuations of judicial authority, are found, upon a view of the whole subject, to be the real doctrines of the Scottish law itself. Nevertheless there cannot be a doubt that, if the balance of authorities in that law were found to hang even or nearly even, the cast ought to be given in favour of a rule recommended by its great convenience, its exact conformity with general principles, and its adoption in most other countries.

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If, then, the sexennial prescription is an answer to this action brought in Scotland, do the proceedings which took place before the French Court interrupt that prescription? The interlocutor holds, and most correctly holds, that if the French prescription be the rule, the French proceeding being admitted to be an interruption in France must be also an interruption in Scotland. But it denies the force of that proceeding to interrupt the Scotch prescription, if the Scotch law be the rule; and I think of this there can really be no doubt, admitting or rather not denying (for the position does not arise upon the facts) that a regular judgment in foro contentioso between the parties to a suit in France might interrupt the Scotch prescription in favour of one of these parties. There was here nothing of the kind. The acceptor was in France, not voluntarily, but by compulsion, and as a prisoner. He was moreover an alien enemy there, and could not appear in court to defend himself or to sue. Then he was out of France not only before the proceeding was instituted, but before the day of payment had arrived. He never received any notice of the action, and had no property within the country, either real or personal, by which he could be rendered amenable to the jurisdiction. It cannot be contended that a proceeding of this description is sufficient to interrupt.

But the question is said to arise, whether the bill being supposed extinguished by the prescription, the French judgment may not be sued upon as a substantive ground of debt?

The question is not raised here at all, whether or not the French decree, if admitted to be the ground of action, is conclusive, for the interlocutor repones the defendant

against it, and allows him to be heard upon the merits. The weight of authority in this country would certainly be in favour of the foreign judgment being conclusive, provided it had been obtained without fraud and collusion, and provided the proceedings were not impeachable on the ground of some manifest violation of the rules of justice, such as condemning a party unheard, and who had no opportunity of being heard; a violation, indeed, tantamount to proof that there was no jurisdiction. On this point there have been, it is true, conflicting authorities, and the decision of this House in Fraser v. Sinclair, which was in a Scotch cause, but has always been cited in the courts of this country, appears to have regarded foreign judgments as only primâ facie evidence of the debt. But if the question were again to arise, it is most probable that your Lordships would adopt the principle which has governed the later opinions in the courts below, and been recognized on both sides of Westminster Hall. However, here the respondent does not appeal from the finding by which the appellant is reponed against the foreign decree, which is treated like a decreet in absence in Scotland. If then he be so reponed, and let in upon the merits, he may defend himself upon the sexennial prescription, and the debt can only be proved by writ or oath.

It is, however, fitting to add something respecting the force of the foreign judgment, in case it should be deemed that it is available as a ground of debt, supposing the prescription only to have the effect of destroying the acceptance. If that judgment is neither an interruption of the prescription, nor such a proceeding as in any way continues the original debt, nor in itself conclusive evidence of a debt independent of the acceptance, I do not

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see how it can operate at all; nevertheless it may be well to observe that none of the authorities would entitle us to receive this judgment as binding, even supposing foreign judgments to have, when admitted in evidence, the same force with judgments of our own courts. Buchanan v. Rucker clearly shows that the court before which such a judgment is given in evidence may examine the mode of proceeding, and reject the judgment altogether if it appears to have been obtained against one who could not be heard. The principle of the decision cannot possibly be confined to the case of the party never having been within the jurisdiction. If he was a foreigner, and only within the jurisdiction by force, and out of it before action brought, nay, before the breach of contract sued on, and prevented by subsisting hostilities from even appearing in the court where he was sued, the circumstances become fully as strong as they were in Buchanan v. Rucker against allowing any weight to the judgment pronounced in such a proceeding. Forrest v. Douglas certainly cannot be relied on as sanctioning an opposite conclusion, for there the Court of Common Pleas, by a manifest misunderstanding of the Scotch law, gave much more effect to a Scotch decree in absence than it could have had in the Scotch courts, holding it to be conclusive, whereas it may at any time within forty years be set aside as of course. Besides, in that case the court guarded itself carefully against any general inference being drawn from the decision:—"We confine our "judgment," say their Lordships, "to cases where the "party owed allegiance to the law of the country from "being born within it, and having within it property "under the protection of that law." Becquet v. Mac-

arthy[1] has been supposed to go to the very verge of the law in admitting the force of foreign proceedings, how different soever their principles may be from our own. But there the defendant held an office in the colony at the time of the action being brought, and down to the date of the sentence; he also appears to have been within the jurisdiction when the cause of action accrued. There can be no reason whatever for holding that the authority of foreign judgments shall be the same, whether given in the absence of parties or in foro contentioso; whether given against parties who were allowed to defend themselves, parties who were either heard or had an opportunity of being heard, or against parties who knew nothing of the proceedings, and could not have appeared if they had. No harm at all can arise from so just and rational a qualification of the rule, and the fullest effect will still be given to the judgment of the foreign tribunal which any principles of justice and reason can require or indeed justify.

Upon the whole matter I am humbly of opinion, that your Lordships ought in this case to reverse the interlocutors of the 10th June 1835 and 20th January 1836, appealed against; declare that the defence of the sexennial prescription, according to the law of Scotland, ought to be sustained; that this prescription has suffered no interruption by reason of the proceedings in the French court; that these proceedings do not constitute a new ground of debt nor evidence of a debt, independent of the bill libelled on; and that the debt can only be proved by writ or oath of party, reserving all defences to the

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[1] 2 Barn. & Adol. p. 951.

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appellant. With these declarations the cause must be remitted.

The House of Lords accordingly pronounced this judgment:—

It is ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That the said interlocutors, in so far as complained of in the said appeal, be and the same are hereby reversed. And is declared, That the defence of the sexennial prescription according to the law of Scotland ought to be sustained; that this prescription has suffered no interruption by reason of the proceedings of the French court; that these proceedings do not constitute a new ground of debt nor evidence of the debt, independent of the bill libelled on, and that the debt can only be proved by the writ or oath of party, reserving all defences to the appellant. And it is further ordered and adjudged, That with this declaration the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

RICHARDSON and CONNEL — SPOTTISWOODE and ROBERTSON, Solicitors.

APPENDIX.

CASE for the Opinion of French Counsel in causâ Lippmann and Attorney against Sir W. H. Don and his Tutor-at-law.

IN the autumn of 1809 the late Sir Alexander Don Baronet, of Newton Don in the kingdom of Scotland, was in Paris in consequence of having been detained by Buonaparte, with other British subjects who were travelling in France, when hostilities commenced in 1803. In consequence, it is said, of being involved in pecuniary embarrassments, he subscribed two bills of exchange, payable not at any particular place, though addressed to the acceptor at the Hotel de Richelieu, Paris, on the 1st of March following, conceived in the following terms, in favour of the pursuer as payee:

Versail, le 13 9bre 1809. Bon pour 20,000 fr.

Au premier Mars prochain paye par cette première de change, à l'ordre de M. Lippmann, le somme de vingt mille francs, valeur reçu, sans autre avis.

A Monsieur,
Mon. Don.

Bon pour vingt mille francs.
(Signed) CHAS. FAGAN.

Hotel Richelieu, Rue Neuve, St. Augustin, Paris.

Accepté pour le somme de vingt mille francs, payable le premier Mars 1810. (Signed) ALEXANDER DON.

Versail, le 13 9bre 1809. Bon pour 20,000 fr.

Au premier Mars prochain paye par cette première de change, a l'ordre de M. Lippmann, le somme de vingt mille francs, valeur reçu, sans autre avis.

A Monsieur,
Mon. Don.

Bon pour vingt mille francs.
(Signed) CHAS. FAGAN.

Hotel Richelieu, Rue Neuve, St. Augustin, Paris.

Accepté pour le somme de vingt mille francs, payable le premier Mars 1810. (Signed) ALEXANDER DON.

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There is no other proof of the value of these bills having been paid to Sir Alexander Don, excepting what appears on the face of the documents themselves. Early in February 1810, and before the bills became due, Sir Alexander Don returned to Scotland. These bills, when they became due, were not paid, and they were protested in Paris for nonpayment against the acceptor, and the dishonour was intimated to Charles Fagan the drawer, but not to Sir Alexander Don, who was then in Scotland. An action was afterwards raised by the pursuer, M. Lippmann, the payee of the bills, before the Tribunal of Commerce, of the department of the Seine of Paris, against both the drawer and acceptor of these bills as defenders. This process was said to be served upon the defender at Paris, who is erroneously designated as a merchant; but no citation was received by Sir Alexander Don, the acceptor, in this country, which was impossible, the two nations being then at war. A citation, however, was left at the Hotel de Richelieu, where Sir Alexander had resided, when he signed the bills, but the officer was there informed that he had left it four months before; in consequence of which answer, by which it appeared that Sir Alexander Don had no residence known in France, he posted up a copy of the summons against the principal door of the Tribunal of Commerce at Paris, and took another to the Imperial Attorney of the Tribunal of First Instance, of the department of the Seine.

On the 25th of July 1810 the pursuer obtained a judgment against both the defenders, viz. against the drawer, who appeared by his attorney, and admitted the validity of the debt, and against Sir Alexander Don, in absence, after, as is alleged, the forms according to the law of France had been gone through, where the defender does not appear. This judgment was for the principal sum in the bills, with interest and expenses. This judgment was intimated on the 2d October 1810 at the Hotel de Richelieu, where the bill was addressed; but Sir Alexander Don was not there at that time, nor did any intimation ever reach him in Scotland, where he then resided. The pursuer then, in default of the acceptor, put the judgment in execution against Charles Fagan the

drawer, but his person could not be found, and his effects were sold under order of the French courts, and the proceeds received by the pursuer, to the extent of 434 francs, after deducting judicial expenses. The bills, protest, and judgment are herewith submitted for inspection; and it may be observed, that both the protests and judgment bear expressly, that when the bills were protested, and process served at the Hotel Richelieu, Sir Alexander Don had left the hotel and returned to Great Britain. Large sums of money are said by the defender to have been remitted by the agents of Sir Alexander Don in this country, to pay his debts in France, before he left that country; and Sir Alexander is said to have repeatedly alleged that he had paid all his debts in France, but these allegations are not admitted on the other side. In July 1814 a demand was made on Sir Alexander Don in Scotland, through Messrs. Rougement and Behrends, for payment of a debt said to be due to Mr. Lippmann, and which, from copies of the bills then furnished to Sir Alexander's agents, appears to have been the same with that now pursued for. Sir Alexander did not discharge the debt, or any part of it, at that time, and its legality was denied. No judicial demand was made upon him, or action raised in this country, before his death, which occurred on the 11th April 1826. The present action has now been raised in the Scotch courts against Sir William Henry Don, son and heir of Sir Alexander Don, and his tutor-at-law. Sir William is still a pupil, and neither knows nor can be called upon to declare any thing in regard to the debt in question.

In these circumstances the opinion of French counsel is requested upon the following points of French law, occurring in the case:—1. According to the French law, has the Tribunal of Commerce, in the circumstances before set forth, jurisdiction over Sir Alexander Don, an alien, enemy, and in Britain at the date of citation, and of the judgment by default, obtained against him? And is it competent, and consistent with the law of France, to cite the subjects of a country at war with France, and not within its territory, nor having any estate or effects there, to appear before the hostile tribunals of France, and in default thereof to pronounce an effectual

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judgment or decree against the party not appearing? 2. Is there any period within which bills prescribe by the law of France, and when is that period in the particular circumstances, as hostilities continued till April 1814. 3. Does the French law hold, that a decree obtained under the aforesaid circumstances against the debtor on a bill in France stops the prescription of the bill, and if it does stop it, what is the period within which the decree itself prescribes? 4. What effect is given by the French law to a decree in absence against a foreigner, who has contracted a personal debt in France, where that foreigner has left the country before citation, and he has received no citation, and never appeared in the action? 5. Does it make any difference by the French law, in the present case, that the proceedings above mentioned took place in the French court against the drawer in the bills of exchange, who did appear, although the acceptor did not, and what would be the effect by the French law of such proceedings against the drawer on a question with the heir of the acceptor, that acceptor having been a foreigner, who never appeared in the action? 6. Would it be held sufficient proof of a debt in the French Courts, that a bill of exchange is produced, with the name of the father of the defender attached to it as acceptor, followed up by proceedings, in which decree in absence was pronounced against him, as above set forth at the distance of nineteen years from the date of the bill, without any proof of the value of the bill having been advanced to the acceptor farther than what appears from the bill itself, and without any action having been brought against the acceptor in his own country, although his residence there was well known, and his solvency not questioned, during a period of sixteen years before his death; or is the production of the bill with the acceptor's signature admitted, and the said judicial proceedings, sufficient to establish the debt against the minor heir, and to exclude all these considerations? 7. Are there any informalities or defects in point of form or otherwise in the documents or proceedings which would render them ineffectual according to the law of France?

(Signed) A. ALISON.

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OPINION of Mr. Jacquinot Pampelune, late Attorney General at the Royal Court of Paris, and of Mr. Berard Des Glajeux, late Advocate General at the said Court, on the questions which the Court of Edinburgh has done them the honour to submit to them in the Case Lippmann and his Mandatory against Sir William Henry Don and his Tutor-at-law.

(Translated from the French.)

The undersigned being assembled in order to deliberate on the questions which the Lord Ordinary at the Court of Edinburgh has done them the honour to submit to them, and being penetrated with the duty imposed upon them by this honourable and important mission which has been confided to them, and in consequence of the existing documents in the case of Lippmann and his mandatory against Sir William Henry Don and his tutor-at-law, and which documents they have ordered to be placed before them; they will, after having scrupulously examined the above-named documents and the points of law relative to this suit, religiously pronounce their sentiments and the principles of the French laws on each of the questions submitted to them. However, they think it their duty first of all to make a few general observations, which appear to them to be of a nature to render their answer on each question more precise.

In the first case, it is of importance that two points should be clearly established, the nature of the titles which form the subject in dispute, and the nature of the judgment which has validated these titles.

1st. The nature of the titles. These titles, termed bills of exchange, do not unite in their form all the conditions required by the French laws, and consequently would not be susceptible simply of themselves to produce all the effects thereof. The value in the bill of exchange is simply announced, received; but the French law does not content

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itself with this enunciation, it requires that it should be mentioned in what manner the value has been furnished, whether in cash, in merchandize, or in account. (See Commercial Code, Art. 110.) The title, which does not contain this enunciation, is however not entirely void or null, it does not cease to be obligatory, but it loses the privileged character of a bill of exchange, and it has only the value of a simple promise, such as a promissory note (mandat).

There results from this circumstance an essential difference between a bill of exchange and a promissory note. A bill of exchange is always in itself a commercial deed, and consequently subjects whoever may have signed it, whether he be a merchant or not, (save the exceptions in favour of women,) to the jurisdiction of the Tribunal of Commerce. A simple promise or promissory note (mandat) is, on the contrary, a commercial transaction, only inasmuch as it has served for a mercantile transaction, or that it has been signed by a merchant. It is, therefore, only from this fact or this character, and not in its full right and of itself, that a promissory note (mandat) is subjected to a commercial tribunal. Nevertheless, even in a case where a commercial transaction has not been proved, or where the signature of a merchant is wanting, the tribunal of commerce, if a dispute relative to a simple promise should be laid before it, may, according to law, decide upon it, provided the defendant does not require the case to be referred to the civil tribunal (Tribunal Civil). See Commercial Code, Art. 636. The mode of execution with regard to a promissory note and a bill of exchange is not the same. A bill of exchange carries with it the right of arresting a debtor; a promissory note or simple promise is not liable to the same consequences. Finally, and even in consequence of the privileges attached to a bill of exchange, the liability of a bill of exchange only lasts five years; at the expiration of that term it is prescribed. Promissory notes, as well as common obligations, are only prescribed in thirty years. These distinctions being settled, and the titles in question being but simple promises or promissory notes, from the defect of the value not having been sufficiently indicated, they ought to

be governed by the rules relating to promissory notes, provided these titles were only to be considered in themselves. But they must be appreciated in this instance in the character attributed to them by the judgment, which declared them to be valid, and which ordered them to be put into execution; it therefore becomes necessary properly to determine the nature of this judgment.

2d. Nature of the judgment of 1810. This judgment is become definitive, if in other respects the legal formalities have been fulfilled, which will be the subject of an ulterior examination; it is become definitive, because no appeal was made against it, because no opposition in any shape whatever took place; and as there was even acquiescence on the part of one of the defendants who was present, this judgment from that moment acquired all the authority of a case definitely judged; what the judgment therefore has pronounced has become irrevocable.

This character of irrevocability does not only exist with regard to the nature given to the titles, but likewise exists with regard to the dispositions applied to them, for every thing is coherent in this judgment, and the disposition necessarily results from the nature of the title, the execution of which is demanded. Now the judgment of the Tribunal of Commerce, pronounced on the 25th July 1810 in favour of Mr. Lippmann against Charles Fagan and Sir Alexander Don, characterizes the titles signed by the latter as bills of exchange, and the motive of the judgment is remarkable inasmuch as it proves the validity of these titles as bills of exchange, because they were not attacked by the defendants. It is mentioned therein, "Considering that " neither the demand nor the titles are contested by the " defendants, and that the question is concerning bills of " exchange, the validity of which has not been attacked by " the defendants, and that Mr. Fagan acknowledges the " debt, and promises payment thereof, provided a term and " delay of nine months be granted him," these titles are therefore now truly acknowledged to be bills of exchange, not only because they have been judged to be such, but likewise because their validity has not been attacked by the

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defendants, one of whom was present, and likewise because he acknowledged the debt by acquiescing to the payment thereof, provided a term and delay were granted to him. The character of bills of exchange has therefore been truly and irrevocably acquired by these titles. Whatever may be the vice in the form which might have reduced these titles to be only simple promissory notes, they must henceforth be considered solely as bills of exchange, because it is impossible to retract what has already been acknowledged by the parties and definitely judged. There results likewise from the titles having been acknowledged to be bills of exchange that bodily arrest may have been, and has been in reality pronounced, as being the manner of putting the sentence into execution; it is thus that the disposition of the judgment is coherent with the nature of the title, and constitutes only the same case irrevocably judged. These preliminaries were indispensably necessary to get to the clear solution of the questions submitted to us. It will therefore be looked upon as positively decided in each of these queries, that the question is concerning bills of exchange, and concerning a judgment which has acquired the force of law.

First question:—"According to the French law, has the "Tribunal of Commerce in the circumstances before set "forth jurisdiction over Sir Alexander Don, an alien, "enemy, and in Britain at the date of citation, and of the "judgment by default obtained against him? And is it "competent and consistent with the law of France to cite "the subjects of a country at war with France, and not "within its territory, nor having any estate or effects there, "to appear before the hostile tribunals of France, and in "default thereof to pronounce an effectual judgment or "decree against the party not appearing?" In order to answer fully this question, it will be necessary to appreciate the jurisdiction of the Tribunal of Commerce over Sir Alexander Don in two respects:—1st. In respect to his quality as a stranger, enemy, and a subject of a country at war with France; 2d. In respect to the quality of a merchant which the judgment attributes to him.

In the first respect the question is a general one, and

would apply itself to the jurisdiction of every French court, in the second respect the question is exceptional.

The question, considered in the first point of view, cannot cause any difficulty. It is a principle of the law of France that a stranger, even a non-resident in France, may be cited before the French tribunal in order to fulfil the obligations contracted by him in France towards a Frenchman. (Civil Code, Art. 14.) Every French tribunal is therefore competent, according to the nature of the obligations, to exercise in such case its jurisdiction over a foreigner. A foreigner, on entering into a contract in any other country than his own, has done an act according to the law of nations by obliging himself to perform in that very country an engagement which he has contracted; he has voluntarily renounced, in respect to this obligation, the jurisdiction and the law of his own country, and has no longer the right to invoke the maxim, Actor sequitur forum rei. It is not necessary on that account that the foreigner should still reside in France at the moment the performance of the contract is claimed; it is quite enough for him to have resided there when the contract was entered into; it is at that moment, and by that very act, that the competence of the French tribunal has been established. Article 14. of the Civil Code, which contains these principles, it is true, requires for their application this condition, namely, that the contract shall have been made with a Frenchman; but this quality does not appear to be disputed in the person of Mr. Lippmann. It is, however, certain that Mr. Lippmann has been settled in France a long while, and that he enjoys there the same civil rights which are enjoyed by Frenchmen. This alone, therefore, would be sufficient to enable him (among the rest of these civil rights) to exercise the power of citing a foreigner before the tribunal of France. A decree of the Court of Cassation, dated on the 24th of April 1827, has formally established this doctrine. (Journal of the Palace, vol. 3d of the year 1827, page 405)

There is another reason which leaves no doubt as to the application in this case of article 14. of the Civil Code. The question is concerning bills of exchange and commercial

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transactions; consequently of contracts respecting the rights of nations subjected in their performance to the laws and to the tribunals of the country in which they have taken place. This principle is so general that it has force and effect, even among foreigners, with regard to commercial transactions entered into in France, and which are to be executed there. In this case one foreigner may even be cited by another foreigner to appear before the tribunals of France. This results, independently of article 14. of the Civil Code, likewise from article 420. of the Code of Proceedings (du code de procedure), and from 631. of the Commercial Code. The first allows the plaintiff to summon the defendant before the tribunal of the district (arrondissement) in which the promise has been made, and where the payment is to be effected. The second subjects to the jurisdiction of the Tribunals of Commerce the disputes relating to commercial transactions between every body. The terms of these dispositions of the law are, as may be seen, as extended as the necessities of commercial operations in behalf of which they have been enacted require it; no distinction has been made either in respect to the persons or their quality. Trade is proper to every country, and ought to meet with protection and justice every where.

These principles, which have already been admitted by the jurisprudence, have been definitely acknowledged by a decree of the Court of Cassation, dated the 26th November 1828. (Journal of the Palace, vol. 1. of 1829, page 75):—
" Considering in law, say jurisprudence, says this judgment,
" that article 420. of the Commercial Code does not make
" any difference between a foreigner and a Frenchman, and
" that it was not the legislator's intention to make any, as,
" according to the ancient jurisprudence, and the principles
" acknowledged during the discussion on the civil code, it
' is certain that the French tribunals are obliged to give
" judgment in commercial transactions effected in France
" by foreigners." Such are the principles which are constantly acted upon in France towards a foreigner with regard to the power of making him appear before the French tribunals on account of obligations entered into in France.

Would any derogation from these principles take place in consequence of the foreigner having been an enemy, and a subject of a country at war with France? But these declarations of hostility and war exist only as far as regards one state towards another. They do not change the private relations between the individuals of either country, they being founded on the rights of nations. A foreigner, although a subject of a country at war with France, remains always but a foreigner with regard to private Frenchmen with whom he deals; he is not the less apt to contract and make all such acts that do not emanate directly from the civil rights of the country in which he resides. But from this very power of being able to contract he engages and binds himself towards others, just as much as the others bind themselves towards him. He therefore submits himself to the fulfilment of the contracts he has entered into, and consequently to the laws which regulate and protect the execution of these contracts.

On applying, therefore, the right to the fact, or first part of the question, the answer, according to the French law, will be affirmative, namely, that Sir Alexander Don, although a foreigner, although non-resident in France at the period of citation, although the subject of a country at war with France, his citation before a French tribunal, on account of bills of exchange accepted by him and made payable in France, was perfectly valid. In the second place it becomes necessary to appreciate the competence of the French tribunal, inasmuch as it is a Tribunal of Commerce and exceptional, and on account of the quality of a merchant attributed to Sir Alexander Don. This competency can easily be proved. First of all, we must remember that the titles are bills of exchange, because it has been so acknowledged and judged, one of the parties concerned being present. Now bills of exchange are therefore essentially commercial transactions with every person, and, according to law, legally subject those by whom they are signed, whether merchants or not, to the jurisdiction of the Tribunal of Commerce. (Art. 631. and 632. of the Commercial Code.) All that was therefore required was to know the nature of the com-

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commercial titles, in order to justify the jurisdiction of the Tribunals of Commerce over Sir Alexander Don.

But there exists another reason for establishing the competency of the Tribunal of Commerce. This reason is drawn from the quality of Charles Fagan, the drawer of the bills, having been acknowledged to be that of a merchant before the Tribunal of Commerce. Charles Fagan appeared before the Court in the person of his attorney, and yet he did not deny the jurisdiction of the Tribunal of Commerce on account of his not being a merchant; on the contrary, he acknowledged its jurisdiction by consenting to the payment of the sum claimed. He has therefore been lawfully designated a merchant; this quality has therefore been considered in him as unquestionable. If therefore a commercial effect, which perhaps might not even be a bill of exchange, but simply a promise or bill to order, bears the signature of different persons not merchants, it will suffice for only one of their signatures to be that of a merchant, in order to give the Tribunal of Commerce a right of examining and passing judgment in the case: a merchant draws with him before its jurisdiction every person that is not a merchant; such is the express stipulation of article 637. of the Commercial Code. The Tribunal of Commerce was therefore, in a double point of view, competent to take cognizance of the demand made against Sir Alexander Don. It was in this respect of very little consequence whether he had any property or estates in France or not. It is true that real estates are specially governed by the laws of the country, but obligations contracted in France personally by foreigners are likewise submitted to the laws.

It ought to be observed here, that the question does not concern obligations that proceed from the laws which affect the condition and capacity of the person, and to which he is every where subjected. A foreigner in France always remains under the empire of the laws of his own country as far as regards his condition or capacity. But the question here is concerning obligations which belong to the rights of nations, and regards persons only inasmuch as they have entered into an engagement to execute them;

the execution thereof must therefore be guaranteed by the very laws under which the obligation has been contracted. If such are the foundations of the law in France, and if, according to these maxims, Sir Alexander Don has been duly cited in France, the necessary consequence that results from it is, that judgment may have been lawfully pronounced against him although he did not appear, for the parties must always be able to acquire the means of having justice done to them, and it ought not to be in the power of a person to escape by his non-appearance from the fulfilment of an engagement he has entered into. Justice does certainly require that the party condemned should have acquired the means of defending himself, but the certainty in this respect cannot depend upon the facts resulting from the good or bad faith of the parties; the certainty in question is entirely legal; it is acquired if it has been proved that the formalities prescribed by law, in order that the parties should be considered as duly cited, have been strictly fulfilled.

We must here add a consideration in equity. Sir Alexander Don was not sued alone; Charles Fagan was cited conjointly with him; their cause was a common cause, their liability was in solidum; their interest and their means of defence were the same; Charles Fagan appeared; their case therefore received all possible assistance, and the condemnation was not pronounced without the defence having been heard.

Second question:—"Is there any period within which "bills prescribe by the laws of France; and when is that "period in the particular circumstances, as hostilities con-"tinued till April 1814?" The answer to this question is to be found in article 189 of the Commercial Code, worded thus:— "All actions relating to bills of exchange prescribe every "five years, calculating from the day of protest, or from the "last day of the judicial proceedings, unless there has been "a condemnation, or unless the debt has not been acknow-"ledged by a separate act." The prescription of a bill of exchange, therefore, takes place at the expiration of five years; this prescription is in force against every person,

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whatever be the events which may have prevented the exercise of the rights resulting from the bills of exchange. But this very same article, and in consequence of these words, unless there has been a condemnation, causes an essential restriction in the prescription which has just been established, for if a condemnation has taken place the prescription is no longer in force. The bearer of the bill of exchange then acquires his redress in a new title—the bill of exchange is annulled—the judgment remains; there then only remains to apply the prescription, and the laws relating to the judgment. Such is then the hypothesis of the present case, and this naturally carries us to an examination of the third question.

Third question:- " Does the French law hold that a " decree obtained under the aforesaid circumstances against " the debtor, or on a bill in France, stops the prescription of " the bill, and if it does stop it, what is the period within " which the decree itself prescribes?" The effect of the judgment obtained, as it has just been stated, is to cause it to take the place of the bill of exchange, and thus to become a new title in the hands of the creditor. There can therefore be no further question about the prescription of the bill of exchange, as this prescription could not have taken place if there had been no condemnation, " unless the condemnation " had not taken place," and the condemnation having been pronounced has rendered every prescription of the bill of exchange impossible. But the judgment itself may be prescribed; however, it can only take place in thirty years. The action which results therefrom, is considered as belonging to the personal actions which article 2262 of the Civil Code only subjects to prescription every thirty years. The prescription, therefore, cannot be opposed to the judgment of 1810.

Fourth question:—" What effect is given by the French " law to a decree in absence against a foreigner who has " contracted a personal debt in France, where that foreigner " has left the country before citation, and he has received no " citation, and never appeared in the action?" A judgment by default has in the above-mentioned cases the same effect in France as if it had been pronounced peremptorily (con-

tradictoirement) after hearing the foreigner, if the necessary formalities to render the citation valid have been accomplished, and provided the judgment has not been prescribed in consequence of its execution not having been effected. This is not yet the place to examine whether all the indispensable formalities necessary to the validity of the proceedings have been exactly followed; this will form the subject of the answer to the seventh. But there exists another condition for a judgment by default, to preserve its full force. It is necessary for it to have been executed within the six months (Code of Civil Proceedings, art. 156.), in default of which it is prescribed, reputed null, and as not having taken place. Prescription is a penalty attached to the negligence of the creditor who, having obtained a judgment by default, has not taken steps to execute it. But even this principle of the law supposed the execution of the judgment to have been possible. If the debtor is a foreigner, who not only has not any property in France, but who does not even reside there, how will it be possible to execute the judgment against him? And if it cannot be executed, how will the debtor acquire the right of prescribing his creditor?

These considerations, all powerful as they are in equity, would not suffice to determine the undersigned to declare that the judgment of the year 1810 could not have been prescribed. Being called upon by the important mission entrusted to them to make the sole authority of the law speak, they will not substitute for it their opinion, however well founded it might appear to them. It is therefore true that the judgment of the year 1810, was not executed against Sir Alexander Don in the sense of article 159 of the Code of Civil Proceedings. It is true that the execution of the judgment has not been manifested with respect to him by one of those acts, in consequence of which the law reputes the judgment to have been executed. It is likewise true that the law does not make any distinction in regard to the execution of the judgment between a foreigner and a person not being a foreigner. If, therefore, Sir Alexander Don had been the only person concerned in the case, the prescription might be opposed, and the judgment reputed null with regard to him.

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But there is a decisive reason in this case to avoid prescription. It is the nature of a bill of exchange to render the obligation which results therefrom in solidum with regard to all those that have signed it. Sir Alexander Don and Charles Fagan were therefore liable in solidum for each other; and one of the effects of this liability in solidum is, that the prosecution of one of the debtors interrupts the prescription with respect to all of them (Civil Code, art. 1206.), and the prescription is in reality nothing but a prescription applied to the acts of the proceedings. It is thus that it has been considered by ancient authors who have written on French law, such as Dunod, Denisart, Ferriere; it is also in this manner that it has been appreciated under the new laws, and particularly by a decree of the Court of Cassation of the 7th December 1825, which has decided, "that the disposi-
" tion of article 1206 of the Civil Code is conceived in
" general terms, and that it applies to all rights, actions, and
" acts capable of being prescribed, and consequently subject
" to prescription or nonsuiting, established by article 156.
" of the Code of Proceedings."

All that now remains to be done is to examine if according to these principles the judgment has been executed with respect to one of these debtors in solidum. The fact is therefore not doubtful; there results from the documents that repeated proceedings have taken place against Charles Fagan, whose furniture has been seized and sold, and whose body was sought for, in consequence of a warrant having been issued for his arrest. The execution of the judgment, as far as regards him, has therefore been complete, and from that moment the effect of these prosecutions has been to prevent any nonsuiting of the judgment against Sir Alexander Don on account of his obligation in solidum. The judgment of 1810 has therefore, though pronounced by default against Sir Alexander Don, preserved its full force against him. It is, however, the duty of the undersigned here to declare that Sir Alexander Don might sue for redress in France against this judgment, for, next to this rule, saying that the execution of the judgment against one of these debtors in solidum interrupts the prescription or nonsuiting with

respect to all, we likewise find in the law the following principle, that if the judgment is pronounced against one of the parties who has no attorney, the opposition may be received until the execution of the judgment. Such is the disposition of article 158. of the Code of Civil Proceedings, and article 643. of the Commercial Code declares this disposition applicable to the judgment by default pronounced by the Tribunals of Commerce. Here then is the combination which results from those dispositions of the law. The judgment being executed against one of the debtors in solidum cannot be nonsuited with regard to the other, but the person upon whom the judgment has not been executed is always at liberty to form an opposition to it until it has been executed.

This is likewise what results from the decree already mentioned of the Court of Cassation of the 7th of December 1825. " The party not appearing," it says, " always retains " the right of forming his opposition, and to make good all the " reasons which he may have to offer against the condemnation " when they come to put it to execution against his person." It must therefore be admitted, that as the judgment of 1810 had not been put in force against Sir Alexander Don, he could still have been allowed to protest against it, and likewise that he would have the same right to-day; for although the execution of this judgment against Charles Fagan may have preserved to this judgment all its effects, it has not deprived Sir Alexander Don of his right of protesting against it whenever it should be executed against him. This right which would have have belonged to Sir Alexander Don, has without a doubt descended to his heir or representative as well as the liability to which he was subjected. It must therefore be considered as a fact, that Sir Alexander Don or his heir might even to-day protest against the judgment of 1810.

But here it will be necessary to state a few rules. According to the law of France there is no nullity by right. The protest against the judgment, which is considered null, must be made before the very tribunal which has pronounced the judgment. It is therefore in France, and before the Tribunal of Commerce, that the opposition ought to be made. Until then the judgment remains in full force.

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Secondly, it is necessary to distinguish in this judgment the subject which has been judged, and which becomes, henceforth inattackable, from what may yet be judged, and which therefore is subject to opposition. One may easily conceive that when the question involves a liability in solidum, the same thing cannot at the same time be and not be; the same title, for instance, cannot be a bill of exchange, and not be such. Thus every thing that concerns the debt and the case itself can no further be placed in doubt; in this respect the case is irrevocably judged, otherwise nothing would as yet have been finished in the judgments, and the dishonesty in one of the parties not having appeared would suffice to revive all the questions again. But whatever concerns the person, or the exceptions to which a person is entitled, may be the subject of a new trial or examination, because, in point of fact, nothing has been judged in that respect; these exceptions hitherto not having been invoked. Thus the exception concerning Sir Alexander Don personally, as not being a merchant, might be brought forward again to-day with regard to the opposition; the right of bringing it forward, therefore, still belongs to his heirs.

But it is a part of the task of the undersigned to point out at the same time what would be the consequence of this right before the French tribunals. The exception drawn for Sir Alexander Don not having been a merchant could not be invoked to show the incompetency of the Tribunal of Commerce with respect to his person. In the answer to the first question the following double motive was brought forward, namely, that the question was concerning bills of exchange, and that Charles Fagan, one of the parties signing, was a merchant, or judicially reputed such; two points irrevocably judged. The judgment ordering the payment of the bills of exchange would therefore remain inattackable. The only effect of the exception might have been to discharge Sir Alexander Don from bodily imprisonment, in case the bill had been a simple promissory note, conformably to the last rule of article 637. of the Commercial Code. But, on the one hand, this rule could not be applied, the title being a bill of exchange; and, on the other hand, even this excep-

tion would be of no use, for Sir Alexander Don being deceased, his heir cannot be subjected to bodily imprisonment in lieu of him, and he can only be made liable as far as regards his property for the engagements entered into by Sir Alexander Don. We ought therefore not to hesitate declaring that an opposition against the judgment of 1810 would have no result.

On recapitulating the question, it appears that the judgment rendered by default against Sir Alexander Don has not been prescribed, because its execution against one of the debtors in solidum has interrupted the prescription with respect to the other. It would still be susceptible of opposition, but this opposition could only be made in France before the tribunal which pronounced the judgment. Therefore, on appreciating this opposition according to the laws of France it would be null in all its results. We are therefore led to conclude that the judgment rendered by default against Sir Alexander Don, in the above-mentioned circumstances, has the same force and the same effects as a peremptory judgment pronounced after the parties have been heard, and which requires the force of a case on which judgment has been passed.

Fifth Question: — " Does it make any difference by the " French law, in the present case, that the proceedings above " mentioned took place in the French court against the " drawer in the bills of exchange, who did appear, although " the acceptor did not; and what would be the effect by " the French law of such proceedings against the drawer in " a question with the heir of the acceptor, that acceptor " having been a foreigner, who never appeared in the ac- " tion?" According to the French law, the bearer of a bill of exchange may prosecute indistinctly either the drawer, acceptor, or both of them together; and the condemnation in both cases produces the same effects. A bill of exchange creates an obligation in solidum between those that have signed it; it is therefore a rule that a condemnation pronounced against the debtor in solidum is a judgment against all the others. In fact, says the author of the Repertory on Jurisprudence, in his questions on law, at the word " chose

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" jugée," a debt in solidum is the same in its substance and in its case for each of the parties interested. A debtor in solidum against whom a judgment has been pronounced forms, morally speaking, but one and the same person with his co-debtor, because they could not bind themselves in solidum for the same debt without constituting themselves the mandatories of each other, in order to provide for the payment of said debt, and, moreover, mutually to represent each other in all the acts and all the proceedings which might lead to enforce the payment thereof, and for their mutual advantage to make good all the means they might possess in order to exempt themselves from the payment. Wherefore Voet does not hesitate to declare, on the title of the Digest de duobus reis, No. 5, that the judgment pronounced in favour of one of the debtors in solidum turns to the advantage of his co-debtors: — " Sed et si unus ex plu-" ribus debendi reis judicio conventus per sententiam judicio " absolutus sit alter ultra nequit efficaciter conveniri." But, from the same principle, the judgment pronounced against one of the debtors in solidum is likewise considered as being likewise pronounced against his co-debtors. In consequence of these principles, even if the acceptor of the bill of exchange should not have been prosecuted, the condemnation pronounced against the drawer would have its full effect against him. We could only make good the exceptions which concern him personally, as it has been stated in answer to the preceding question, because these exceptions have remained entire, and do not affect the cause of the obligation. But if it is so in the case where the acceptor was not a party concerned in the judgment, it is most certainly so when he has been cited, and when the condemnation has been pronounced conjointly against him. The fact of his non-appearance can make no alteration in the consequences, which proceed from the force of principles, and from the nature of the things.

Now, as to the effect of the judgment against the heir of the acceptor, it is the same with regard to the property as it was with respect to the acceptor himself. The heir, in succeeding to the property of his predecessors, succeeds

likewise to his obligations. But the property of the heir alone is engaged, and not his person. Thus bodily arrest, to which the acceptor of the bill would have been liable, cannot be put in force against his heir. These rules do not admit of any exceptions in favour of foreigners.

Sixth Question: — " Would it be held sufficient proof of " a debt in the French courts that a bill of exchange is " produced with the name of the defender attached to it as " acceptor, followed up by proceedings in which decree in " absence was pronounced against him, as above set forth, " at the distance of nineteen years from the date of the bill, " without any proof of the value of the bill having been " advanced to the acceptor, farther than from what appears " from the bill itself, and without any action having been " brought against the acceptor in his own country, although " his residence then was well known, and his solvency not " questioned during a period of sixteen years before his " death; or, is the production of the bill with the acceptor's " signature admitted, and the said judicial proceedings, " sufficient to establish the debt against the minor heir, and " to exclude all these considerations?" An affirmative answer upon these questions cannot be doubted in France, according to the principles laid down. The bill of exchange is of itself a proof, inasmuch as it acknowledges the value received. The person on whom the bill of exchange is drawn is at liberty to accept it or not, but having accepted it he acknowledges having received the value. The law does not admit of any proof foreign to the title. From that very moment, too, the acceptor binds himself towards the holding the bill of exchange. The funds not being supplied becomes a matter of consideration between the acceptor and the drawer; but the rights of the holder of the bill remain the same with regard to the acceptor although no funds have been provided, and the latter is, nevertheless, bound to pay, without prejudice to his claim against the drawer on account of the order he had received to that effect. A period of nineteen years and upwards having elapsed since the date of the draft can in no manner modify the obligation, as it results at present from a judgment which

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could only have been prescribed at the expiration of a term of thirty years.

Moreover, what has been said concerning the judgment and the citation in France is applicable here. It will suffice to add, on the one hand, that although the fact of a foreigner having a fortune and estates in his own country be notorious, it would not deprive a Frenchman of his right to prosecute him in France, and, on the other hand, that the state of war, which existed between England and France at the period the bills became due, did not allow the prosecution of the condemnation. All contrary considerations remain without effect in presence of these principles; and it has already been explained, with regard to the heir, that his liability is the same as his predecessor's; his minority can make no difference in this question.

Seventh Question: — " Are there any informalities or " defects in point of form or otherwise in the documents or " proceedings which would render them ineffectual accord- " ing to the law of France?" This question is of high importance, for if there existed in the documents or proceedings any defect which rendered them null the judgment itself would be annulled; nothing would have been done or judged. It must however be clearly understood that this nullity would not follow as a right, but that a judgment must be pronounced to that effect, and Mr. Lippmann would still have the right of beginning the prosecution over again in France against the heir of Sir Alexander Don. It would therefore be necessary to compare the documents and the proceedings with the dispositions of the law. The documents relating to the suit are, properly speaking, the titles and the judgment. The proceedings are composed of the facts which have preceded the judgment, and of those which have followed it.

With regard to the documents, and in the first instance the titles, it has been laid down by the preliminary observations, that the titles, styled the bills of exchange, announcing only the value received, without mentioning the nature of the value, were deficient with respect to one of the conditions prescribed by the French law for bills of exchange; but it

was at the same time proved that, as a general rule, these titles, although imperfect, were not on that account null, but that they were considered as simple promissory notes or promises; that in this particular case they ought even to be styled bills of exchange, their validity not having been disputed, and the judgment which acknowledges them to be bills of exchange having acquired the force of law. The judgment which has pronounced these titles valid is therefore become the most essential document in the suit. The validity has been fully appreciated as to the right which Mr. Lippmann had to cite a foreigner, his debtor, before a French tribunal, and as to the peculiar competency of the Tribunal of Commerce.

In its form this judgment offers nothing but what is regular, and conform to whatever is laid down by the French laws. As to the acts of proceedings, it has been proved in the judgment itself that the citation was served twice upon Sir Alexander Don, first at his last place of residence, Hotel de Richelieu, Rue Neuve, St. Augustin; but on the portress declaring that he had left that hotel four months before, and that he was supposed to be in England, without her however knowing in what part, the assignations were stuck up at the principal door of the Audience Court of the Tribunal of Commerce, and duplicates thereof were given to the King's Attorney General, who countersigned the originals. The fulfilment of these formalities has accomplished the point of law expressed in Article 698 of the Code of Proceedings, with regard to those persons who having lived in France are no longer resident there, and whose actual residence is unknown. Sir Alexander Don was in this case; he had left France without making known where he might be met with. The same formalities have been observed in signifying the judgment, and the order that followed it. The acts which are joined to the documents bear testimony thereof. There are therefore in the proceedings no informalities or defects which might cause its nullity. All the proceedings have been executed in conformity with the French laws, and the judgment receives new force from the regularity of the acts by which it is surrounded.

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This judgment therefore remains in this cause with all the authority of a judgment which has acquired the force of law; and the undersigned, on ending the honourable mission intrusted to them, hope that they may be allowed to submit the following consideration to the court of Edinburgh: — That it is of importance to the transactions which bind people of different countries, that obligations founded on the rights of nations should be respected every where, and that the tribunal in every country should lend itself a mutual support in order to cause them to be respected.

Done and deliberated at Paris this 20th day of June 1834. (Signed) JACQINOT PAMPELUNE, Ancien Procureur General près la Cour Royale de Paris. (Signed) BERARD DES GLAJEUX, Ancien Avocat General près la Cour Royale de Paris.

I the under-written, sworn interpreter of the Supreme Court of Cassation, the Royal Court of Appeal, the Court of Common Pleas, the Tribunal of Commerce, &c., do hereby certify that the foregoing is a true and faithful translation, agreeing with the original in the French language, which was presented to me, and which I have returned after putting my name and paraph thereto. — Ne varietur. Paris, the 26th July 1834. (No. 3741, Reg^re. C.) Approved of; three words erased being null. — (Signed) FREDERIC LAMEYER.

These are to certify that the above is the true signature of Mr. Frederic Lameyer, sworn interpreter of the Supreme Court of Cassation, &c. &c. &c., of Paris. — Paris, this 26th day of July 1834.

His Britannic Majesty's Consul at Paris.

(Signed) THOMAS PICKFORD.