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such short prescription, and therefore this debt must be allowed to be proven by witnesses ; and if it were otherwise, our merchants would neither get trust nor credit abroad, if strangers came to understand they would be cut off, where they had not pursued within three years. And they cited Sande, *Decis. Fris. lib. 1. tit. 12. dec. 5.* as also our own decisions, Galbreath against Cunninghame, No². p. 4430 ; and 15th February 1630, Ord against Duffs, *voce* PRESCRIPTION ; and 1st February 1665, Elphinston *contra* Rollo, *voce* WRIT. *Alleged* on the other hand, That seeing this was designed to affect a Scots estate, the same ought to be judged and regulated by our own law ; and nuncupative testaments, though valid in England, yet have no effect with us beyond L. 100 Scots ; and a testament made in Holland, testing upon heritage lying in Scotland, though valid by their law, has been rejected by ours ; And in a late case in 1691, between an English merchant and the Marquis of Montrose, (*See* PRESCRIPTION,) the LORDS refused to admit a debt contracted in Ireland after three years, to be proven by witnesses ; and if this were allowed, they might draw infinite sums of money upon Scotsmen to affect their estates, if they might constitute debts against them by the testimony of English witnesses, at any time they please, and after all the witnesses are dead. THE LORDS thought the inconveniencies very weighty on the other side, and were clear as to what was furnished to gentlemen and others, that were not actual trafficking merchants, (which was Montrose's case,) the prescription as to the manner of probation would meet these debts, if not insisted for within the three years ; but as to merchants, it was against the faith and credit of the nation, to obtrude that particular law against strangers ignorant thereof ; and so by a plurality, seven against six, they found the prescription could not be obtruded against these pursuers, it being *in re mercatoria*, and between merchants, and done in England ; and some added this special circumstance, that Sir James was an Englishman ; and others alleged, that the buying in gross and wholesale, would not prescribe among ourselves in three years, but only where merchant goods are sold out in retail. *See* PRESCRIPTION.

Fol. Dic. v. 1. p. 321. Fountainball, v. 1. p. 657.

1708. July 16.

JEAN THOMSON and JOHN HAY, Executors of JOHN HAY Taylor in London
against The EARL of LINLITHGOW and his Curators.

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An accmpt, though contracted in England, was found to prescribe accord-

IN a pursuit on the passive titles at the instance of the Executors of John Hay, against the Earl of Linlithgow and his Curators, for an account contracted by the late Earl at London, whereof the last article is in the 1695, it was *alleged* for the defender, That the account was prescribed, not being pursued within three years.

Alleged for the pursuers; *imo*, Prescription was interrupted by the execution of a general charge to enter heir in January 1697, within two years of the last article of the account, with a summons for payment executed in May 1698; which summons must be an effectual interruption; because, deducting a year's time after the late Earl's decease, during which the pursuers could not insist *cum effectu*, in respect of the defender's privilege of *annus deliberandi*, there are not three years betwixt the citation and the last article of the account. *2do*, The triennial prescription cannot be obruded, because the debt pursued was contracted in England, where no such prescription takes place; for in personal contracts, the law of the *locus contractus* must be the rule; merchants or tradesmen who trust foreigners, not being obliged to know the municipal law and customs of the place, where the debtors reside.

Answered for the defenders. The execution of the general charge could have no effect of interruption, because it mentions no particular debt, nor contains any conclusion for payment; nor yet could the summons interrupt, not being executed within three years. The *annus deliberandi* is not to be regarded; in respect the defender was served and retoured heir to the late Earl within a few months after his decease. *2do*, A pursuit in Scotland against a Scots man, can only be determined according to the Scots law.

THE LORDS sustained the defence of prescription. See PRESCRIPTION.

Fol. Dic. v. 1. p. 321. Forbes, p. 268.

* * * Fountainhall reports the same case :

THE Relict and Children of John Hay taylor in London, as his executors, pursue the Earl of Linlithgow, as heir to his uncle, for payment of L. 40 Sterling of a taylor's account owing to them by the last Earl, and offered to prove the furnishing of the work by witnesses. *Alleged*, The account is prescribed, the last article not being within three years of raising the process, and so can only be proven *scripto vel juramento* by the act 1579. *Answered*, Ought to be repelled, because an account taken on in England, where no such law takes place. *2do*, Interrupted by a general charge to serve heir, executed long within the three years. *3tio*, I could not legally pursue within his year of deliberation; and if that be deducted, both the charge and the summons are within the three years. *Replied* to the *1st*, The law of Scotland introducing a triennial prescription of tradesmen and merchants accounts *quoad modum probandi*, must only regulate this matter, being betwixt Scotsmen, and pursued here. To the *2d*, The general charge cannot interrupt, *eo ipso* that it is general, and does not bear a special condescendence of the debt for which it was sought, and then it might have done, as was found in Preston's case *contra* Lord Ballantyne, for supporting an inhibition served on such a charge. To the *3d*, The *annus deliberandi* can never be deducted here, for two reasons, *1st*, because the Earl was served heir to his uncle within the year, which was a plain renunciation of

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ing to the
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ment was
pursued for.

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the benefit of that delay. *2dly*, You could have pursued me within the year upon the other passive titles of behaviour as heir, vitious intromission, &c. *Replied*, A general charge may not be a sufficient interruption, where the party libels more grounds of debt than one; but here the summons contains nothing but this single account of L. 40 Sterling, and so the charge can be applied to no other subject but to this allenary. And as to the *annus deliberandi*, I was not bound to know you were served heir; and the most this argument could operate, was to deduct these months after the service, but *quoad* the months before, they cannot be counted in the prescription. Though these three points were very considerable, and that minority does not stop these shorter prescriptions, yet the Lords repelled them all, and found the account prescribed *quoad* probation by witnesses. See PRESCRIPTION.

Fountainball, v. 2. p. 454.

1717. July.

WILLIAM RAE against JANET WRIGHT.

No 59.

A merchant traveller having died in England, his brother intromitted with his effects *sine titulo*, and during the currency of the negative prescription of six years, introduced by the English act of limitation, retired to Scotland. Being sued, his defence was upon the said act of limitation, which the Lords sustained.

JAMES RAE, a merchant traveller, having died in England, his brother Richard, without any warrant, did intromit with his effects: For the equal half of which intromission, his executrix, Janet Wright, being pursued by William Rae, a third brother, her defence was, 'That the intromission having been in England, the action for restoring these effects or value, is prescribed by the running of six years, conform to the English statute of limitation, *cap. 16. Parl. 21. Jacobus I.*'

It was *answered*, That the statute has no place in this case; which must be judged by the Scots law, both parties having been Scotsmen, though sometimes they travelled into England. And *de facto*, before the lapse of six years after Richard's intromissions with what belonged to his brother James, he returned to Dumfries with his effects, and there continued to his death; during which time, the English prescription could neither run in his favours, being out of country, nor against his brother William, who could pursue no where else but in Scotland. Nor does this question fall to be decided by the English law, *ratione contractus*; for here was no written obligation, agreement, or contract betwixt the parties: The ground of the present action, is a plain delict, an injurious and vitious intromission with a defunct's effects; and the case is the same, as if Richard had robbed his brother in France or Holland, and retired with the effects to Scotland, and thereupon pretended to defend himself by foreign laws; and crimes and delicts, and their consequences, are more *juris gentium*, than contracts or obligations, punishable wherever the offenders may be found, *ne maneat impunita*.

Replied, It is a rule, that the *locus contractus* is only to be considered, according to the laws of which, action upon the contract falls to be regulated; and