

1737. *January 19.* MURRAY *against* COWAN.

No 62.

IN a process for recovery of money lost at play, with the triple value, founded upon the British statute, 9th Queen Anne, the defence was, That the action being brought upon a penal statute, and for a penalty, was fallen by the lapse of a year, in terms of the English statute, 31mo *Elizabeth*, cap. 5, declaring that no action shall be sustained upon any penal statute made, or to be made, unless within one year of the offence. And it was *pleaded*, that as this is a sovereign law in England, it must regulate the said penal British statute, 9th Queen Anne, the same way as if the limitation were engrossed in the act. *Answered*, It is by no means the same; the action arising upon the British statute, is in its nature perpetual, because not limited by the act. The act of limitation, so far as its authority goes, will found a defence so as to take away the action, *ope exceptionis* only; but as the laws of England have no authority here, the said act of limitation cannot be founded upon to bar the action. THE LORDS repelled the defence. See APPENDIX.

Fol. Dic. v. 1. p. 322.

1738. *February 9.*

RUTHERFORD *against* Sir JAMES CAMPBELL of Aberuchill.

No 63.

AGAINST an action for payment of an accmpt of furnishing made to a Scotsman at London, which was offered to be proved by the defender's oath, a no process was *objected*, founded upon the English act of limitation, which declares, that no action does ly after six years. *Answered*, *imo*, No penal statute is authoritative *extra territorium*. The English statute may have this effect in Scotland, to infer a presumption either that the debt is not due, or that it is paid; but, this presumption is taken off by the mean of proof condescended on. *2do*, Were the question to be tried in England, the statute would be found not to take place, because of a late statute *quarto Annæ*, cap. 16. § 19., which declares, That the prescription shall not run so long as the debtor is beyond seas; and the defender has been all along in Scotland, which is the same case. THE LORDS found the pursuit not cut off by the English prescription.

Fol. Dic. v. 1. p. 322.

* * Clerk Home reports the same case :

CAPTAIN RUTHERFORD, as assignee by Daniel Cockdale, coach-maker in London, to an accmpt of furnishings made by him to Sir James Campbell while at London, during the years 1724 and 1725, brought a process against

Sir James for payment, and referred the same to his oath. The defence was, That more than six years since, the last article of the accmpt being elapsed before the process was commenced, the action was cut off by the sixteenth article of the 21st year of James I. entitled, 'Act for Limitation of Actions,' &c.

Replied; That the judges in Scotland are bound by the law thereof only, and no laws made in a foreign country can have any authority here; an English prescription then, *qua* such, can have no more legal authority here than any other limiting, forfeiting, or penal statute made in England. So far may be true, that, where an accmpt is pursued in Scotland, contracted in England, which has lain over more than six years, the circumstances of the case may infer a presumption that the debt is not resting owing; and a reasonable presumption it is; for the man, who, in his own country, has delayed making any demand for payment, and allowed the door to be shut against him by prescription, may well be presumed, in another country, to have nothing to claim; and this presumption ought to meet him bringing his process here, after he is cut out by the laws of his own country; therefore, the English act can never be pleaded higher than to the effect of establishing a presumption in the law of Scotland that the debt is paid, or not due. But, as to the penal consequences of annulling the claim, and denying action after six years, which are merely statutory, these things can never be pleaded in Scotland, because we have no such statute; and, when the matter comes to this, there can be no question that a presumption of this, or any other kind, may be taken off by a contrary proof.

Duplied; From the words of the act, it appears, *imo*, That, by the lapse of six years, the action is *funditus* taken away. *2do*, That there is no exception, as in our acts, for the triennial prescription, unless the debt be proved to be resting owing, by the oath of the defender; and, since there is none such in the English statute, the pursuer cannot be permitted to borrow such exception from the Scots statute, and annex it to the English one, which appears to cut off the debts contracted in England by the six years prescription, as entirely as our long prescription of 40 years, which leaves no room for a reference to the oath of the defender.

Triplied for the pursuer; Where the creditor lives in one country, and the debtor in another, it appears a pretty arbitrary question, Whether the law of the one country or the other must be the rule? But, be this matter as it will, it can have no influence upon the present question; for, granting that the English prescription is the rule, yet it can never be such a governing one here as it is in England; as an English statute, it cannot so much as be pretended that it has any legal or coercive authority here: What then remains further than this, to infer a presumption that the debt is paid, or not due, where the creditor has allowed the door to be shut upon him by the laws of his own country? Though this should be sustained as a presumption in our law, there can be no doubt that, were it ten times stronger, it may be taken off by the defender's oath. At the same time, it must be taken notice of, that the de-

No 63.

fence can scarce be reared up into the shape of a presumption, in this case, where the defender retired soon after the date of the furnishing, and has continued here ever since, and doth not so much as pretend that he has made any satisfaction or payment.

For the defender, the decision, *Rae contra Wright*, No 59. p. 4506., was quoted; and, for the pursuer, *Thomson and Hay contra Earl of Linlithgow*, No 58. p. 5404.

THE LORDS found, That Sir James Campbell not having lived six years in England, from the date of the last article in the accompt, the pursuer's action does not fall under the act of limitation.

N. B. It appears, from a memorial in this case, That it occurred as a doubt to the Lords, at advising, whether the statute of limitation could have place in this case, though the action had been laid in England; seeing the defender did not continue there six years after the furnishing; and, upon this head, it was observed, that, by the above statute, if the plaintiff be beyond seas, the prescription runs not against him; but that there is no exception therein, with regard to the defendant; which, however, was altered by the act *quarto Annæ*, c. 16. § 19.

C. Home, No 92. p. 144.

No 64.

Against a suit here for payment of a promissory note contracted in England, the defence was sustained that the debt was extinguished by the English prescription of six years.

Foreign statutes have no statutable authority *extra territorium*.

What effect is given here to foreign statutes.

1740. November.

SAMUEL GROVE against JOHN GORDON, Esq.

GROVE brought a process against Gordon, for payment of L. 160 Sterling, in a holograph promissory note, granted by Gordon to Sir Archibald Grant, dated London, 11th November 1730, to which the pursuer had right by indorsation. The defender did not pretend the debt was paid, nor extinguished by any transaction; nor did he state any particular fact to show that it was an unjust debt, but rested his defence upon the statute of limitations in England; insisting, the claim was extinguished by prescription; that no action would be sustained in England; and that if the claim was voided in the *locus contractus*, it could not be revived by bringing the action in another country. This defence was endeavoured to be supported by analogy, *imo*, Of a Scotch bond informal by the act 1681, and therefore null, which it was averred would not produce action in France, nor in any other country where the law of nations is understood. *2do*, Of an usurious bond in Scotland, stipulating more than the legal interest, which would not produce action in a foreign country, even where the legal interest is equal to that stipulated in the bond. And *3tio*, Of the *exceptio rei judicatæ*, which can never be stronger than an exception founded upon a statute, and yet is sustained in all countries.

In answering this defence, it was premised, that foreign statutes have no coercive authority *extra territorium*; and therefore, that they cannot be pleaded to any effect here, other than to furnish arguments from equity, or from any