No 64.

Upon the plan of the pursuer's pleading, which appears just and solid, the statute of limitations, when pleaded in England, has an effect different from what it has when pleaded in Scotland. In England it is calculated to bar action; and therefore, in England, action could not have been sustained upon this promissory-note. But in Scotland, where the statute can only be considered as an argument, not as a law, action ought to have been sustained upon the promissory-note, being a good evidence of the debt *jure gentium*. The defence upon the presumed extinction ought to have been found relevant at the same time; but that it was elided by the answer, to wit, that the defender did not so much as say, Satisfaction was made.

Rem. Dec. v. 2. *No* 16. *p.* 29.

1742. *December* 2. Simon Lord Lovat *against* James Lord Forbes.

No 65.

A promissory note granted in London by a Scotsman residing there to another, and payable on demand, falls under the English statute of limitation, if no action be brought within six years.

Lovat, happening occasionally to be at London in August 1720, lent William Lord Forbes L. 100 Sterling, for which he took his promissory note, 'obliging himself to pay the said sum on demand;' and, upon William's death, he brought an action against James, as representing his brother William, for payment.

The *defence* was, That, for some years before the date of the note, William Lord Forbes resided constantly in London, and, before that period, had never fixed his domicile, or place of residence, in Scotland; that soon after the 1720, he married an English lady by whom he got a considerable fortune, and was thereby in a condition to have repaid this money, which it is presumed he did, as the defender never heard of this claim until the date of this summons. Further, from the time of the debtor's marriage he had a fixed residence in London with his family, until the 1728, save once that he was occasionally in Scotland for a few weeks; and that London being the *locus contractus*, the security payable on demand, which behoved to be the debtor's dwelling-house, or place of residence, and no demand having been made within the years of prescription, the same was cut off by the statute of limitation.

Answered; The defence resolved in the negative prescription, arising from the laws of a foreign country, to which the pursuer could not be subject, but during the period of his residence there; which never happened for any space near equal to the number of years required by the statute to establish a prescription; therefore there were no *termini habiles* for prescription in this case, which could never commence against the pursuer so long as he remained under the authority of the law of Scotland; neither could he be reckoned negligent, which is the foundation of the negative prescription within six years, as ordained by the statute of limitation, when he did not reside there. Further, this doctrine is agreeable to the principles of most lawyers, That all personal claims are subject to that jurisdiction where the creditor has had his residence; and, it

must add some weight to it, that the debtor in the note had likewise his dignity, estate, and principal dwelling-house in Scotland, albeit he may have had some temporary residence in England; but it can never infer an alteration of one's domicile, that he may have occasionally, for a certain purpose, resided elsewhere. Nor can the *locus contractus* support the English prescription in this case, unless the defender will maintain that the debtor could not have been pursued in Scotland, which it is impossible to do, as the noble Lord the debtor was a Scotch peer, and had his domicile, or *summa rerum et fortunarum*, there. It was surely competent for the pursuer to have brought this action against his debtor in England, *ratione contractus*, if he found him there, or to have insisted against him here *ratione domicilii*, or *rei sitæ*, at any time within the space of 20 years, according to our law. The form of promissory notes is promiscuously the same in both countries, and the demand being now made within the period limited by our statute, ought to make our laws govern the decision of the present question preferable to those of another country. See Andreas Gaill, lib. 2. observat. 124. § 16. *l.* 7. *C. de incol. l.* 17. § 13. *ff. ad municip.* 7th Feb. 1672, Commissaries of Edinburgh, *voce* FORUM COMPETENS; 16th July 1708, Thomson, No 58. p. 4504.; 25th July 1732, Rodgers, No 60. p. 4507. No 65.

Replied for the defender; That though one might have a *forum competens* in many different countries, *ratione originis, domicilii, rei sitæ, et contractus*; it did not from thence follow, that there might be as many different prescriptions, as there are different *fora*, where a party may be sued in judgment. In the next place, the law of the country where the debt is contracted, and which is presumed to be the *locus solutionis*, if another place is not specified for that purpose, must regulate the effect of any obligation, and consequently the endurance of it. This doctrine seems to be founded in the principles of the law of nations, and is, in effect, a consequence of admitting an obligation or contract executed abroad to have its full effect here, *e. g.* one residing in London could not be found fault with, for having paid that debt without a written discharge if the law of England allowed a proof by witnesses of such payment to be effectual in discharge of the debt, and therefore it would be most unjust, if the creditor finding his debtor personally in another country, should object to the proof by witnesses of such payment. The same absurdity would occur with respect to prescription, which is no other than a legal discharge of the debt. A debtor in England, against whom no action has been brought within six years, thereby obtains a general *quietus*, an absolute discharge of the debt in all time coming, and therefore need not be solicitous about preserving any discharge in writ, or proof by witnesses, when the law of the country where the obligation was granted, and where he resided for the time, has given a general absolvitor; to suppose, therefore, that this person could be attacked for payment of this debt, in all the other countries of Europe, where he might happen to have a *forum competens* at the time, and that it should not be competent for him to defend himself, in the same way and manner he could have done in

No 65. England, would be absurd. In a word, it is not to be doubted, that if the obligation is released *quocunque modo*, according to the law of the country where the debt was contracted, and where payment fell regularly to be made, but that discharge must meet the obligation in any part of the world, where it is made the ground of action. As to the pursuer's argument, that prescription must be regulated *secundum leges fori actoris*; it is plainly inconsistent with the first principle of law, *actor sequitur forum rei*, as well as the opinion of the doctors; besides, the form of the note shows, it was not intended for a permanent security, as it was made payable on demand; and as that behoved to be personally to the Lord Forbes, or at his dwelling-house for the time, it must have been in the eye of parties, that the money was to be repaid at London, which therefore was both the *locus contractus*, and the *locus solutionis*. See Huber in his *prælect. de conflict. leg. divers. Voet, lib.* 1. *tit.* 8. § *ult.* 16th November 1626, Galbraith, No 10. p. 4446.; 21st February 1633, Balbirnie, No 11. p. 4446.; 7th February 1634, Hyde, No 12. p. 4447.; 10th January 1702, Chatto, No 13. p. 4447.

The Lords found, That the statute of limitation governed this case; but remitted to the Lord Ordinary to hear parties, whether the pursuer's residence in Scotland stated him in the case of the exception from the act (beyond seas?)

C. Home, No 210. *p.* 350.

1742. *December* 9.

Colonel James Cathcart, Pursuer, *against* George Middleton of London, Banker, Defender.

No 66.
Case undecided relative to the statute of limitation, James I. of England, *anno* 21. *cap.* 16.

The pursuer brought a process against the defender, the scope whereof was, that he, *anno* 1720, put into Mr Middleton's hands, at London, L. 3000 Sterling, to be employed by him in purchasing South-sea company stock, sold by the company, by the third money subscription; and the defender having undertaken that office, in which he failed in the due execution, therefore he was liable to repay the same to him with interest and damages.

The defender denied the fact charged in the libel, and *pleaded*, That the negotiation being averred to have been entered into and transacted in England, all demands arising, or supposed to arise upon it, must be governed by the *lex loci* where the transaction was had; and, by the above statute, actions of debt, actions upon the case, and actions of account, are to be commenced within six years after the cause thereof accrued, and not after; and therefore, since the date of the transaction is said to have been in the famous year 1720, and no action brought, or even demand made, till after more than twice six years were run, the same is barred by the statute.

Answered for the pursuer; That the suit being brought in Scotland, the limitation introduced by the law of England could not bar or stop the same, since no such prescription was known in our law, of which the rules could alone