

ferior to Kelso's. Besides, Kelso does not seek to divert the burn at all, being satisfied with its overflowings.

ALEMORE. This is not a fountain rising in Boyd's ground, but a rivulet running through different grounds. Every one may use it. None can divert it.

PRESIDENT. I am of Lord Alemore's opinion. I do not, however, say that, if a spring arose in a man's ground, he might not divert it; though, if he did not divert it, the consequence would be, that it might join below with other springs.

On the 30th June 1768, the Lords found, in substance, that the superior heritor could not divert the burn so as to prevent its returning into the channel for the behoof of the inferior heritor; adhering to the interlocutor of Lord Coalston.

Act. D. Rae. Alt. R. M'Queen.

1768. July 13. JOHN RANDAL *against* ALEXANDER and GEORGE INNES.

TRIENNIAL PRESCRIPTION

Takes place on Debts contracted by a Scotsman in England, if claimed in Scotland.

[*Faculty Collection, IV. 310; Dictionary, 4520.*]

MONBODDO. The decisions and authorities are so opposite that I do not know what to make of them. I despair of seeing our law determined by decisions. Here we must resort, as I would always wish to do, to principles and the authorities of the best lawyers. [All this is contradictory. It amounts to this, that a decision upon principles is a decision upon his principles, and that the best lawyers are *they* who support his opinion.] With respect to the constitution of obligations, the law of the country where the contract is entered into, must be the rule. A debt contracted after the English manner, may in this country be extinguished in the same way. This rule will go to prescription, which is presumptive payment. If the parties had continued in England during the six years, and no demand had been made by the creditor, if afterwards the debtor had come to Scotland, there could be no demand. If, on the other hand, prescription were not run by the law of England, when the debtor left the country, the creditor would be entitled to payment in Scotland. A man cannot be freed from his debt by leaving the country, and settling in Scotland. But when a man settles in Scotland, the Scottish prescription must be the rule. After he settles in Scotland, the debt will prescribe by the law of Scotland in three years. This is agreeable to the last and best decision,—that in the case of M'Neil.

GARDENSTON. Of the same opinion. If the rule is not to be according to the law of this country, there can be no limitation at all.

COALSTON. No statute has any authority beyond the territory where it is

made ; but still the great ends of justice cannot be attained without adopting the regulations of other countries in particular cases. All voluntary acts, done in a foreign country, must be tried and determined according to the law of that country. The present question is, How far can the statute of limitations be founded on *here* ? If the debtor has resided in England, and, by his residence for six years, has obtained a liberation, he will not again be subjected to the debt when he comes to Scotland ; but if he comes to Scotland before the six years are expired, and remains there unchallenged for three years, he is free, upon the principles of the law of the country where he resides.

AUCHINLECK. The great end of judging is to do justice. Prescription is a very proper political institution to quiet the minds of the people ; but it is dangerous to say that, in all cases, we must determine upon prescription by the law of Scotland. If a debt prescribes in six years by the law of England, it would be hard to make it subsist for 40 years, merely on account of the debtor coming to Scotland. On the other hand, if a man who is liable in a debt, which would not prescribe in less than 40 years by the law of Scotland, should go into England, it would be hard to make that debt subsist but for six years. It is objected that there will be inconveniences in subjecting one coming into Scotland to the clauses of Queen Anne's Act of limitation, for, that thereby the ground of action might subsist for ever. I answer, that, as in the case of bills, which do not prescribe before the lapse of 40 years, action is denied, if they lie ever long without cause shown ; so action would be denied in this case. And, on the other hand, as in bills, action will be allowed, when a cause of silence is shown : So also, in this case, action will be allowed.

PITFOUR. The Scots prescription ought to be sustained in all cases. We know no other prescription but our own. The statute of limitations may be urged as an argument for affording a presumption of payment, but it cannot be urged as an authority in law. It may be objected, that a man may be induced to leave England where he is liable in a debt, and come to Scotland, where he will be free by the triennial prescription : I answer, that it is not conclusive to argue from a case which will very rarely happen. Few debtors will choose to change their domicile in order to avoid a single debt : Be this as it will, we must not alter the law on account of contingent inconveniences. If the judges of every country determine according to the prescription established in their own law, every debt will prescribe, unless there be a country where there is no law of prescription at all. In matters of form, the law of the country where the contract is entered into, may be followed, because, as to form, people are obliged to follow the only rules that are known to everybody ; and, in a question of form, everybody knows what the rule is, so that there can never be any difficulty of coming to the knowledge of it. But we cannot judge upon the principles of any foreign law, especially of the law of England. It is inscrutable : we get precedents in abundance, but we do not get all precedents : we have but partial views of that law presented to us. Whenever we judge by the law of England, we judge wrong : the fault is not in judging wrong, but in pretending to judge at all where we are ignorant.

PRESIDENT. The judge who spoke last has treated his predecessors with great freedom. If the law of England is so inscrutable, how comes he to be so

well acquainted with it, and so able to point out the errors of the judgments of the Court of Session in matters of that law? I do not entertain the apprehensions that he does. In cases of necessity the law of England may be resorted to. I have been early taught that foreign law is fact, and, like all other facts, the knowledge of it may be attained. It is nothing that English lawyers and English judges differ in opinion, as the lawyers and judges of all countries do: We ourselves daily differ as to the principles of the law of Scotland; and there is no remedy. If a plea is made, that an obligation is extinguished by the *lex loci* where the obligation was entered into, we must inquire *what* is that *lex loci*, and so determine. If we should find that the statute of limitation does not take place in Scotland, still it may be good in England, and the debtor returning thither might be tried according to the English law. Here there is a defence pleaded upon the law of Scotland, not an extinction of the debt by the law of England; and the defence seems, *hoc statu*, good.

HAILES. I have still a difficulty arising from the situation of the parties. The royal regiment of artillery is in a singular situation; it is a *stationary* regiment, having always its colours and its head-quarters at Woolwich. An English tailor contracts with an officer of that regiment: supposing him to have a fixed domicile, he knows that his contract will not prescribe in less than six years; and, if his debtor leaves England, he supposes that the prescription will not continue to run: the debtor is ordered across the Tweed, upon detachment, by his commanding officer: he does not mean to evade his creditor, he only obeys his commanding officer: he dies in Scotland. And thus his debt will be annulled without any intention on his part, and without it being in the power of his creditor to prevent it. What I mention relates to that part of the account which was furnished in England; for, as to what was furnished in Scotland, I have no difficulty: it must prescribe according to our law.

JUSTICE-CLERK. I consider the prescription of the country where the obligation is entered into as one of the modes of extinguishing an obligation. But when a person comes into this country *animo remanendi*, while a ground of action subsists against him, I know of no law by which we can determine upon that action, but our own law.

KENNET. This cause is to be determined by the prescription of the Scots law. This is agreeable to the opinion of Huber Sande. I think this must be the case even as to the debt contracted in England, for there is no particular place of payment stipulated; and, therefore, the *locus solutionis* must regulate the payment, that is, Scotland, where the debtor resided.

On the 13th July 1768, the Lords sustained the defence of the triennial prescription (without a vote.)

Act. A. Wight. *Alt.* Cosmo Gordon.
Reporter, Auchinleck.