

*Pleaded* for the Trustees; *imo*, As the note in question was granted for annualrents of sums uplifted by James Baillie, as factor for Sir Thomas Renton in Scotland, it was a Scots debt, and therefore ought to be regulated by the law of Scotland.

*2do*, If it fell to be regulated by the law of England, then, as James Baillie went out of England into Scotland immediately after granting the note, he falls under the exception contained in the act of the 4th of Queen Anne, cap. 16. § 19. importing, that the prescription shall not run in favour of a defender during the time he is beyond seas.

*Answered* for Robert Baillie; The exception in the act of the 4th of Queen Anne, relates to defenders gone beyond seas, but not to defenders gone into Scotland.

*Replied* for the Trustees; The exception contained in the act of the 4th of Queen Anne being an equitable provision, ought to have an equitable interpretation; in which view, it would fall to be extended equally to those retired into Scotland as to those gone abroad; for the only reason why prescription is refused to a defender beyond seas, is, that the creditor has not an opportunity of suing him in England; but neither has he such opportunity when the defender retires into Scotland.

Such extension will be agreeable to the analogy of interpretation on the exception contained in this statute.

Jersey and Guernsey, in the letter of the exception, are beyond seas; but, in the interpretation of it, they are not. Prescription is still allowed in the law of England to run in favours of a debtor retired into either of these islands, though both are beyond seas; it is then the spirit, and not the letter of the statute, that is to be attended to.

‘ THE LORDS found action lay on the note.’

Act. *J. Dalrymple.*

Alt. *Hamilton-Gordon.*

Clerk, *Forbes.*

*J. D.*

*Fol. Dic. v. 3. p. 220. Fac. Col. No 156. p. 234.*

1761. *March 2.* GRIZEL MACNEIL *against* RODGER MACNEIL of Taynish.

ON the 7th October 1720, Hector Macneil, residing in Ballyfillip in Ireland, drew a bill upon Hector Macneil of Taynish, then in Ireland, which was duly accepted. Both drawer and acceptor were natives of Scotland. The bill was in the following words: ‘ Ballyfillip, 7th October 1720, Sir, against the first day of February next to come, pay to me or my order, at the dwelling-house of Mr Neil Macneil at Belfast, the sum of L. 100 Sterling money, value received by you from me. Pray, make thankful payment, and oblige,’ &c.

In the year 1750, Grizel Macneil, indorsee to this bill, brought an action against Roger Macneil, the representative of Hector Macneil of Taynish, acceptor of the bill.

No 68.

Irish statute of limitations not a defence against an action in Scotland, when the defender has not resided six years in Ireland after contracting the debt.

No 68.

Roger's *defence* was, That the bill having been granted in Ireland, fell to be regulated by the statutes of limitation; and was therefore prescribed by the lapse of the six years contained in those statutes.

*Answered* for the pursuer; She is safe under an exception in one of those statutes, which imports that the prescription shall only take place when the person who pleads it has remained, six years after contracting the debt, in the kingdom, whether of England or Ireland, according as the prescription is pleaded in the one or other; for the fact is, that neither the acceptor of the bill, nor the defender his representative, ever resided six years successively in Ireland after granting the bill, they having both had their ordinary residence in Scotland.

The Irish statutes of limitation founded upon are copied *verbatim* from the English statutes of the 21st of James VI. c. 16. and the 4th of Queen Anne, c. 16. A view of the history of these statutes will shew that the pursuer's answer to the defender's defence is well founded.

At common law in England, there was no limitation of actions: Limitations of actions were only in virtue of statutes; for so Lord Coke says expressly. One of these statutes was the 16th of the 21st of James VI. It declared, 'That all actions of account, or upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending, &c. shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, and the said actions for account, and the said actions for debt, within six years next after the cause of such actions or suit, and not after.' To which is subjoined the following exception: 'That if any person or persons, that is or shall be entitled to any such actions of accounts, actions of debts, be, or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *femme couvert*, *non compos mentis*, imprisoned, or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to, or being of full age, *decouvert*, of sane memory, at large, and returned from beyond seas, as other persons having no such impediment should have done.'

Upon this exception, it will be observed, that, if the plaintiff was beyond seas, the prescription did not run against him, and he was at liberty to commence his suit six years after his return: But in the statute there was no exception with regard to the defendant; and the old law still remained, that the prescription did run, even though the defendant was out of the country; though there was the same reason that the law should have been the same with regard both to the plaintiff and defendant, to wit, that it should not run against the plaintiff, nor for the defendant.

The error of this omission was afterwards seen ; and therefore it was remedied by another statute, to wit, *4to Annæ, cap. 16. § 19.* in which it was enacted, ' That if any person against whom there is any action of account, or upon the case, or of debt, grounded upon any lending, &c. be, at the time of any such cause of suit or action given or accrued, beyond the sea ; that then such person who is entitled to any such suit or action shall be at liberty to bring the said action against such person or persons, after their return home from beyond the seas, within such times as are respectively limited for the bringing of the said action by this act, and by the act made in the 21st of James VI.'

From which it is as plain as the words of the statute can make it, that, since the defender, after accepting the bill in question, went beyond seas from Ireland into Scotland, and was not constantly in Ireland six years after returning into it from beyond seas again, that he falls under the exception of this last statute, which saves the prescription where the defendant has not been six years in Ireland after returning from beyond seas.

' THE LORDS found, That action lay on the bill.'

Act. *J. Dalrymple.*

Alt. *Hamilton-Gordon.*

Clerk, *Forbes.*

*J. M.*

*Fol. Dic. v. 3. p. 220. Fac. Col. No 26. p 52.*

1767. February 14. WILLIAM EWART against JOHN GOURLAY.

JOHN, an Englishman, having become indebted to William, in the year 1757, in a sum of money paid by him for John, he, William, in 1765, obtained a border-warrant from the Sheriff of Berwickshire, and did arrest the person of John, who found caution *judicio sisti et judicatum solvi.*

William thereafter insisted in an action against him and his cautioner for payment.

*Pleaded in defence,* That this debt having been contracted in England, fell to be regulated by the laws of England ; and, if so, it was cut off by the statute of limitations, 21st Ja. I. cap. 16. *2do,* The defender condescended upon certain circumstances, from which he argued, that a clearance had been made, and the debt discharged.

The Sheriff found it presumed, ' That there had been a total clearance betwixt the pursuer and defender ; and therefore found the action not relevant, after so great a distance of time, unless instructed by writ, or the defender's oath.'

The cause was brought before the Court of Session by advocacy, in which it was *argued,* That the defender could not avail himself of the defence founded on the statute of limitations, in respect the pursuer offered to prove, by sundry witnesses, that the defender had acknowledged the debt within the years of prescription, which, it was said, by the authority of all the English

No 68.

No 69.

In an action brought for payment of a debt, the defence of prescription, founded on the statute of limitations, was eluded by an offer to prove a promise of payment by witnesses, within the years of prescription.