

DIVISION VII.

Prescription, by the Law of which Country regulated.

1664. November.

GRADEN *against* RAMSAY.

IN an action pursued by Grace Graden, as executrix to John Graden her father, against Dr Ramsay, for payment of a certain sum, contained in a bond made by the said Doctor, and some other persons, to the said deceased John, it was *alleged* by the Doctor, That the bond being subscribed many years ago by the Doctor, and other friends of the Earl of Holderness, a little after his death, and the money truly employed in defraying his funerals, the same was truly paid back by the Earl's executors; though after so long a time the Doctor cannot now instruct the same; but he *alleges*, that the bond can furnish no action against him, because it was granted at the time when both subscriber and receiver of the bond were all living in England, and the bond is dated in England, where the money was received; and therefore, as in England bonds of that antiquity do prescribe, so ought this bond, being now pursued in Scotland. It was *answered*, That the creditors and debtors were all Scotsmen, and the bond drawn after the Scots form, and appointed to be registered and to have execution in Scotland; and therefore it must be ruled according to the law of Scotland.

THE LORDS repelled the allegiance.

Fol. Dic. v. 1. p. 321. Gilmour, No III. p. 82.

No 56.

A bond granted in England being prescribed by the English law, while the parties resided there, was afterwards made the foundation of process in Scotland. The Lords repelled the English prescription, in respect the bond was drawn in the Scots form between Scotsmen, and bore a clause of registration in Scotland.

1695. January 11.

SUSANNA PHILIPS and JOSEPH SHORT *against* JAMES STAMFIELD of Newmills.

WHITELAW reported Susanna Philips and Joseph Short *contra* James Stamfield of Newmills, on a very nice point. These English merchants had furnished merchant-ware to Sir James Stamfield in 1679. When they now pursue his heir, for constituting the debt, it is *objected*, the debt is prescribed as to the manner of probation by witnesses, not being pursued for within three years after contracting. *Answered*, That being only a local and municipal statute, derogating from the common law of nations, it cannot take place against strangers, and the *consuetudo loci contractus* must be the rule. But England hath no

No 57.

In an action for payment of furnishing made at London, the defence of triennial prescription was repelled.

No 57.

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, No 2. 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.

No 58.

An accout, 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.