1783. *July* 30. ABRAHAM DELAVILLE and OTHERS *against* MARTHA GROVES and OTHERS.

FOREIGN.

Application of Scottish prescription to English bonds.

[*Dict.* 4525.]

ESKGROVE. This is the first example that I know of an attempt to get the better of our long prescription, by bringing in the law of another country. It has been taken for granted by one side, that, in England, there is no prescription. In proof of this, there is nothing produced but the opinion of lawyers, which do not prove the fact; and I cannot believe that *that* is the case in England, or that the jurisprudence of that country is so incomplete. But, even supposing that, I hold that our proceedings must be according to the law of Scotland. It is said that the place of the contract, and the residence of the parties, and the place of payment, are in England, and therefore that this case is to be decided by the law of England. *Answer*,—This is good as to the constitution of a debt. We must always inquire whether there is a debt or not. This depends on the law of the place where the contract is entered into; and, as to transmission, if the conveyances are granted in England, the same rule must take place. If a debt is extinguished by the transaction of parties, or by a discharge, the form of the law of the country where payment is made must be the rule. The present question is different: it is, "Whether the Court is authorised to sustain action, and give execution on a debt, after a silence of fifty or sixty years?" The acts 1469 and 1617 are clear, and they make no distinction as to countries. In all the questions concerning the short prescriptions, was it ever doubted that, in a case like the present, the long prescriptions took place? In prescription it is not the *debt* which prescribes, but the *action*. This may be well illustrated by the act 12 Geo. III. It is there provided, that, after a certain term, bills shall be *of no force or effect to produce diligence or action*. This relates to foreign bills as well as to home bills. The statute as to the prescription of bills is not just the same in England; for in England there is no proof of resting owing allowed. There, before the statute 12 Geo. III., and even since it, a debt may not be recoverable by the English law and yet be good in Scotland. As to the *forum domicilii*, it is a good, though not a permanent *forum*. When a debtor goes into another place than that of the contract, that place becomes his domicile. [Here he quoted Huberi *Opera Minora*.] As to the *forum rei sitæ*, if the question as to it is tried in any country, the determination will be *res judicata*, to any extent, all the world over. This was fully confirmed, on appeal, in the case of *Fraser* against *Sinclair*. In questions respecting the short prescription, the Court remained long in a state of vacillancy. Of late years, however, it has disregarded the law of every country but its own. So it did in the case of *Randal* against *Jones*. It is true that, in that case, the debtor had been three years in Scotland; but *that* was not the ground of the judgment. I think that, although the debtor had been but one day in Scotland, the plea of prescription would

have been good, because the creditor had always been *valens agere*. In the case of *Barret* against the *Earl of Home*, the defence was laid on the triennial prescription that had run in the lifetime of the Earl, although not a day of the term of prescription had run by the law of England, for the Earl was out of England all the time.

It is said that here is an English company. But if there ever was a company translated into Scotland, it is this. They were the greatest landholders in the nation. There was no creditor that did not know this. They were all cited edictally, yet they never produced anything to support their debts. If the creditors can now pursue in England, let them do so; and, if they obtain judgment, let them come here, and the Court will determine as to the consequences of that judgment: but, at present, we must judge by our own law.

SWINTON. No law can extend beyond the territory in which it is made. As to the constitution, subsistence, and extinction of a debt, the place of the contract must be the rule. Execution must be according to the law of the place where execution is sought. If the act 1469 respects foreign debts, so also must the act 1681 ; and yet the act 1681 certainly has no effect as to foreign obligations. As to the triennial prescription, I think that the decision in the case of the *Earl of Home* was erroneous. [He quoted the case, *Grove* against *Gordon*, 1740, in Kaimes's *Select Decisions*, and Dirleton, *voce Process against Strangers*, and Stewart's *Answers*.]

KENNET. In the constitution of debt the *lex loci* must be the rule. A statute cannot be extended beyond its territory. Here I do not desire more: I only give the statute effect within its territory. The case of *Randal* did not govern the question of residence for three years, and that circumstance did not occur at all in the case of *Lord Home*.

MONBODDO. The debts were originally English,—the question is, Whether ought the accident of the company having acquired subjects in Scotland to make any alteration? A good apology may be made for the silence of the creditors: they did not expect any payment, but the prospect is now better. It is admitted that the English law must be the rule in part. The question here is as to extinction or preservation of a debt. With respect to the inconveniency of judging according to the law of England, there is no difficulty; for that law, as to us, is matter of fact, of which we may be informed, just as of any other matter of fact; and, in this very case, we have determined that the limitation of a debt is to be judged by the law of England. As to *Lord Home's* case, he had a domicile in Scotland, and, consequently, might have been pursued here: so that decision may be well supported. Prescription, short or long, must be judged on the same principles. The *forum domicilii* is the rule. The company had no domicile in Scotland. The *forum rei sitæ* is nothing. I wish that, in a case of this nature, all the judges may deliver their opinions; for I know that, *in another place*, those opinions are called for, and are of weight.

HAILES. I do not know what the practice is in another place, nor by what authority opinions are called for *there*, or how they can be produced *there*. But, if any one should do me the honour to call for my opinion, I must answer, that it has been given by Lord Eskgrove, to which I have only to add, that I do not well understand the decision, *Grove*, in 1740, collected by Lord Kaimes; and,

though I do not understand English law, I can see a mistake in the decision as collected: for it says, that, with respect to England, Scotland is not *beyond seas.* This may be geographically true, but it is legally untrue; for the law of England holds that Scotland *is* beyond seas, while Ireland *was* not beyond seas. Whether it continues so or not I cannot tell. As to the case in Dirleton, it relates to the constitution of a debt, and it points at means of inquiring into foreign law, which are not followed in modern practice.

GARDENSTON. During the whole course of 40 years the company had a *forum* in Scotland, and was amenable to this Court. Here is no personal conclusion, but only an attempt to secure the land by adjudication: a *forum*, in consequence of landed property, is the most effectual one, although other forums may be competent.

If there is any one article in our law that does honour to the sagacity of our ancestors, it is the law of prescription: one reason assigned for that law is, *to quiet the minds of the lieges.* If the English law be let in, both negative and positive prescription will be in danger. I cannot distinguish between short and long prescription: indeed, he who is cut off from his debt in three years, has more cause to murmur than he who has had forty years, within which he might have pursued for payment. The decisions on the triennial prescription are in point. Here the debtor did not reside in Scotland, but he was always amenable to our courts, and his estates might have been attached.

There is a real debt *here*: this is a strong point. The debt was originally personal, but it is now secured on land. If a creditor has a personal bond in England, and an heritable bond in Scotland, the personal bond might subsist, and yet the heritable prescribe. *Here* is an example of two forums, and each country will judge according to its own law. By the law of England there are certain debts not good against the heir; but, if the heir is pursued in this country, the Court will give relief.

ELLIOCK. It is admitted that execution must lie by the law of Scotland: is it not strange that the law of Scotland should not be allowed to try whether there be a debt at all?

BRAXFIELD. A company erected in England has its only domicile in England even at this day: it has an estate in England, but its creditors have attached its estate in Scotland. In the constitution of all obligations the *lex loci* is the rule; and in the transmission, the *lex rei sitæ*, whether as to *mobilia* or *immobilia*: the *domicilium debitoris* is the only universal forum for trying the existence of a debt. I must suppose that, in this case, prescription does not take place in England: if it did, there would be no cause. A creditor asks a personal decerniture,—the objection is, that the debt is prescribed: the creditor answers, I am not asking any estate, but only a personal decerniture: as long as the debt is subsisting, *that* cannot be denied. The law of Scotland does not require a man to take a decreet merely for the purpose of interrupting the negative prescription: if I can get nothing in England I come to Scotland, where I expect to get payment: and as my claim still subsists in England, I am entitled to a decree.

It was observed by Lord Advocate, that the statutes concerning negative prescription are general. *Answer*, There are many implied exceptions, and this one of them. [The notes of Lord Braxfield's argument are very imperfect

this is owing partly to my not comprehending exactly the import of his reasoning, and partly to the fatigue and heat which I suffered.]

HENDERLAND. This question occurs in a competition of creditors, and the principal debtor appears. The negative prescription is objected. *Answer*, The statute does not apply to English debts: the statute is a Scots statute: it cannot go beyond its territory: from the nature of the obligant power, it could not affect strangers. Can we say that a Scots law is to regulate the conduct of Englishmen? We must judge by our own law; but we must judge only of what falls under that law. We never can extend our own law into other countries. The York Building Company, it is said, have had estates in Scotland for forty years: this makes no difference. Had they not bought lands, the purchase-money would have been in England: had they sold the estates, the price would have increased their stock in England. The English creditors cannot be hurt by this when they make their claims. I admit that the cases of *Randal* and the *Earl of Home* are puzzling; but I suppose that in them the defenders had no domicile in England, and that the Court determined on that circumstance.

On the 30th July 1783, "The Lords found that the negative prescription took place."

Act. Ilay Campbell, &c. *Alt.* H. Dundas, &c.

Reporter, Monboddo.

Braxfield (in the chair.)

Non liquet, Alva: Justice-Clerk did not vote by reason that his son was a creditor of the York Building Company.

1783. *November* 13. ROBERT CAMPBELL *against* DAVID HENDERSON.

HEIR APPARENT.

Though the ancestor die in the most distant parts, no addition is to be made to the *annus deliberandi*, on account of the time elapsing between the death and the notice of it obtained by the heir.

[*Faculty Collection*, *IX.* 189; *Dictionary*, 5292.]

SWINTON. This question is not as to *common law*, but as to *statute*.

JUSTICE-CLERK. Whenever any insupportable inconveniency arises from the statute, the legislature, in its wisdom, will afford a remedy.

PRESIDENT. The Court must act according to the statute. The same sort of inconveniency occurs in other cases, and it is not complained of. Thus, a summons at shore and pier is good, when the party is out of the kingdom, although in the East Indies. Yet such summons can serve no purpose for informing the party.

BRAXFIELD. The *annus deliberandi* is a personal privilege to heirs, and is not