

NO. 5. Pleadèd : A debtor can be sued only before those courts to whose jurisdiction he is subject, and judges must decide according to their own municipal laws. Now, Morgan never acquired a domicile in any other country but Scotland, and therefore his debts by open account, wherever contracted, must be subject to the Scots triennial prescription ; 7th July 1755, Trustees of Renton, No. 67. p. 4516. ; 13th July 1768, Randall No. 70. p. 4520. ; 4th February 1772, Barret against the Earl of Home, No. 72. p. 4524.

Answered : Had Morgan returned to Scotland after contracting the debt and remained there three years, the objection might be well founded ; but as he was never afterwards in Scotland, the substance of the debt must depend on the *lex contractus*. If Morgan had been cited *intra territorium* of the Courts of England, he must have submitted to the English law, and he must also have done so had he arrived in India, where the same law prevails, at least among British subjects. It is absurd to suppose, that an English merchant, under the present circumstances, should lose his debt, because he was ignorant of the Scots triennial prescription ; Ersk. B. 3. Tit. 7. § 48. ; 14th February 1792, York-Buildings Company against Chesswell, No. 74. p. 4528.

The Lord Ordinary "sustained the objection."

On advising a reclaiming petition, with answers, it was

Observed on the Bench : To give room for the operation of the Scots prescription, the debtor must have an actual residence in Scotland for three years subsequent to the contraction of the debt : Morgan in this case had only a *forum*. The flaw in the objector's reasoning arises from his not attending to this distinction. It seems extremely doubtful whether the case of Barret against the Earl of Home was well decided.

The Lords, by a great majority, altered the interlocutor of the Lord Ordinary, and repelled the objection.

Lord Ordinary *Balmuto*.  
Clerk, *Menzies*.

For Common Agent, *Williamson*.

Alt. *Semple*.

R. D.

*Fac. Coll. No. 206. p. 474.*

1807. February 19. MACDOWALL *against* MACLURG AND ANOTHER.

NO. 6. IN the year 1784, Janet Macmillan bore a natural child to James Mac-  
The triennial prescription found not applicable to lurg, who immediately went to Jamaica, where he acquired some money and died there in 1796, naming two executors, with directions to pay some

small legacies, and remit the remainder of his fortune to Alexander Copland, NO 6: merchant in Crossmichael, the interest to be annually paid to the testator's mother, and then to be divided equally between a natural child, and the one he had by Janet Macmillan.

This last child Janet Maclurg, had been born in the house of her maternal grandmother Margaret Macdowall, where she continued till the year 1794, when she went to reside with her paternal grandmother.

In 1803, Margaret Macdowall raised an action against her granddaughter Janet Maclurg, and also against Alexander Copland, concluding for payment of L. 10 annually for each of the eleven years, during which she was supported by her.

The triennial prescription was pleaded in defence against this action.

The Lord Ordinary (15th January 1805) sustained the defences, "in respect the pursuer has not condescended upon any relevant or sufficient grounds" for supporting her claim.

This interlocutor was adhered to by the Court (22d May 1806) upon advising a reclaiming petition, with answers.

The pursuer again reclaimed, and

Pleaded: The prescription introduced by the act 1579, includes only such debts as it is usual to pay from time to time; and if the demand of payment has been long delayed without any agreement to that purpose, a suspicion must arise, that the debt has been satisfied. But this presumption can have no place, when from the absence of the party it was almost impossible to receive any payment, or even to make a demand for it. Alimony furnished to a person who has attained the years of majority, is in a very different situation. With him, both a contract may be entered into, and a demand for payment made. But with a minor, no contract can be entered into; and if he has no guardian, and the proper debtor be unknown, or out of the country, the application of the triennial prescription to such a case, would be inexpedient; Davidson against Watson in House of Lords, No. 273. p. 11077.; Paterson against Cochrane, 14th February 1758, No. 275. p. 11080.

Answered: The object of the act introducing the triennial prescription was to prevent the inconvenience of allowing debts not constituted by writing, the discharge of which would be equally unvouched, from being reared up at a distance of time. The terms "menis ordinars and uther the like debts," include alimentary debts, and the statute introduces a presumption, that after the lapse of three years, the sums due have been discharged; Ersk. B. 3. Tit. 7. § 17.; which can only be removed by the writ or oath of the defender, that the debt is still undischarged; Lady Cairnsfield against Duke of Gordon, February 1714, mentioned in the case of Hamilton against Lady Hamilton, 25th July 1716, No. 303. p. 11100.;

a claim of  
alimony  
against the  
father of a  
bastard  
child, he  
having gone  
abroad.

NO. 6. Bruce Cumming against Andrew, January 1722, mentioned in the note under No. 303. p. 11100.; Forsyth against Simpson, 15th February 1791, No. 276. p. 11081.

The Court (4th February 1807) “alter the interlocutor reclaimed against, and sustain the pursuer’s claim for repetition of the aliment of the defender, during the time she maintained her; remit the cause to the Ordinary to ascertain the amount of this claim; to find the defender liable in expences, and to do otherwise in the cause, as his Lordship shall see cause.”

To which judgment, the Court (19th February 1807) adhered, by refusing a reclaiming petition, without answers.

Lord Ordinary, *Cullen.*  
Alt. *Copland.*

Act. *R. Bell.*  
Agent *Vans Hatborn, W. S.*

Agent *H. Moncrieff, W. S.*  
Clerk, *Scott.*

F.

*Fac. Coll. No. 273. p. 61*

1808. *March 1.* SIR ALEXANDER KINLOCH, against JAMES ROCHEID.

NO. 7. THIS case having, according to the judgment of the House of Lords, (see No. 4. *supra*.) being again taken into consideration by the Court, they appointed memorials. On advising these, the Court pronounced this interlocutor: (Jan. 27. 1807,) “Sustain the defence of the negative prescription against the general accounting demanded by the pursuers, and adhere to their interlocutors, in so far as the same have been submitted to review, in terms of the order of the House of Lords.” The case was again laid before the Court by petition and answers. The arguments already given in the former report were gone over again at great length; but it does not appear necessary to restate them here. In addition to these arguments, it was now pleaded,

For the pursuer.

1st, As the defender’s father and himself were not heirs *alioqui successuri*, the only right by which they held the subject in question was Mrs Rocheid’s settlement. This right, however, was not absolute, but qualified. It was a trust. The defender’s father and himself were indeed among the persons and first in order among them, for whom the trust was granted, but that did not make it less a trust than if it had been granted to a mere stranger, for instance to an accountant. Now, what was the right arising out of this