

1778. January 13. JAMES DAVIDSON *against* MARION ELCHERSON.

WILLIAM MURRAY having, in the course of business, left Scotland in 1768, and gone to Hamburg, died there soon after without making any settlement. Parish, a Hamburg merchant, took the custody of his chest, in which effects were found to the value of L. 300, consisting in part of bank notes.

Marion Elcherson, his mother, claimed the succession of these effects in the court of Hamburg, as heir by the law of that country.

The uncles and aunts of Murray confirmed *qua* nearest of kin to him before the Commissaries of Edinburgh, and transferred to James Davidson their right to Murray's effects at Hamburg.

Parish brought a multiplepounding, in which appearance was made for both these parties. Davidson insisted for decret against Parish to deliver over these effects to him, the succession in which ought to be regulated by the law of Scotland. Elcherson contended, that the law of Hamburg, where the effects were situated, must be the rule.

Pleaded for Davidson, *imo*, Murray was not at Hamburg, *animo remanendi*. Consequently his domicile continued to be in Scotland, his native country. The law of the defunct's domicile regulates the succession, *ab intestato*, in his moveables, wherever situated. This is founded on principles of equity. The defunct is presumed to have known the heir pointed out by the law of his own country; and, by not making a settlement, shows his intention to have that heir to succeed to him. The slight circumstance of his having moveable effects in a foreign country, does not imply that he was even acquainted with the laws of succession there, much less that he meant his succession in these moveables to be governed by them.

It is otherwise in the case of a land estate, which has a fixed and permanent situs. But moveables have no fixed situs. Their place may be shifted without the consent, or even the knowledge of the person in the right to them, as in the case of debts due by bond, or other *nomina debitorum*, the situs of which alters with every change of residence in the debtor. The real situation of moveables, therefore, cannot afford any rule, in justice or equity, for regulating the succession to them. By a fiction of law, their situs is held to be in the place where the defunct had his domicile; and, by the law of that domicile, the succession to them is accordingly governed. Voet. l. 1. t. 4. § *Quamvis*, &c.; Principles of Equity, b. 3. c. 8. § 3.; Erskine's Inst. b. 3. t. 9. § 4.; Brown *contra* Brown, No 109. p. 4604. a decision in point.

The interposition of the court of Hamburg may be found necessary to carry the judgment in favour of the heirs, by the law of Scotland, into execution. But, it is to be presumed, that the foreign court will give effect to that judgment, as, in distributing these moveables, the rules of succession, in this country, ought, in equity, to be adopted by the court at Hamburg. At any rate,

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A Scotsman died at Hamburg, without making a settlement. In his chest there, effects, partly bank notes, were found to the value of L. 300. It was found, that the succession fell to be regulated by the laws of Hamburg.

No 111. the assignee of the heirs is entitled to have the decret of this Court, ascertaining his right to these effects.

2do, Whatever may be the case as to other effects, the situs of the bank notes found in Murray's chest at Hamburgh, was in this country. The situs of these, like that of bonds, bills, and other *nomina debitorum*, is where the debtor resides. This holds, at least, as to such of them as are notes of private banks, to which the privilege of being held as cash ought not to be extended.

Pleaded for Elcherson, *imo*, The subject in question being locally situated at Hamburgh, and Parish, the raiser of the multiplepinding, residing there, nothing can be decided *cum effectu* in this Court. The action, therefore, should be dismissed, leaving the parties to prosecute their claim in the proper court at Hamburgh.

If a judgment is to be given, it ought to be found; that the succession must be regulated by the laws of Hamburgh. The local situation of effects determines the law by which they must be governed in all cases; because it is there only that jurisdiction can be exercised over them, wherever the domicil of the proprietor may be.

This is the received doctrine of the law of Scotland, and applies equally to moveables which have a situs at the time, as to immoveables, whose situs is fixed. In the Dictionary of Decisions, *voce* FOREIGN, many instances are mentioned illustrating this principle. That the moveables of foreigners locally situated within Scotland, are regulated by its municipal law, in every particular, and in that of succession, as much as any other. In the case of Henderson, No 40. p. 4481. it is mentioned as a part of the judgment, 'That goods ought to be asked by that person who would be found to have right thereto, by the law of the kingdom within which they are, and not the law of any other kingdom.' And, in another case, Melvil, No 41. p. 4483. this is likewise said to have been given as the opinion of the Court. Shaw *contra* Lewis, No 47. p. 4494; Bisset, No 50. p. 4498.; Stair, b. 1. t. 1. § 10.; Bankton, b. 1. t. 1. § 82, and 83.; Dirleton, *voce* NOM. DEB.

The contrary doctrine is not founded on solid grounds. Any supposed predilection in the deceased, for the law of the domicil, cannot be regarded in this question. Succession *ab intestato*, is the act of the law, and looks not to the will of the deceased, presumed or implied. It takes place when he has no will, as in the case of an infant, or an idiot. The law, therefore, must have its operation on effects subject to its authority, independent of any conjecture, from the residence of the deceased in another country, that he would have inclined the law of that country to take place. The decision in the case of Brown of Braid is single, and contrary to all the former decisions.

2do, That part of the effects, consisting of bank notes, is in no different situation from the other effects; for such notes are, in law, held to be cash. So it was expressly decided 24th February 1749, Hugh Crawford *contra* the Royal

Bank, No 2. p. 875. Consequently, the situs of the bank notes, like that of coin, is where the notes themselves are found to be.

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Whether these notes are of a public or private banking company, does not alter the case. It is from the terms of the notes, and not the authority of the persons who issue them, that they are held as cash.

THE COURT found, 'That the distribution of the moveables in this case, must be regulated by the laws of Hamburg, where these moveables are, and were situated at the death of William Murray: That no action for such distribution lies, or is competent before this Court; therefore dismisses the foresaid process of multiplepinding, and competition relative thereto.'

A reclaiming petition against this interlocutor was ordered to be seen, in so far as respected the situs of the bank notes. On advising the petition with answers, the Court adhered.

For Davidson, *M'Laurin, Armstrong.*Alt. *J. Campbell, Cullen.**Fol. Dic. v. 3. p. 222. Fac. Col. No I. p. I.*

1778. January 13. HELEN HENDERSON against JOHN M'LEAN and Others.

JOHN M'LEAN, a captain of artillery in the East India Company's service, having been mortally wounded in an engagement at Tingarecotta, in the Mogul's country, immediately before his death, executed a will, by which he bequeathed his whole estate to his father, a brother, and sister, in certain proportions. The will was proved, in common form, in the Mayor's court of Madrass. The executors recovered the funds, which were all in India, and remitted them to the legatees in Scotland. Afterwards, Helen Henderson, M'Lean's widow brought an action against the legatees, claiming a third part of the defunct's moveables, as her *jus relictae*.

The same point was argued in this cause that was argued in the above, Whether the law of the defunct's domicil, or of the place where the effects were situated, regulates the succession in these effects?

A separate plea maintained for the pursuer was, that supposing the *lex loci* regulates the succession of moveables, no *lex loci* is here ascertained to exclude the law of Scotland. It was said, that the law of England does not extend to the Company's territory on the Corromandel coast; but, although the English law reached the territory of Madrass, Tingarecotta, where M'Lean died, being in the Mogul's country, the succession to such personal effects as he had with him there, would be regulated by the law of that country, if it were known. As it is not, and the effects are now in the hands of the legatees residing in Scotland, the Court has jurisdiction over them; and the widow's claim to her *jus relictae*, by the law of Scotland, ought to be sustained.

Answered for the legatees; The effects were recovered, and the legatees are in possession by authority of the law of the place where the effects were situated.

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A Scotsman in India executed a settlement, bequeathing his whole estate to his father, a brother, and sister. Found, that his widow had no claim against the legatees for a third of the moveables as her *jus relictae*.