by birth a Scotsman. He meant to return to Scotland as soon as he could. He transmitted his property to Scotland as fast as he acquired it. All his relations are inhabitants of that country. Every circumstance of his life and his express declarations prove, that he looked upon himself to be a citizen of Scotland; and therefore they hoped the house would reverse the interlocutors complained of, and direct his property to be distributed according to the law of Scotland.

[577]

APPENDIX.

No. II.

[*See the note at the head of the preceding case.*]
7th May 1792.

[1 Scots R.R. 667. Cf. 2 Scots R.R. 182, and *De Nicols* v. *Curlier*, 1900, 69 L.J. Ch. 109.]

In the case of *Hog* v. *Lashley*, 7th May 1792, the argument on this question of the *lex domicilii and the lex loci* arose from two interlocutors; one of the lord ordinary, which found "that there was no ground for distinguishing between Scots and English effects: because the succession to a defunct's effects ought to be regulated, not by the different laws of the many different countries in which these may happen to be locally situated at the time of his death, but by the law of the domicile; and because it had been in several cases so determined in England." Another interlocutor of the whole court of session found expressly, "that the succession to the personal effects of the deceased, wherever situated, must be regulated by the *lex domicilii*."

The appellant contended, 1mo, that by the more modern decisions of the court of session, particularly in the case of Lord Banff; the case of *Lorimer* against *Mortimer*, decided in 1770; the case of *Elcherston* against *Davidson* in 1778; and the case of *Morris* against *Wright* in 1785; it had been established that the succession to personal estate *ab intestato*, was to be regulated not by the law of the country where the defunct had his domicile, but by the laws of the different countries in which his said personal estate happened to be situated at the time of his death.

2do, That whatever might be the rule with regard to succession *ab intestato*, the power of making a will was *juris gentium*, and therefore any restraints upon the liberty of testing, imposed by the *lex domicilii*, must be confined to effects over which that law extends, and can be attended with no consequence in other countries where no such restraints prevail: that the power of alienation is inherent in the right of every proprietor; and as a testament is a species of alienation, so one who can alienate his property in a foreign country, notwithstanding any restraints upon alienation, or the mode of alienation, in his own, must be equally at liberty to dispose of it by testament, whatever limitations may, in that respect, be imposed by the law of his domicile, from which he withdraws his effects, by the very act of placing them elsewhere: that the fiction of law mentioned by some foreign writers, *mobilia non habent situm vel sequelam*, deserved no regard; reality was alone to be attended to; and moveables had, in truth, a local situation: the same was likewise the case with *nomina debitorum;* the proper *situs* whereof was the place of the debtor's residence, as there only the [578] subject existed upon which the right of the proprietor was to operate; and there only it could have any substantial effects: that it had been repeatedly decided that the right to a debt due in Scotland, does not vest *ipso jure* in the assignees under an English commission of bankruptcy; but if the debt, or *nomen debitoris*, was understood to be in England, and if the transmission of the right of exaction was to be regulated only by the law of the creditor's domicile, the direct contrary would follow, and the assignees would have a complete right *ipso jure;* in like manner it has been found, that the assignation of a debt due by a debtor in Scotland, is not complete without intimation, whatever be the law of the creditor's country; which is inconsistent with the respondent's hypothesis. Whether, therefore, the *situs* of debts is to be judged of by the rules of the law of Scotland, or by general principles derived from the intrinsic nature and reason of the thing, the conclusion must be the same, that the debt is situated where it must be recovered; that is, where the debtor resides.

There were also two other arguments merely on the extent and operation of the Scotch law of legitim.

In answer to these pleas the respondents contended, 1mo, that as the municipal regulations of different states are frequently at variance with each other, the question must frequently occur, whether the law of one country or of another ought to be the prevailing rule; and in all such cases recourse must be had to the law of nations, which settles the duties that one state owes to another in their mutual intercourse, in the same manner as the law of nature, when applied to men considered in their first condition, imposes certain duties on individuals. In cases of succession, a distinction has been universally adopted between moveables and landed property: in every country of modern Europe it is established, that the succession to the latter must be governed by the laws of the state in which it is situated; it makes a part of the territory of such state, from which it cannot be removed; but moveables being fixed to no particular place, may be removed at will from one kingdom to another; and it often happens, in the course of modern commerce, that moveables of immense value, belonging to the subjects of one state, are lodged within the territory of another, subject however to be withdrawn at the pleasure of the owners; hence have arisen those celebrated maxims *mobilia non habent situm*, and *mobilia sequuntur personam* —the plain meaning of which is obviously this, that nations will not consider the local situation of moveables in any question concerning them; and that they will dispose of the moveable property within their territory, belonging to a stranger, in the same manner as if it were with him in his own country. The more ancient decisions of the courts of law in Scotland did accordingly embrace the same system; even as recently as the year 1744, it was held in the case of *Brown* contra *Brown*, that the succession to certain debentures and promissory notes due in Ireland, was to be regulated by the law of Scotland, where the defunct had his domicile; and although in some later cases the court **[579]** had adopted a different opinion, that was owing to its being erroneously taken for granted, that the courts in England, in judging of effects locally situated there, proceeded according to the rules of the law of England, without any regard to the *lex domicilii;* but that this was clearly a mistake, the court of session had occasion to be well informed, from what passed upon the decision of a late case before your lordships, *Bruce* versus *Bruce*, from the decisions of the English courts, and from authorities on the law of England.

2do, That if the *lex domicilii* must regulate the course of succession *ab intestato*, it must in the like manner regulate every question with regard to the defunct's power of testing upon his moveable or personal estate. To say that a will is *juris gentium*, and being protected by that law, must be good all the world over, except where it is fettered by municipal restraints, is a mere fallacy. The sole province of the *jus gentium* is to decide upon controversies betwixt one state and another; but if it is once admitted, that the domicile of a defunct is the circumstance upon which such controversies, with regard to succession to personal estate, is to be determined, it can be a matter of no consequence whether the defunct has made a will or not; for by the very same law that would regulate his succession *ab intestato*, every question relative to his power of testing must of necessity be decided. To appeal to the inherent rights arising from property cannot avail the appellant; a man may no doubt alienate his property of whatever kind, provided he does not thereby transgress the law of the country where it is situated; but with regard to his power of testing, he must of necessity submit to the law of that country of which, by his fixing his domicile there, he has become a subject; his property, wherever situated, is in effect a part of the total property of that country; it is therefore interested in the distribution thereof; and of course every restraint which its law imposes upon the *facultas testandi*, must be equally binding upon him, *quoad* effects locally situated without, as within its territory. It is presumed, *fictione juris*, that the whole of his personal estate is with the owner in his own country; and it is a necessary consequence, that his power of disposing of it by will must depend upon the law of that country. "*Sed considerandum, quadam fictione juris, seu malis*, praesumptione, *hanc de mobilibus determinationem conceptam niti: cum enim certo stabilique haec situ careant, nec certo sint alligata loco; sed ad arbitrium domini undiquaque in domicilii locum revocari facile ac reduci possint, et maximum domino plerumque commodum adferre soleant cum ei sunt praesentia; visum fuit, hanc inde conjecturam surgere, quod dominus velle censeatur, ut illic omnia sua sint mobilia aut saltem esse intelligantur, ubi fortunarum suarum larem summamque constituit, id est in loco domicilii: proinde si quid*

domicilii judex constituerit, id ad mobilia, ubicunque sita, non alia pertinebit ratione, quam quia illa in ipso domicilii loco esse concipiuntur." (Voet. Tit. de Statutis, sec. 11.)

And these answers were enlarged upon, and enforced by the following reasons annexed to the respondent's case in the House of Lords. (R. Dundas, J. Scott, A. Wight, W. Adam, J. Clerk.)

[580] I.The question, whether succession to personal estate *ab intestato*, must be governed by the Laws of the country, where the defunct was domiciliated, or of all the different countries, where his funds happen locally to be at the time of his death? is a question *juris gentium;* a law, though not consisting of positive institutions, yet recognized in every civilized state, and by which a nation is considered as an individual, and its duties to other nations, and its conduct towards them as individuals, are pointed out and directed. In every case where a doubt arises, whether the law of one country, or that of another, ought to be followed, recourse must be had to this *jus gentium*, there being no other rule of decision. But once this point is settled, the case becomes strictly municipal; and what is the law of nations, becomes of necessity the law of that state where the suit is instituted.

A distinction has been made in every country of modern Europe, in cases of succession, between *bona immobilia*, and *bona mobilia*, and this distinction makes part of the *jus gentium*. Landed property has been universally considered as most important; and as it cannot be moved from one country to another, but makes a part of the territory of the state in which it is situated, the owners thereof are in effect citizens of that state, and *qua* such bound to conform to its laws, the rules whereof must govern not only the mode of transferring the land from one to another, but also the course of succession. Moveables stand, however, in a different predicament; they are fixed to no particular place, but may be removed at will from one state to another. They are accordingly held *sequi personam* of the owner; and the very same principle upon which the succession to landed property is regulated by the *lex loci rei sitae*, dictates the propriety of governing the succession of moveables or personal estate, wheresoever situated, by the law of that country to which the owner properly belongs, A late political writer, Dr. Adam Smith, justly observes, that the wealth of a state is an aggregate of the wealth of all the individuals in it; and in like manner it is laid down by the writers on the law of nations, that the property of individuals is the property of the state, and the sum of all the wealth of individuals is the total wealth of the state. Hence the Goods of an individual, although passing into a foreign country, still belong to the state of which he is a member; and the country, where they accidentally are situated at the time of his death, can have neither right nor interest to regulate the succession. "*Les biens d'un particulier ne cessent pas d'etre a lui, parce qu'il se trouve en pais etranger, et ils sont encore partie de la totalité des biens de sa nation. Les pretensions que le seigneur du territoire voudroit former sur les biens d'un etranger, seroient donc également contraire aux droits du proprietaire, et a ceux de la nation dont il est membre.*" (Vatell, liv. 2. c. 8. sec. 109. sec. 181.). Hence it is justly held by the law of nations, that moveables belonging to strangers shall be equally safe both to the owners and to their country, as if they were locally situated within it, and must, in respect to the right of succession, be regulated by the law of that country, *i.e.* the state in which he has fixed his **[581]** domicile; or, as it is said by the writers, *ubi sedem fortunarum figerit;* the words *patria* and *domicilium* being among these writers convertible terms.

This rule is also founded on other just and wise principles. One may have moveable property in a number of different countries, each of which may entertain different systems of distribution. If, therefore, *lex loci rei sitae* were to govern his succession, a separate distribution would take place in every different country where his property happened to be situated; and as no man can be supposed acquainted with the laws of every foreign country, he would be uncertain what was to become of his succession. Even after making a will, he could not know what effect it would have, as almost in every country there are restraints upon the *testamenti factio*, unknown to the generality of the subjects of other states. Nay, what is still worse, a debtor, by changing his former residence, and fixing his domicile in another country, would be able to govern the succession of his creditor, without his own knowledge.

The *lex domicilii* has accordingly been recognized by all the writers on the law of nations, and by the civilians, as the rule by which the succession to *bona mobilia*, or personal estate, ought to be regulated.

This rule seems accordingly to be adopted in every nation in Europe. From several of the Authorities in the appendix, it appears to be so universally throughout the Dutch, Flemish, and German Provinces. The law of France is also the same: "*C'est le domicile qui regle le partage des successions mobiliares; ainsi par example, si un particulier decede ayant son domicile a Paris, sa succession mobiliare sera reglée et appartiendra a ceux, qui la coutume de Paris appelle pour etre ses heritiers.*" (Denisart Coll. de Juris Prud. Voce Domicile, sec. 3 and 4.)

The law of England is also the same: in the case of *Burn* v. *Coll*, Privy Council, 1st April 1762, it was determined, that when a testator resident in England died, the judge of the probate in the plantations was bound by the probate granted in England. In *Pipon* v. *Pipon*, Trin. 1744, in Chancery, it was decided, that succession in moveables is regulated by the *lex domicilii*. This decision is referred to in the case of *Thorne* v. *Watkins*, which was decided in the court of chancery in 1750, and is collected in Vezey's Reports, vol. ii. p. 35. On the margin of the report there is the following note, which is a sort of title or rubric: "English subject residing and dying here, and administration here, with debts or *Choses in Action*, due in Scotland, distributable as the rest of his personal estate. So if in other foreign countries; debts follow the person of the creditor, not debtor. (See also *Hunter* v. *Potts*, 4 Term Rep. K. B. 182: *Foubert* v. *Turst*, *ante* vol. 1. p. 129. of these Parliament cases.)

That the same rule was understood to prevail in Scotland, till an erroneous idea was entertained with regard to the practice in England, is equally clear.

Dirleton, in one part of his work (and p. 39. Voce Nomina debitorum), throws out a doubt upon this subject in the following words: "If *nomina* which are not *res* but *entia rationis*, have *situm;* when the debtor is in Scotland *animo* [582] *remanendi*, and the debt is contracted with him as residing there? *ratio dubitandi*, they are thought and called a personal interest, and therefore should *sequi personam: contra* they are *res in obligatione et potentia.*" But Sir James Stewart, in his answer, speaks decidedly upon the subject: "*Nomina debitorum* are not accounted *res*, nor yet are they mere *entia rationis*, but in plain Scots are debts; and whether they have *situm* or not, requires a distinction, if the *situs* should be that of the debtor, or that of the creditor; but personal debts are thought *sequi personam creditoris;* yet what may be the consequence, when the debter lives in one kingdom and the creditor in another, is very uncertain; but *cum sequuntur personam creditoris*, I should think, that wherever the creditor either transmits or forfeits his right, it should go accordingly."

Dirleton repeats the same doubt again, under the word *mobilia:* but, in the same page, he states it not as a doubt, but as a clear proposition, That, "*mobilia sequuntur conditionem personae sui domini, adeo ut ejus ossibus adherant active et passive; immobilia autem coherent territorio:*" And Stewart, in his answer says, "If *mobilia* has *situm*, seems to be an improper question; for it is more proper, that *mobilia sequuntur personam;* and as to the question, if an Englishman in Scotland could make a nuncupative testament, as to moveables in Scotland, to me it is without doubt, and that even a Scotchman, residing and dying in England, may also make a nuncupative testament reaching his moveables. But in our law, we have a rule as to the probation by witness, limiting the same to £100 Scots, which being a rule of judgement, might incline our judges to reject a nuncupative testament, though made in England. The court of session seems to have proceeded upon this last-mentioned circumstance, in denying effect to English nuncupative testaments in Scotland; as indeed it is a general rule with respect to process and execution, as well as making up legal titles to any subject, that the forms of the country where the proceedings are instituted, must be observed."

Mr. Erskine's authority is clear and express upon this Subject (I. 3. T. 9. sec. 4.): "Where a Scotchman dies abroad, *sine animo remanendi*, the legal succession of his moveable estate in Scotland must descend to his next of kin, according to the law of Scotland; and where a foreigner dies in this country, *sine animo remanendi*, the moveables which he brought with him hither ought to be regulated, not by the law of the country in which they locally were, but by that of the proprietor's *patria* or *domicile* whence he came, and whither he intends again to return. This rule is

founded on the law of nations; and the reason of it is the same in both cases, that since all succession *ab intestato* is grounded on the presumed will of the deceased, the estate ought to descend to him, whom the law of his own country calls to the succession, as the person whom it presumes to be most favoured by the deceased, see *Principles of Equity*, p. 279, and the decision there quoted; Falc. 1. November 28th, 1744, Brown; which however is contrary to some former **[583]** decisions, though conformable to the opinion of the most celebrated civilians. As *nomina debitorum*, or personal debts, are moveable in the strictest sense, their succession is therefore descendible, according to the *lex patriae* or *domicilii*, wherever they may be locally situated or be due."

It may here, in passing, be observed, That Mr. Erskine speaks rather inaccurately, when he supposes that all succession *ab intestato* is grounded upon the presumed will of the deceased; such presumed will can only apply to the part of a man's estate, over which he has the power of testing; and the preference that is given to the *lex domicilii*, does not arise from the *presumpta voluntas* of the deceased concerning the distribution of his effects, but from its being presumed, that he wished to have them with himself in the place of his domicile, and meant to collect them all there.

It is true, that in some cases decided since that of *Brown*, referred to in the above passage of Mr. Erskine, the court of session adopted a different rule; but these judgments proceeded altogether upon a mistake with regard to the practice in England.

The first regarded the succession to personal effects situated in England, that belonged to Alexander lord Banff, who died at Lisbon in November 1746, without making a will. The competitors were, an aunt by the father's side, who was next of kin according to the law of Scotland, and three brothers uterine, who were preferable by the law of England. It was stated, that the defunct's principal domicile was in Scotland, and that he never had any settled domicile in England; but sir Dudley Ryder, at that time Attorney General, having given an opinion that the succession to effects situated in England was to be governed by the law of England, it came to be taken for granted, both in that and in subsequent cases, that the judges in England did in such questions regard only the *lex loci rei sitae*. It was accordingly stated in the next case of *Lorimer* against *Mortimer*, decided in 1770, "That, by the law of England, effects, as well heritable as moveable, situated in England, do descend *ab intestato*, agreeably to the rules of descent established by the laws of England, without any regard to the *lex domicilii*;" and this proposition was not so much as controverted by the other party. In like manner, in the case of *Elcherson* versus *Davidson* decided in 1778, the same erroneous statement was made in the following words: "if a Scotsman leave effects in England, the person entitled by the law of England will obtain letters of Administration in Doctors Commons; and it will be in vain for an uncle or an aunt to compete with a mother, no such thing being known in the law of England; and in conferring the office in Doctors Commons, the civilians there will not give themselves the trouble to inquire what the law of Scotland is with respect to succession."

The same mistake led to a similar decision in the case of *Morris* in 1785. But when the case of *Bruce* v. *Bruce* came to be determined by your lordships two years ago, the cloud was dispelled and the court of session became sensible of their error.

[584] It may at times be attended with some difficulty to determine what is a person's proper domicile; and in some cases, the court of session seems on that account to have adopted the *lex originis;* but when the domicile is ascertained, the succession must be regulated by the law which there prevails.

II. But if the succession *ab intestato* is to be regulated by the *lex domicilii*, the same law must likewise regulate the power of testing upon personal estate. The writers upon the law of nations, and the civilians, are equally clear upon this point, as appears from the authorities to be found in the appendix.

The same rule takes place in England. The principles laid down by Lord Hardwicke in the case of *Thorn* v. *Watkins* apply equally to testate as to intestate succession. And in 1787 a decree, almost precisely in point, was given by one of your Lordships' number (Lord Kenyon), then Master of the Rolls, in the case of *Kilpatrick* v. *Kilpatrick*, which stood thus: Kilpatrick of Bengal, made his will in 1781, bequeathing certain legacies to be paid, partly out of his effects

in India, and partly out of his effects he had in England; among others, he bequeathed £300 to Archibald Fleming, a Scotchman, residing in Scotland. On Kilpatrick's death, this £300 became a vested interest in the legatee, was a *Chose in Action* recoverable from the executors in England, and consequently an English debt, which Fleming might have disposed of by testament, if he had lived in England. Fleming did not recover payment of the legacy, but died in 1783, having made a will, disposing of his whole estate and effects to Farquharson, and appointing him executor. Fleming's widow, however, put in her claim to the half of his personal estate, as being entitled thereto by the law of Scotland, *jure relictae;* and in particular, to the half of Kilpatrick's legacy; and one of the masters in chancery having reported, that he conceived the widow to be entitled to one moiety of the legacy, it was ordered, "That it should be referred back to the said master to review his said report of the 17th day of this instant July, and to state to the court the ground on which he founded the opinion mentioned in his said report; and that the matter of the said petition should stand over in the mean time: In pursuance whereof, the said master by his report, bearing date this day, certified, that he had reviewed his report of the 17th day of this instant July, and that the opinion therein mentioned was grounded on the answer given by Ilay Campbell, Esq, Lord Advocate of Scotland, to a case laid before him on behalf of the defendant Ann Fleming, respecting her right to a share of the legacy in question: In which answer the said Lord Advocate declared, *That by the law of Scotland, those effects which were called simply moveable, belonging either to husband or wife at the time of the marriage, fell under the communion of goods between the married parties; and in which also the children, if any existed, had an interest; and that the husband,* jure mariti, *had the administration and disposal of them while the marriage subsisted, but upon the dissolution thereof a division took place,* **[585]** *and the wife (if she was the survivor) took one third* * *as their legitim in case a widow existed, and one half if no widow; and that the remaining share alone the husband could dispose of by testament: for that he could not by any testamentary deed exclude the children's legitim, or the wife's* jus relictae, *and that the* jus relictae *might however be excluded by settlements or provisions made upon the wife, with her own consent, before or after marriage; and that in Scotland there was no distinction between* choses in action, *and effects actually recovered.* Therefore, such being the doctrine of the law of Scotland, laid down by a gentleman of Mr. Campbell's eminence for professional learning, he, the said master, made no difficulty of subscribing thereto; and upon these principles founded his opinion, that the petitioner, Ann Fleming, the widow of the said defendant Archibald Fleming, not having any settlement or provision made upon her by her husband, and he having died without issue, she was entitled to one moiety of the legacy in question, and the interest thereof:" Upon which the Master of the Rolls ordered, "That the said Master's reports, bearing date respectively the 17th and 25th days of this instant July, be confirmed; and that one moiety of the sum of £356 17s. 4d. cash in the bank, placed to the credit of their cause, on the account of the defendant Archibald Fleming, be paid to the petitioner Ann Fleming, the widow of the late defendant Archibald Flem-

* Here a few words appear to be wanting in the copy of the decree.—The words omitted appear to be the following, "if there was no child, or if a child, one-half as her *jus relictae;* and the children one-third."—The following statement is extracted from a subsequent part of the case, not connected with the present question.

"The general rules of succession, with respect to the moveable estate of a person deceased, have subsisted in the law of Scotland, with little alteration, as far back as any written records of the law are extant. When the defunct leaves a widow, and child or children, his moveable estate, after payment of debts, in divided into three equal parts, one of which goes to the widow, and is called the *jus relictae;* another goes to the child, or children, under the name of *Legitim,* (an expression borrowed from the Roman law,) portion natural, or bairns part of gear; and the remaining third is held to be the dead's part, which may be disposed of by testament; and if not so disposed of, will fall to the children likewise, as nearest in kin. If there is a widow and no children, the division is bipartite, the wife being entitled to one half, as *jus relictae,* and the dead's part is the other part: or if the defunct has left a child or children, but no widow, the division is also bipartite; one half being accounted legitim, and the other half dead's part."

ing; and the other moiety thereof to the defendant Archibald Farquharson, the executor of the said defendant Archibald Fleming." It seems scarcely necessary to observe, that the decree must have been the same if the question had been between the executor of Fleming and the children of Fleming claiming their legitim.

Although the case has not hitherto directly occurred as a subject of decision in the courts of law in Scotland, the plea that the respondents are now maintaining, will upon inquiry be found to be supported in several of the ancient statutes of that country.

In the *Statuta Willielmi* there is a chapter "*De hospitio et testamento peregrinorum;*" from which it is plain that their succession was not regulated by the laws of the kingdom, "*si testari voluerint liberam* [586] *inde habeant facultatem quorum ordinatio inconcussa servetur.*" And if they died intestate, "*bona eorum per manus episcopi, in cujus episcopatu sunt, perveniant; et tradantur si fieri potest heredibus, vel in pias causas erogentur.*" There is no division here into Dead's part, Relict's, and children's part: But by the act 1425. c. 48. "*that all the king's lieges live and be governed by the laws of the realme; item,* It is ordained be the king be consent and deliverance of the three estates, that all and sundry the Kingis leiges of the realme live and be governed under the Kingis lawes and Statutes of the realme allanerlie, and under na particular lawes nor special priviledge, nor be na laws of other countries or realmes." The act 1503, c. 79. is nearly in the same terms, and it is remarkable, that the enactment is not, that the laws of Scotland and no other shall be used *within the realm,* but that all and sundry King's lieges be governed by these laws; nor is this expression casual, for it is repeated in the act 1503; and agreeably to this way of speaking the King was *Rex Scotorum* not *Scotiae;* his right of sovereignty being over the people rather than the territory. The act 1436, c. 88. has very justly been considered as another legislative enactment in favour of the *lex domicilii,* in cases of succession "*Eodem die rex, ex deliberatione trium statuum in parliamento congregatorum, decrevit, quod causae omnium mercatorum et incolarum regni Scotiae, in Zelandia, Flandria, vel alibi extra regnum decendentium, qui se causa merchandisarum suarum, peregrinationis, vel aliqua quacunque causa (dummodo causa non morandi extra regnum) se transtulerunt, debent tractari coram suis ordinariis infra regnum, a quibus sua testamenta confirmantur, non obstante, quod quaedam ex bonis hujusmodi decedentium, tempore sui obitus fuerunt in Anglia vel in partibus transmarinis.*" It is fair to presume that the purpose of the legislature in enacting that these causes should be determined by the judges of the land, was to have them determined by the law of the land. In that view this act amounts to a legislative declaration in favour of the principle for which the respondents contend; for it directs that the effects of Scotchmen shall be governed by the law of Scotland wherever they are situated.

Dirleton states the following doubt: "If *mobilia* or *nomina* belonging to strangers (*e.g.* in England) should be confirmed here? or if it be sufficient they should be confirmed in England? *Ratio dubitandi, sequuntur personam:* on the other part they are a Scotch subject or interest." Sir James Stewart, his commentator, is however completely decided, and answers this last question as follows: "we met with this before, and it is still thought, that *mobilia et nomina* in this country belonging to strangers do transfer according to the law of the country where the owner resides and dies, *quia sequuntur personam.*" Dirleton himself indeed, *voce testament,* seems to acknowledge that the *lex domicilii* is the rule, as follows: "*Quae ratio,* that a testament made in France or Holland according to the custom there, which is different from ours, should be sustained in Scotland, as to any Scots interest [587] falling under the same?" Stewart in his answer to this doubt, which is not as to what is law, but merely to the reason of it, expresses the same decided opinion as formerly: "A testament made by a person dying in France or Holland according to the custom there, should be sustained in Scotland, though the custom be different; and even as to a Scotch interest falling under the same, because *testamenti factio* ought in all reason to follow the person; and persons dying any where, ought to be allowed to act or testate according to the custom of the place, as to all their *jura personalia.*"

Lord Kames suggests a case in point, and gives a decided opinion for the respondents. After laying down the doctrine of intestate succession, he proceeds as follows: "But what if he, a Scotch husband, have made a will, dividing his moveables among

his blood relations, leaving nothing of his moveables in England to his wife; her contract of marriage affords an effectual claim against him, which he cannot evade by any voluntary deed; and even without a contract, as the *jus relictae* is established by the law of Scotland beyond the power of the husband to alter, she ought to have her proportion of these transient moveables, as the English judges are in this case bound by the law of Scotland, not by their own. To fortify this doctrine, I urge the following argument: where two persons joining in marriage are satisfied with the legal provisions, there is no occasion for a contract, and the parties may be held as agreeing that the law of the land shall be the rule. It is in effect the same as if the parties had subscribed a short minute, bearing, that the *jus relictae*, and every other particular between them, should be regulated by the law of their country; and such an agreement expressed or implied must be binding all the world over, to support the relict's claim against the testament of a deceased husband. It may however happen, that two persons carelessly join in marriage, having an object in view very distant from a legal provision. Law does not admit of a presumption against rational conduct; but though it should be admitted, it will not avail: as every man is bound in conscience to obey the laws of his country, the husband, when disposed to think, will find his wife entitled by that law to the *jus relictae*, and will see that an attempt to disappoint her would be against conscience. This must be evident to him when at home, and it must be equally evident that change of place cannot relieve him. At any rate, the *jus relictae* must have its effect as to his moveables in Scotland; and it would not be a little heteroclete, that his transient effects should be withdrawn, for no better reason, than that they happen accidentally to be in a foreign country, where the *jus relictae* does not obtain. (B. 3. C. 8. sec. 3.)

[588] *The following authorities were stated at length at the end of the respondent's case, from the writers on the law of nations, and the civilians, in favour of the* lex domicilii.

"Puisque l'etranger demeure citoyen de sou pais et membre de sa nation, les biens qu'il laisse en mourant dans un pais etranger, doivent naturellement passer a ceux qui sont heritiers suivant les loix de l'etat dont il est membre. Mais cette regle generale n'empeche point que les biens immeubles ne doivent suivre les dispositions des loix du pais ou ils sont situés.—Mais quant aux biens mobiliares, argent et autres effets, qui'l possede ailleurs, qu'il a aupres de lui, ou qui suivent sa personne; il faut distinguer entre les lois locales, dont l'effet ne peut s'etendre au dehors du territoire et les loix qui affectent proprement la qualité de citoyen. L'etranger demeurant citoyen de sa patrie il est toujours lié par ces dernieres loix, en quelque lieu qu'il se trouve, et il doit s'y conformer dans la disposition de ses biens libres, de ses biens mobiliaires quelconques. Les loix de cette espece, du pais ou il se trouve, et dont il ne'est pas citoyen, ne l'obligent point. Ainsi un homme qui teste et meurt en pais etranger, ne peut oter a sa veuve la portion de ses biens mobiliaires assignée a cette veuve par les loix de la patrie. Ainsi un Genevois, obligé par la loi de Geneve a laisser une legitime a ses freres, ou a ses cousins, s'ils sont ses plus proches heretiers, ne peut les en priver en testant dans un pais etranger, tant qu'il demeure citoyen de Geneve; et un etranger mourant a Geneve n'est point tenu de se conformer a cet egard aux loix de la republique. C'est tout le contraire pour les loix locales; elles reglent ce qui peut se faire dans le territoire et ne s'etendent point au dehors." (Vattel, liv. 2. cap. 8. sec. 110, 111.)

"Etenim regulariter mobilia ubicunque naturaliter existerent illic censentur esse ubi dominus domicilium fovet, immobilia illic ubi vere sunt. Indeque immobilia regenda lege loci in quo sita sunt, mobilia vero ex lege domicilii domini; cum ergo actiones personales saltem ex communi consensu eas quae ad rem mobilem tendunt mobilibus annumerari dictum sit; consequens est ut licet proprie nullibi situm habeant tanquam incorporales, tamen illic esse censeantur ubi creditor in cujus domino et patrimonio actiones sunt, domicilium fixit." (Voet, lib. 1. tit. S. sec. .)

"Mobilium tamen ratione in dispositionibus testamentariis dum quaeritur an illae in universum permittendae sint nec ne, uti et ab intestato successionibus donationibus inter conjuges vetitis permissisve, et aliis similibus, de juris rigore communi, quasi gentium omnium consensu laxatum est, sic ut ex comitate profecta regula praxi universali invaluerit, mobilia in dubio regi lege loci in quo eorum

dominus domicilium fovet, ubicunque illa vere extiterint." (Tit. 4. de Statut. sec. 12.)

"Irritum proprie dicitur testamentum, cum testator maximam, mediam, vel minimam patitur capitis diminutionem, atque ita **[589]** activam testamenti factionem habere desinit ex status mutatione. § alio autem 4 Instit. quib. mod. testam. infirm. l. si quis 6, § irritum 5 ff. h. t. Et quamvis hodie apud nos et plerosque alios nulla capitis diminutio testamenti semel recte conditi vires perimat; tamen si quis habitans in loco, in quo minor annorum numerus in testatore requiritur, veluti in testari licet, veluti in Hollandia, ibidem anno decimo quinto testamentum fecerit, deinde vero domicilium alia transtulerit, ubi necdum per aetatem testari licet, veluti ultrajectum, ubi plena pubertas in masculo testatore exigitur, testamentum ejus quantum ad mobilia per talem migrationem irritum efficitur. Idemque eveniet, si Hollandus uxorem heredem instituerit (quod ibi licitum) deinde vero ad aliam migret regionem, ibique domicilium figat, ubi gratificatio inter conjuges ne supremo quidem elogio permissa est; nam et hoc in casu mobilium intuitu in irritum deducitur voluntas ejus; cum mobilia in successione testata vel intestata regantur ex lege domicilii defuncti, adeoque res devenerit in hisce ad eum casum, a quo propter qualitatem testatoris, vel honorati, initium habere nequit. Neque enim sufficit in honorato, quod tempore facti testamenti capax sit, sed et tempore mortis testatoris eum capacem esse, necesse est. § in extraneis 4 Instit. de hered. qualit. et differentia. Et quod attinet aetatem in testatore requisitam, illa utique testatoris qualitatem concernit, quam a jure habet, adeoque illa testandi habilitas aut inhabilitas, quae ex aetate est, proxime accedit ad illam, quae ex eo est, quod quis vel paterfamilias vel filius familias sit; ac proinde, uti testator paterfamilias sibi imputare debet, quod sese alteri adrogandum dederit et sic sese exuerit testandi facultate: ita quoque, qui ex Hollandia domicilium transfert ad eum locum in quo per aetatem necdum testari potest." (Lib. 28. tit. 3 sec. 12.)

Ulric Huber, after laying down certain axioms relative to the municipal laws of particular states, thence deduces the following position: "Cuncta negotia et acta, tam in judicio quam extra judicium, seu mortis causa sive inter vivos, secundum jus certi loci rite celebrata, valent, etiam ubi diversa juris observatio viget, ac ubi sic inita, quemadmodum facta sunt, non valerent. E contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nusquam valere possunt; idque non modo respectu hominum, qui in loco contractus habent domicilium, sed et illorum, qui ad tempus ibidem commorantur. Sub hac tamen exceptione; si rectores alterius populi ex inde notabili incommodo afficerentur, ut hi talibus actis atque negotiis usum effectumque dare non teneantur, secundum tertii axiomatis limitationem." (Pars 2. Lib. 1. Tit. 3. sec. 3.) And after illustrating this rule by different examples, from testaments, contracts, decrees, actions, marriages, and the qualities of persons; under which last he seems to comprehend the power of testing, he says: "Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, qua tales personae alibi gaudent vel subjecti sunt, fruantur et subjiciantur. Hinc qui apud nos in tutela, curave sunt, ut adolescentes, filiifam. **[590]** prodigi, mulieres nuptae, ubique pro personis curae subjectis habentur, et jure, quod cura singulis in locis tribuit, utuntur, fruuntur. (Sec. 13.)—Sunt, qui hunc effectum qualitatis personalis ita interpretantur, ut qui certo loco, major aut minor, pubes aut impubes, filius aut paterfamilias sub curatore vel extra curam est, ubique tali jure fruatur, eique subjiciatur, quo fruitur et cui subjicitur in eo loco, ubi primum talis factus est, aut talis habetur; proinde, quod in patria potest aut non potest facere, id eum nusquam non posse vel prohiberi facere. Quae res mihi non videtur habere rationem, quia nimia inde συγχυσις jurium et onus pro vicinis, ex aliorum legibus oriretur. Exemplis momentum rei patebit. Filiusfam, in Frisia non potest facere testamentum. Proficiscitur in Hollandiam ibique facit testamentum, quaeritur, an valeat? Puto valere utique in Hollandia, per regulam primam et secundam, quod leges afficiant omnes eos, qui sunt in aliquo territorio: nec civile sit, ut Batavi de negotio apud se gesto, suis legibus neglectis, secundum alienas judicent. Attamen verum est, id heic in Frisia non habiturum esse effectum, per regulam tertiam, quod eo modo nihil facilius foret, quam leges nostras a civibus eludi, sicut eluderentur omni die. Sed alibi tale testamentum valebit, etiam ubi filiusfam. non licet facere testamentum,

qui cessat ibi illa ratio eludendi juris patrii per suos cives: quod in tali specie non foret commissum. (Sec. 14.)—Hoc exemplum spectabat actum ob personalem qualitatem domi prohibitum. Dabimus aliud de actu domi licito, sed illic, ubi celebratus est, prohibito, in suprema curia quandoque judicatum. Rudolphus Monsema natus annos 17, Groninga diebus quatuordecim postquam illuc migraverat, ut pharmaceuticam disceret, testamentum condiderat, quod ei in Frisia liberum erat facere, sed Groningae, ait D. Nauta relator hujus judicati, non licet idem puberibus infra 20 annos, nec tempore morbi fatalis, neque de bonis haereditariis ultra partem dimidiam. Decesserat ex eo morbo adolescens, herede patruo, materteris legato dimissis, quae testamentum dicebant nullum, utpote factum contra jus loci. Heres urgere, personalem qualitatem ubique circumferri, et jus ei in patria competens alibi quoque valere; sed judicatum est contra testamentum, convenienter ei quod diximus, praesertim, cum heic eludendi juris patrii affectatio nulla suisset."

Rodenbourg not only lays down the general principle in his treatise "De jure quod oritur ex statutorum vel consuetudinum discrepantium conflictu," but also refers to many particular cases in which the law of the domicile applies to testate as well as to intestate succession. It will suffice to state the rule itself in his own words. (Cap. 2. Tit. 1. in fine.) In one passage he says, "Mobilia quippe illa non ideo subjacent statuto, quod personale illud sit, sed quod mobilia certo ac fixo situ carentia, ibi quemque situm velle habere, ac existere intelligimus, ubi larem ac fortunarum fixit summam. Quare quodcunque domicilii judex de mobilibus statuerit, non ideo in alibi existentibus obtinere dixeris, quod vires extra territorium porrigat statutum, nedum quod personale sit, sed quod in domicilii loco mobilia intelligantur existere." (Tit. 2.) And in another **[591]** "Diximus mobilia situm habere intelligi, ubi dominus instruxerit domicilium, nec aliter mutare eundem, quam una cum domicilio. Et subest ratio, mobilia quippe, cum perpetuum ac fixum, ut res foli, locum non habeant, totum illud dependeat necesse est a destinatione ejus, cujus ea res est, ut ibi habeantur mobilia existere, ubi esse ea voluerit dominus: haud aliter ac ipsamet persona, ibi esse, vel domicilium habere accipitur, ubi semet esse voluerit. Igitur ibi mobilia sua quemque velle ut existant credimus, ubi degit ipse, laremque favet ac fortunarum habet summam. Quo jure et nomina non immerito censueris, ut ea in successionibus et similibus mobilium rerum sortiantur naturam."

By the 39th article of the 16th title of the laws of Meckline, it is declared, that "Omnia bona mobilia, aurum, argentum, gemmae, ornamenta, pecunia numerata, sive quae in nominibus debentur haereditati, intra fines jurisdictionis reique publicae Mechliniensis, quocunque loco ea reperta fuerint, ita dividentur, ut ea bona mobilia quae intra pomoerium Mechliniense reperiuntur."

Christinaeus thus begins his commentary upon this law: "Mobilia ergo quae sunt extra territorium statuentium, debent judicari perinde ac si forent in eo loco in quo erat persona defuncti, secundum tradita a Do. Andr. Gayl. Pract. Observ. lib. 2. Observ. 124. num. 18. quia, uti ibidem dicit, bona mobilia respiciunt personam." Here follow several authorities, after which the author thus proceeds: "Idem dicendum sit in nominibus dubitorum, eo quod actio personalis semper cohoereat ossibus personae, et ab ea separari nequeat. Ac proinde non habent situm."

The fifth head of his commentary upon this article states the Question: "An hic articulus locum habeat tam in causa testati quam intestati?" with regard to which he observes, "Ejusque ratione cum statutum hoc, ibi, Alle havelyche geoden; (omnia bona mobilia) et ibi Gelt ende schulden, generaliter loquatur, diu multumque me referente agitatum disputatumque fuit in causa Caroli vanden Wiele et consortium actorum, contra haeredes domicellae Annae Bernaerts viduae quondam Arnoldi vanden Wiele, ejusque institutae haeredis reos, an hic articulus locum haberet tam in causa testati quam intestati: et sanior pars censuit eundem locum habere, cum statutum non constituat differentiam inter succedendi modum, sed indistincte declaret, mobilia et nomina, ubicumque locorum reperta, haberi debere pro repertis in loco domus mortuariae; ut inde recte consequatur maritum et uxorem, cum haec mobilia et nomina habeantur quasi subjurisdictione Mechliniensi sita, de his aliter disponere non potuisse per testamentum in mutuum favorem et commodum, quam ex praescripto statuti, hoc est coram magistratu Mechliniensi, nam si testati et intestati causam probe spectemus, nulla hac in parte constituenda videtur differentia."

[THE APPEAL in this case was barely dismissed, and the interlocutors complained of affirmed; but the Editor has no opportunity of knowing from anything that appears on this case, to what extent **[592]** the House of Lords coincided with the reasons adduced by the Respondents.

The following extracts from the Appellant's case will, in some measure, shew the state of the argument on the contrary side of the question. The reasons, as stated in that case, were merely short deductions from these arguments.]

It was argued (T. Erskine, W. Grant, J. Anstruther), that the right of succession is a consequence of the right of property, and that a right of alienation is necessarily inherent in a right of property: the same reasoning which supports the right of alienation and conveyance *inter vivos*, applies equally to transferring property by testamentary deeds; and accordingly it has been so treated by every writer upon the law, and particularly by Grotius, and by Lord Stair, B. 3, Title 4. § 2. The former of these writers expresses himself in the following terms: "*Quanquam enim testamentum ut actus alii formam certam accipere possit a jure civili ipsa tamen ejus substantia cognata est dominio*, et eo dato juris naturalis;" and the latter says, that Every right being a faculty or power of exaction, or disposal, it is a chief interest and effect of it that the owner may dispose thereof, not only to take effect presently, but, if he please, after his death; and, by the law of nature, the sole will of the owner is sufficient to pass his right, if communicable, to take effect in his life, or after his death: so then the first rule of succession, in equity, is the express will of the owner, willing such and such persons to succeed him in whole or in part."

Testamentary succession being therefore founded on the nature of property itself, is the original species of succession; and legal succession, or succession *ab intestato*, can only take place as subsidiary to, and in the absence of the express declared will of the deceased. It has accordingly been held by all writers as founded on the presumed will of the proprietor, which is not to be understood to mean the will which it is to be presumed the party actually had, but that which it is to be presumed he either had or would have had if he had willed at all upon the subject. Grotius, L. 2. C. 7. § 3. says, "*Successio ab intestato quae dicitur posito dominio remota omni lege civili ex conjectura voluntatis naturalem habet originem.*" *Puffendorf*, 1. 4. c. 11. § 1. treats it thus: "*Ex dispositione legis naturalis sine expresso et peculiari facto prioris domini dominia rerum transire dicuntur in successionibus ab intestato scilicet cum eo dominii vis foret attributor ut quis de rebus suis possit disponere non solum quoad ipse—in vivis esset sed etiam efficaciter in mortis eventum in alios transferre probabile non videatur si quis super bonis suis, nihil deprehenderetur dispossuisse eum illa a morte sua pro derilectus habita cui vis occupanti voluisse pateri igitur sequendum hic defuncti voluntatem probabilissime presumptam ratio naturalis dictabat.*"

Lord Stair, throughout his whole title of succession, B. 3. t. 4. treats succession *ab intestato* as founded on the presumed or conjectured will of the deceased, and expressly says, s. 3. where there is no express will, "the presumed will of the defunct takes place."

[593] If the will of the proprietor forms the groundwork of the natural right of succession, and if succession *ab intestato* be founded also upon that will, to be presumed according to some rule which each particular country may think best for that purpose; it will follow, that all restraints upon the will of the proprietor, or upon his power of disposing, established by the municipal laws of any country, are *pro tanto* contrary to the nature of property, and infringements upon natural right; they are therefore to be construed strictly even by the courts of justice of that state by which they are imposed, and are not to be extended to another state, when the law leaves an absolute power of disposal in the owners of property.

If there be no positive law regulating the succession to property situated in another state, and if succession *ab intestato* be nothing more than a rule established for discovering the presumed will of the deceased, the rule adopted for that purpose may either be the *lex domicilii* of the deceased, or the law of the *locus rei sitae*, according as the one or other shall be thought most proper for the purpose. Both countries act upon the same principles, viz. a desire to carry into effect the will of the deceased, although they may have adopted different means of attaining their conclusion; but the question cannot arise in the case of testamentary succession, because

it is idle to discuss whether this or that rule be the most proper for discovering the presumed will of a person who has expressly declared what his will is.

Property situated in another country can only pass by the law of that country where it is situated. The *lex domicilii* of the owner is in every respect a foreign law, and has no binding operation as law in the country where the property is situated; and when adopted, it is not adopted as a law to regulate property: but as a rule of presumption can only be appealed to in a case where there is room for presumption, and in such cases it may perhaps be the best rule of presumption after succession *ab intestato* is established, it seems no unreasonable supposition that when a person dies without a will, he means to leave his succession to be regulated as the law shall direct; and if such a supposition is to take place, it is equally reasonable to suppose that he meant his property to be regulated by that law which he knew best; or in other words, by the *lex domicilii;* and the appellant would hazard nothing in admitting that such presumptions are fair and reasonable in any case where presumptions can at all take place.

It was further argued, That there is no reason for distinguishing alienation by will, from any other species of alienation. If a person having property in England, alienates that property by an instrument valid by the laws of England for that purpose, it seems perfectly immaterial to inquire, whether such an instrument was valid by the laws of the country where he happened to reside at the time; it is not intended to have any operation there, nor intended to convey property situated there.

[594] It is enough if it be valid by the law of the country where it is intended to operate; and it would be carrying the argument a great way, to say, that in order effectually to alienate property situated in another country, it is not only necessary to do it by an instrument effectual by the law of the country where the property is situated; but also, that the instrument must be one which would have been effectual to have transferred the property, if it had been situated in the place where the party resided.

And therefore, unless it can be contended that there is some distinction between alienation by will, and other modes of alienation, it is sufficient to inquire whether the instrument is valid to transfer property situated in England, a point which cannot be disputed after probate has been granted by the proper ecclesiastical court.

But further; This is not a case where the alienation could not have been made by the law of Scotland; for it is admitted, that the right to legitim might have been defeated a thousand ways by conveyance *inter vivos*, by changing the nature of the property, by vesting it in heritable bonds, in personal bonds, secluding executors' bonds, bonds with substitutions; or even in bonds with a substitution to such person as he should name by any writing under his hand; therefore, as the thing might have been done by one mode or other, according to the law of Scotland, the question comes to be, Whether in order to transfer property in England, which property might have been legally transferred according to the law of both countries, it be necessary to use the English or Scotch form of conveyance? or whether a conveyance valid by the laws of England, becomes invalid, merely because the person executing it happens to live in Scotland? It has been often contended and properly decided, that a conveyance of personal property, if executed according to the forms of the *lex domicilii*, is sufficient to convey property, although situated in another country; because the person is supposed to be conversant in the law of his own country only. It is upon this principle that the deeds of one country are sustained in another; but it never was contended, that if a person living in a foreign country, made himself acquainted with the laws of the country where his property was situated, and endeavoured to convey it according to those laws, that this very act rendered his conveyance invalid; and that no conveyance can be valid but one executed according to the forms of the *lex domicilii*, although it be executed according to the forms of the law in *loco rei sitae*.

It was also observed by the appellants, that one great argument used by Lord Hardwick, in the case of Thorn and Watkins, in favour of the *lex domicilii* taking place in intestate succession, namely, that a contrary decision would destroy the credit of the funds, must, in this case of testate succession, operate directly the contrary way; for if it shall be held, that the property of **[595]** Scotchmen situated in

England, is liable to the claim of legitim, it necessarily follows, that every Scotchman who wishes to have a power of disposing of his property by will or testamentary deed, must withdraw his property from the funds, and transfer it to Scotland.

The respondent, in the course of his arguments, laid much stress upon the supposed maxim, that *mobilia non habent situs*, and are to be considered as having no proper local situation, but as being attached to the person of the proprietor, and therefore situated at the place of his domicile. If this maxim be true to its utmost extent, then unquestionably there can be no dispute what law is to take place; for in every possible case, the *lex domicilii*, and the law of the *locus rei sitae*, must be the same. It is because the maxim is not true, that the question is raised; for, in the very terms of it, it supposes the *situs* of the property to be in one place, and the domicile of the person in another.

It would be idle to discuss, whether property situated in England was to be governed by the law of England, if it were an incontrovertible proposition of law, that no domiciled Scotchman could have moveable property situated in England. It is however unquestionably true, that to many purposes, moveables have a *situs*, and may be described by it.

The maxim can mean no more than a short way of expressing the opinion of those who think that the *lex domicilii* should regulate succession *ab intestato* in moveables; and therefore this maxim, or rather this section, may be very much laid out of the question; the true state of it being, by what law is testate succession *in mobilibus* to be regulated, when the domicile is in one place, and the *situs* of the moveables in another? It may also be observed, that this maxim or fiction of some foreign jurists (for they are by no means all agreed on it) has no force in this country as a maxim of law. It can derive its force only from the reasoning by which it is supported. It is therefore by a discussion of that reasoning, by which it is proved that the *lex domicilii* ought to take place in opposition to the law of *locus rei sitae*, that the question is to be decided, and not by a quotation of the maxim that *mobilia non habent situs*. Indeed, it is in itself nothing more than a fiction, invented and supported as a means of getting rid of the difficulty of the reasoning, by converting a question of fact into a proposition of law; and it is accordingly treated by its warmest supporters as a pure fiction.

From the quotation from Voet, lib. 1. tit. 4. pars 2. *de statut.* sect. 11. relied upon by the respondent (see *ante*, p. 579), it was contended by the appellant to be clearly understood by that author as nothing more than a fiction or presumption, established for discovering the presumed will of a person. Where that will is not expressed and confined to that case, the appellant has no occasion to dispute its truth, or the propriety of its application. It may however be remarked, that it would be more simple to **[596]** say, that when a person dies intestate, it may be fairly presumed, that he intended his property to be divided at his death by the law of his own country, with which he was acquainted, than to have recourse to any fiction whatsoever, the truth of which cannot be supported even by those who are its warmest advocates. For this very same author, lib. 48. tit. 20. sect. 7. treats it as a maxim by no means applicable to all cases; or rather, he confines its application to the single case of intestate succession. In reasoning upon the effect of a forfeiture for a crime in one state, upon property situated in another, after contending that such forfeiture would operate to confiscate immoveable property to the state where it lay, provided the crime was such as would have induced a forfeiture if it had been tried in that state, he adds, "*Nec aliud ex juris rigore statuendum de mobilibus licet enim in materia* successionis ab intestato, *receptum sit mobilia regi lege, domicilii defuncti quia ubicunque naturaliter existant finguntur domino presentia esse tamen vere subsant potestati atque imperio ejus in cujus territorio inveniuntur.*"—From this quotation it is clear, that Voet does not consider this maxim, so much relied upon by the respondent, as universally true or universally applicable. On the contrary, he considers it as solely relating to the case of intestate succession, and as a presumption established for the discovery of supposed will. With this case, therefore, it has no relation. This, which is fairly to be inferred from the opinions of Voet, is distinctly laid down by Huber, an eminent Dutch lawyer, and one no less an advocate for the *lex domicilii* being the proper rule for determining succession *ab intestato*. He states the question, "*Si quis moriatur*

intestatus *relictis bonis in diversis civitatibus quae non eisdem legibus succedendi utuntur utrum successio deferatur secundum legis reipublici in qua vixit et mortuus est defunctus an ubi sita sunt bona.*" To which he answers, "*Immobilia sequi jus loci in quo sita sunt mobilia cum non faciant partem territorii sed affectionem ad personam ultimi possessoris habeant sequuntur jus loci in quo illi domicilium habuit.*" And then he adds, "*Quod si testatoris vel contrahentes claris verbis expresserunt quid de rebus immobilibus fieri vellent tum ratio juris gentium postulat ut voluntas affectum suum habeat ubicunque sitae sint* mobilis immobilisve, *cum nihil tam naturali, sit quam ut voluntas domini volentis rem suam in alium transferre rata habeatur ut ait Justinianus in sect. per Traditionem* 40 *Inst. de Acquir. R. D. Hab. di. Jur. l.* 5. *sect.* 4. *tit. sect.* 22, 23." It might almost be supposed, that this opinion was given upon this very case, and will decide it, as far at least as the opinions of foreign lawyers can have any weight.

But it has been contended, that although it may be true that some moveables have a *situs*, yet that debts *nomina debitoris* follow necessarily the person of the creditor. This, although it were admitted, would not affect a great part of the property, contested in this case, most of which consists of money in the **[597]** funds, which certainly must peculiarly be considered as having a *situs;* so much, that it cannot be transferred from one hand to another, unless the owner comes himself to the place where it is, or authorises some person to appear and act for him; and accordingly every foreign writer upon the law has stated *depositae montium*, as peculiarly having a *situs*, which bears a strict similarity to money in the funds.

It seems to have been a point by no means settled in the law of Scotland, whether *nomina debitoris* follow the person of the creditor or the debtor. Dirleton, one of the acutest writers on the law of Scotland, puts the questions, *si nomina*, which are not *res*, but *entio rationis* have *situm*, when the debtor is in Scotland, *animo remanendi*, and the debt is contracted with him as residing there? He then states the argument on both sides, and clearly shews to which his own opinion leans. *Ratio dubitandi*, they are thought and called a personal interest; and, therefore, should *sequi personam:* Contra, they are *res in obligationi et potentia.* 2*do*, If the creditor be forefaulted in France, being a Frenchman, they do not forefault to that king *quia subditus amittet*, only *quia sunt civitatis.* 3*tio*, They are liable in Scotland to extraordinary taxation. 4*to*, The debitor is *quasi servus* and *servi habend. situm;* to consider *quid juris* elsewhere, as to Banks, and *montes pietatis.* Stewart, the commentator of Dirleton, leans to the opposite opinion, but with great hesitation.

In a variety of cases the law does suppose debts to have a *situs* in the country of the debtor; a debt due in Scotland does not rest, *ipso jure*, in the assignees under a commission of bankrupt. Now, if they were to be considered as situated in England only, the assignees must have, *ipso jure*, a complete right. The process of arrestment, by the law of Scotland, is founded entirely upon the idea, that the property of a creditor is in the hands of debtor, situated where he is, and must be produced by him upon the decree of forthcoming. It is not used for the purpose of preventing the debtor from paying to his creditor, or for transferring a right from the creditor, but is a process to compel the debtor to deliver up property which he has in his hands really belonging to his creditor, but which that creditor ought to pay to the person using the arrestment. It is therefore not the transference of a right, but a demand to deliver up property; for this purpose, it must be supposed to have an actual *situs* in the place where it is demanded, and where it is required to be delivered up. The decree is looked upon as a judicial assignation of a subject, which therefore must be supposed to be situated in the place where the debtor is; otherwise the judge can have no authority to deliver it up or assign it; for arrestment is not a process *in personam*, but is held by all the writers on the law of Scotland to lay a *nexus* upon the subject itself, and to entitle the arrester to an action, by which he may appropriate it to himself. The only foundation for it therefore is, **[598]** that debts have a *situs* where the debtor is, and where alone they can be exacted.

But the appellant further apprehends, that a series of decisions has established it as a point of Scotch law, that the *lex loci rei sitae* is the governing rule both in testate and intestate succession; and therefore, if it be the law of England that the law of Scotland, with regard to succession, is to regulate the succession of Scotchmen, dying and leaving property in England, it will necessarily follow that the

operation of the law of Scotland must be confined to property situated in Scotland only. The law of Scotland must therefore be inquired after as a fact; and if a series of decisions are adhered to, the law of Scotland confines itself within the limits of the country, and decides that the law of England must take place with regard to property situated there; it is therefore a matter of no importance to the appellant, whether the law of England or the law of Scotland be held the rule of succession in the present case. If the law of England be, that the law of Scotland shall prevail with regard to the property of Scotchmen situated in England, then the law of Scotland decides, that with regard to such property, the law of England is the rule; if, on the contrary, it be held, that the law of England and its rules of distribution regulate without distinction all property lying within its reach, then equally the appellant must succeed. At the same time it is to be observed, that although it were proved that the *lex domicilii* were the rule as to intestate succession, the argument will not bear upon the case of testamentary succession. Lord Stair, b. 1. t. 1. sect. 16. says, "The law of Scotland regulates the succession and rights of Scotchmen in Scotland, though dying abroad and resident there; expressly laying it down, that though domiciled abroad, the succession to Scotch rights must be governed by Scotch law, and completely disregarding the law of the domicile." Lord Bankton follows the same doctrines, b. 1. t. 1. sect. 82, 83. He says, "The succession of persons residing and dying abroad, devolves according to the laws of the place where the subject lies." He then proceeds to give instances, and concludes, "For the same reason in legal succession, whether of heritage or moveables, the rule is, that those who are called to it, who by the laws of the place where the subject lies are entitled, and not those who are the lineal successors by the law of the country where the proprietor resided and died." These opinions of the most respectable writers upon the Scotch law have been followed by a series of decisions in the courts of that country for near two centuries. The first case which is to be found, is so early as the year 1611, Haddington; and is thus abridged in the Dictionary, vol. 1. p. 320.—"A Scotchman, born bastard, dying in England, his goods will fall under escheat to the king, and his donator will have a right thereto, notwithstanding any testament made by the bastard unconfirmed in England; and **[599]** albeit it be alleged that bastards have *testamenti factionem* there."

It is clear, that if in this case the *lex domicilii* had been followed, and if it were supposed that all moveables had *situs*, there the decision must have been in favour of the will. And what forms a strong point of similarity between this case and the present is, that the restraint which the law of Scotland imposes upon the *facultas testandi* of bastards is not dissimilar to the restraint which is imposed on a father with respect to *legitim.*

The next case, in point of time, is to be found in Durie, December 9th, 1623, *Henderson's Bairns* contra *Debtors.* And although it was a case concerning heritable bonds only, and in which the testator had, by will made in Flanders, instituted all his children his heirs, which testament was not by the law of Scotland valid to pass heritage; yet it is important to mention it here, because the reasons assigned for the judgment clearly shew the opinion of the judges upon the present point. After mentioning that such a testament was valid by the law of Flanders, it is said, "That that testament could not be valuable but for the goods and heritage which was within the province where the testator made his testament, and could not extend to goods and gear which were within another kingdom, when the goods would not fall under that division and testament by the law of the kingdom where the goods and lands lay; but the said goods ought to be asked by that person who would be found to have right thereto, by the law of the kingdom where they were, and not by the law of any other kingdom; neither could the law of any other country have place in Scotland, for any thing being within Scotland, but the proper law of the country itself."—The next case is *Melvill and Drummond,* July 16, 1634, Durie, whic also related to heritable bonds, but the *ratio decidendi* is stated to be, that *bona tam mobilia quam immobilia regulantur juxta legis regni* and *loci quo bona ea jacent et sita sunt.*

The same principle seems to have guided the judges during the usurpation, June 1656, *Craig* v. *Lord Traquair,* and January 19, 1665, *Lewis* contra *Shaw,* where a nuncupative testament made by a person domiciled in England was found

not effectual to carry moveable estate situated in Scotland, although the will was actually proved in the ecclesiastical court in England; and this case is more deserving of attention, because the very same arguments which are now adduced were then offered without effect. Yet had it ever been imagined by the lawyers of that day, that the *lex domicilii* must govern, and that *mobilia non habent situs*, it is impossible not to have given them effect, and decided a contrary way.

The rule in the law of Scotland, of rejecting nuncupative testaments, is a limitation of the *facultas testandi;* and in this case, the law of Scotland gave effect to its own restraints in the **[600]** case of goods in Scotland belonging to a domiciled Englishman; it never could intend that Scotch restraints were to operate over property situated in England, although belonging to a person domiciled in Scotland. There are a variety of other cases, all tending to establish the proposition, that the law of Scotland regulates the succession to personal property by the *lex loci rei sitae:* It is unnecessary to do more than mention them. *Bisset* v. *Brown*, July 19th, 1666, reported by Dirleton; *Archbishop of Glasgow* contra *Bruntsfield*, Mar. 1583; *Dryden* v. *Elliot*, 1684; both reported in Harcarse; *Lorimer* contra *Mortimer*, February 1st, 1770; *Elcherson and Davidson*, January 13th, 1778; and *Henderson and Maclean* in the same year; and the only case which supports the contrary doctrine, is that of *Brown and Brown*, November 28th, 1744, reported by Falconer and Kilkerran, which seems never to have been followed, and even to have been disapproved of at the time it was made, as clearly appears, by what is said by Lord Kilkerran, in his report of Morrison's case, Kelk. 214. *voce* Foreign.

The very respectable opinion supposed to be delivered in the house of lords in the case of *Bruce and Bruce*, is thought by the respondent to bear upon this case; but the appellant apprehends, that it was not necessary in that case expressly to determine what was the law of Scotland, because the House of Lords were of opinion, that Mr. Bruce was not domiciled in Scotland; and therefore the law of Scotland could not apply to his case, it not even being pretended that he had any property there. He imagines himself, with the utmost deference to that opinion, still at liberty to contend what the law of Scotland is in his case; and even if it were supposed that that very weighty opinion decided what was the law of Scotland in a case of intestate succession, and what was the best rule of presuming the will of the deceased; yet he still apprehends, that he is at liberty to argue, and hopes he has proved, that the principles upon which that opinion is supposed to be grounded, do not apply to the case of testate succession upon which he relies. If the appellant succeeds in establishing, either that the *lex loci rei sitae* is the rule of Scotch law, with regard to the succession to the moveable estate of Scotchmen, wherever situated; or if he has succeeded in establishing, that the *lex domicilii* is a rule only adopted for the purpose of ascertaining presumed will, and therefore not applicable to this case; it will be unnecessary for him to discuss what is the rule adopted by the law of England. It is quite enough for his purpose, that it is admitted that the law of England looks to the *lex domicilii*, that is, the law of Scotland, which he conceives he has proved to be in his favour.

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[601] CASE 2.—SARAH DRUMMOND (Widow of JAMES DRUMMOND, and Guardian to DAVID DRUMMOND her Son),—*Appellant;* JAMES DRUMMOND, & al.,—*Respondents* [20th February 1799].

[See 2 Scots R. R. 18. Discussed in *Brodie* v. *Barry*, 1813, 2 V. and B. 127, and *Maxwell* v. *Maxwell*, 1870, L. R. 4 H. L. 506.]

Though the personal estate of a Scotchman dying domiciled in England, must be distributed according to the law of England, yet that shall not affect or interfere with the succession to his real estate in Scotland. Therefore, where for securing a sum of money borrowed, a heritable bond is granted, by which the land in Scotland is rendered liable as the principal debtor there, and the heir pays the said bond by sale of part of the estate, (being at the same time one of the next of kin and administrator,) he shall not come for relief upon