1791. *June* 7. REBECCA HOG *against* THOMAS HOG.

No 116.
Succession of moveable effects, situated in a foreign country, whether testate or intestate, regulated by the *lex domicilii*.

THE father of Thomas and Rebecca Hog, having his domicil in Scotland, died possessed of a large personal estate situated in England, which by a deed of settlement was conveyed to Thomas.

As children's right of legitim is not acknowledged in England, it came to be a question between Rebecca, by whom the legitim was claimed, and Thomas the disponee of the effects, by what law the succession to that English property was to be regulated, whether by the *lex loci rei sitæ* which rejected, or the *lex domicilii* which recognized the claim of legitim. In an action against Thomas, at the instance of Rebecca, the defender

Pleaded; The power of alienation is inherent in the nature of property. This evidently implies that the proprietor can alienate, either absolutely or *sub modo*, which is the same thing as to say, that he can immediately transfer his right by a deed *inter vivos*, or by a testamentary settlement destine it, under the condition, that until his death the subject shall not be enjoyed by the donee; *Grotius, De jure bell. ac pac.*; Stair, b. 3. tit. 4. § 2.

Legal succession being therefore plainly subsidiary to the testamentary, is necessarily, in default of express will declared by testament, founded on presumed will, or that which it is presumed either was exercised, or would have been, had circumstances permitted; *Grot. ibid. lib.* 2. *cap.* 7. § 3.; *Puffendorff, De Jur. Nat. et Gen. lib.* 4. *c.* 11. § 1.; Stair, b. 3. tit. 4. §. 3.

Restraints, indeed, have by some states been imposed on the will of proprietors in the disposal of their property; but being adverse to the nature of that right, they ought ever to receive the strictest interpretation. By the law of the Twelve Tables, the natural right of disposing by will, was acknowleged in its fullest extent; *Uti quisque legasset super re sua, ita jus esto.* And such is the law of England, although anciently it admitted the same restraints as that of Scotland; Blackstone, vol. 2. p. 402.

When effects are situated in a territory different from that in which the deceased proprietor had his domicil, that presumed will which ought to regulate his intestate succession may be inferred, either through the medium of the *lex loci rei sitæ*, or of the *lex domicilii*, according as the rules of either may appear most likely to be adopted, though the circumstance of apparent acquiescence is peculiar to the last. But in the case of a testamentary settlement, there is no room for presumption; and to this declared will, the *lex loci rei sitæ* will give full effect, even when by the *lex domicilii* restraints may have been imposed; as these, for the reason already given, are to be confined within its own territory.

Indeed this is no more than equivalent to what is clearly permitted. By a mere variation of mode or form, a proprietor may accomplish his purpose of transmitting his property after his death, when otherwise he would have been restrained by the law of his domicil. But by the act of placing that property

No 116. in a country where the alienation is free from such shackles, a variation surely not less effectual is produced.

It would be singular, if the law of the domicil were to operate thus against express will. A person may have a domicil in a foreign country, for an occasional and temporary residence, with the laws or institutions of which his connection is so extremely slight, that it would be hardly reasonable to regulate, according to them, even his intestate succession. But in the case of testate succession, it would be palpably unjust. To justify such a restraint on the disposal of property, it is necessary that some obligation of that tendency on the proprietor should have been previously created. Now, on that supposition, there must be a wrong implied in any change of a domicil by which the obligation would be defeated. But there is here evidently no wrong, which proves the non-existence of any such obligation.

With respect to authorities, some foreign writers, adopting the fiction expressed by the terms *Mobilia non habent situm*, have thence inferred, that the law of the domicil ought to regulate succession. But a fiction destitute of any legal sanction, as that is in this country, is to be regarded merely as a falsehood; and though the opinions of those authors, the civil law being quite silent on the point, refer to the local usages of certain German or Belgic states, these usages are by no means uniform in this matter. The following authorities confirm the doctrines now maintained; *Voet. ad Pand. lib.* 1. *tit.* 4. § 2.; *Idem, de Statutis*, § 11. 9. 2. 7. 8.; *Id. ad Pand. lib.* 28. *tit* 1. § 44. *lib.* 48. *tit.* 20. § 7.; Christen. *ad leg. Mechlin. p.* 529. 530. 565. 563.; Peck. *de test. conjug. lib.* 4. *c.* 18. And Huber. *de jur. Civil. lib.* 3. § 4. *tit* 1. § 22. 23. expresses himself thus: 'Si testatores vel contrahentes claris verbis expresserint, quid de rebus 'immobilibus fieri vellent, tum ratio juris gentium postulat, ut voluntas effec-'tum suum habeat, ubicunque sitæ sunt mobiles immobilesve; cum nihil tam 'naturale sit, quam ut voluntas domini, volentis rem suam in alium transferri 'rata habeatur, ut ait Justinianus in § 40. Instit. de A. R. D.'

On such principles, it may be determined what the law of any particular country in this respect ought to be; and it will now appear that the law of Scotland is regulated by those principles. Thus Lord Stair lays it down, 'that the 'law of Scotland regulates the succession and rights of Scotsmen in Scotland, 'though dying abroad being resident there,' b. 1. tit. 1. §. 16.; and Bankton says more explicitly, that the *lex loci rei sitæ*, not the *lex domicilii*, is the rule both in testate and in intestate succession, b. 1. tit. 1. § 82. 83.

In the case of Purves *contra* Chisholm, No 46. p. 4494, it was found, that goods in Scotland, belonging to a bastard, a Scotsman, domiciled in England, fell under escheat contrary to the law of the domicil.

In those of Henderson, No 40. p. 4481, and of Melvill, No 41. p. 4483, the succession of effects in Scotland was regulated by the *lex loci rei sitæ*, in opposition to the *lex domicilii*; and the decisions, as it appears from their

terms, proceeded on the general principle, although the subjects were heritable bonds, or bonds bearing annualrent, then also deemed heritable. No 116.

On the same principle was the decision, 16th June 1656, during the Usurpation, Craig *contra* Lord Traquair;* and in that of Shaw against Lewis, 19th January 1665, No 47. p. 4494, a nuncupative testament, made by a person domiciled in England, was found not to be effectual to carry moveable property in Scotland; Stair; Gilmour.

Of a similar tendency are Bisset *contra* Brown, No 50. p. 4498; Dingwall *contra* Vandosme, No 15. p. 4449; Archbishop of Glasgow *contra* Burntsfield, No 16. p. 4449; Dryden *contra* Elliot, March 1684, *voce* Forum competens; Gray *contra* Earl of Selkirk, No 19. p. 4453.

As to the case of Brown *contra* Brown, No 109. p. 4604, though admitted as an authority, it would not affect the argument on testate succession; and it was soon disapproved of by the Court. Contrary judgements were given, Lorimer *contra* Mortimer, 1st February 1770, *See* Appendix; Davidson *contra* Elcherson, No 111. p. 4613; Henderson *contra* Maclean, No 112. p. 4615; Morris *contra* Wright, No 113. p. 4616; Hay and others *contra* Scott, No 18. p. 2379.

Answered; The prevalence of the *lex domicilii* is founded on the rights of nations. Their wealth is but the aggregate of that of all their people, in which it is plain every state must have a right, not to be altered by mere local situation; excepting landed property, which must ever remain subject to the law of the territory; and therefore the succession of moveable effects, wherever situated, is to be governed by the law of the state to which the proprietor belongs, or by the *lex domicilii*.

The same conclusion is to be inferred from the inconsistency attending the opposite supposition, when moveable effects are situated in various countries, with whose institutions the owner is unacquainted. He could then form no judgement, were he even to make a will, of what would be the destination of his property after his death. On such grounds, authors treating of the general principles of law, have founded their opinions. Vattel, liv. 2. chap. 8, § 110, 111; Puffendorff, *ed. par* Barbeyrac, liv. 8, chap. 5, § 3; Ulric. Huber. lib. 1, tit. 3, § 2, 3, 5, 9, 10, 12, *et seq.*; Voet. *ad Pand.* lib. 1, tit. 4, lib. 38, tit. 3, § 17, lib. 5, tit. 2.; Peckius *de testam. conjug.* lib. 4, c. 35; Zoes. *ad Pand.* lib. 28, tit. 1; Denisart. Collect. *de jurisprud. voc.* Domicil, § 3, 4. The same is the doctrine of the law of England, and so stated by Chancellor Hardwicke, Vezey's Reports, vol. 2. p. 35.

It is not from any respect to a presumed will, that this preference is given to the *lex domicilii*. In the opinion of the most eminent writers, such is not the principle of intestate succession; nor is the right of *testamenti factio* a result of the law of nature, but entirely *juris civilis*, or, in other words, dependent on the interposition of municipal law, Puffend. l. 4. c. 10. § 14; *Esprit des loix*, liv. 26. chap. 6.; Bynkersh. *Observat. jur. Rom.* lib. 2. c. 2.

* *See* Appendix.

No 116. But in respect to the legitim, which is truly a right of property in the children, it is peculiarly vain to argue concerning presumed will. In early society, a father is only a joint proprietor of the family-stock, which being gained by the united labour of husband, wife, and children, pertains of right also to the two last. Hence both the legitim and *jus relictæ* in their original nature, as well as their present form, are rights of property; and in this view they must appear equally sacred in all countries; Kames, Hist. Law-Tracts, No 3. l. 11. *ff. de deliber. et posthum. hæred.*; Erskine, b. 3. tit. 9. § 16. Stair, b. 3. tit. 8. § 44.; Dirleton, *voc. Legitima liberorum.*; *Reg. Majest.* lib. 2. cap. 37.

That the law of Scotland bestows the same preference on the *lex domicilii*, as appears in other systems of jurisprudence, is next to be shewn. In the statutes of William, chap. 30. a plain distinction is made between the succession of effects in Scotland belonging to strangers, and those of natives. The act of Parliament 1426, c. 88. ordains, 'quod causæ omnium mercatorum et incolarum 'regni Scotiæ extra regnum decedentium, debent tractari coram suis ordina-'riis infra regnum a quibus sua testamenta confirmantur; non obstante quod 'quædam ex bonis hujusmodi decedentium, tempore sui obitus fuerunt in An-'glia vel in partibus transmarinis.' Steuart, in his Answers, *vos.* Strangers, lays it down, 'that *mobilia* or *nomina* in this country, belonging to strangers, 'do transfer according to the law of the country where the owner resides and 'dies.' And Mr Erskine, in the most positive terms, declares for the *lex domicilii*, b. 3. tit. 9. § 4.; as does Lord Kames, Prin. of Eq. b. 3. c. 8. § 3.

Nor are the decisions of the Court of a different tendency. That in the case of Purves was governed by the *lex originis*, which was often not distinguished from the *lex domicilii*, and not by the *lex loci rei sitæ*; which might also be said of those of Henderson and Melvill, if they had been in point, or had not related to heritage; as it may of those of Craig and Lewis.

At the same time, it is to be observed how fatal those decisions, though considered as authorities for the *lex loci rei sitæ*, would be to the argument in favour of testate succession; because then that law would have prevailed against a will, and this being once admitted, the same effect could not be denied to the *lex domicilii*.

The cases of Bisset, the Archbishop of Glasgow, Dryden, and Gray, do not relate to succession. But the decision, Brown *contra* Brown, 28th November 1744, is directly in point, and in favour of the *lex domicilii*; while that of Lorimer was in favour of the *lex originis*. The first judgement in opposition to the *lex domicilii* was given in the case of Elcherson. But it was founded on an erroneous opinion of Sir Dudley Rider, relative to the succession of Alexander Lord Banff, 'that his effects situated in England must be governed by the law 'of that country.' The mistake, however, was made known by the Lord

Chancellor Thurlow's opinion in the case of Bruce, No 115. p. 4617, and must now for ever cease to operate. No 116.

The LORD ORDINARY's interlocutor was the following: 'Finds, that there is 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 the death, but by the law of the domicil, and because 'it has been in several cases so determined in England.'

On advising a reclaiming petition and answers, the COURT pronounced this judgement: 'Find, that the pursuer's claim of legitim can in no degree affect 'the moveables not situated in Scotland at the time of her father's death.'

A petition against this interlocutor having been presented, and followed with answers, the COURT appointed a hearing in presence.

By some of the Judges, who dissented from the opinion of the majority, it was observed, that in testamentary succession there is no room for the preference of the *lex domicilii*, which is founded on the *presumpta voluntas*, that is, the principle of succession *ab intestato*; that the fiction of *mobilia non habentia situm*, (which is so far reasonable, that moveables may be naturally supposed *in transitu* to the owner's domicil, so as not to have a permanent *situs* abroad), being framed in aid of that presumption, cannot operate against express will; that as Mr Hog might by other means have defeated the claim of legitim, so he effected the same end, by placing the subject of it in a territory where no such burden is known; that this exclusion of the legitim is similar to what would have happened in former times in regard to the quot, by the transporting of moveables to a country where no such exaction prevailed; or in the case of a local tax imposed on goods, if they were removed to a different territory.

The majority of the Court seemed to be of opinion, that the right of legitim, though during the father's life it be subject to his power of defeating its object, yet that power not having been exercised, it becomes at his death the same perfect or absolute right, as if it had never existed under such a condition, and like any other right of property, ought to have its effect every where.

The judgment of the Court, to which they afterwards adhered, on advising a reclaiming petition with answers, was as follows.

'THE LORDS find, that the succession to the personal effects of the deceased 'Mr Hog, wherever situated, must be regulated by the *lex domicilii*, and therefore they alter the interlocutor reclaimed against: Find, that the petitioner's 'right of legitim extends to such personal effects in England, or elsewhere, as 'well as in Scotland.'

Lord Ordinary, *Dreghorn*. Act: *Solicitor-General, Wight, Jo. Clerk*.
Alt. *Lord Advocate, Dean of Faculty, G. Fergusson, M. Ross*. Clerk, *Sinclair*.

Fol. Dic. v. 3. p. 224. Fac. Col. No 185. p. 376.

*** This caase was appealed;

No 116. THE HOUSE OF LORDS (7th May 1792) 'ORDERED AND ADJUDGED that the appeal be dismissed, and the interlocutors complained of, be affirmed.'

No 117.
Succession in moveables regulated by the *lex domicilii*.

1791. *November* 30. JANE DURIE *against* ALEXANDER COUTTS.

THOMAS DURIE, whose residence was in the Isle of Man, having occasionally come to Scotland, executed there a trust-deed of settlement in the Scottish form.

In the narrative it is set forth to be his intention, 'That his whole property 'should be vested in certain trustees; that his houses, &c. should be sold, if 'they thought fit; and that the produce of his heritable and personal estate 'should be applied in manner after mentioned.'

It then makes over to the 'trustees, for the use and behoof, in the *first* place, 'of the heirs of his body, whom failing, of David Durie, whom failing, of 'Jane Durie and Margaret Durie, equally, and to the longest liver of them, all 'and sundry heritable subjects that should happen to pertain to him at the time 'of his death; and particularly, an heritable debt of L. 2000 affecting certain 'lands in Scotland; together with all and sundry debts and sums of money, as 'well heritable as moveable,' &c.

And 'full power is granted to the trustees to intromit with, transact, uplift, 'and discharge the sums and others above disponed.'

The conveyance was burdened, beside the granter's debts, with the payment of various annuities and other legacies.

The succession having devolved to Jane and Margaret Durie, they, being sisters, mutually executed settlements according to the forms of the Isle of Man, where they lived, in favour of each other, and of Jane Durie their mother.

Margaret died several years before her sister Jane, who, immediately before her death, by a nuncupative will, bequeathed her whole effects, real and personal, to her mother. At this time the heritable debt had not been paid to the trustees, as it very soon after was.

Upon the death of Jane a competition for the succession, chiefly in respect to that debt, took place, between her mother, on the one hand, who, by the law of England, was entitled to it, both under her testaments and as legal heir; and, on the other, Mr Coutts, the heir by the law of Scotland; the issue of which depended on this point, Whether the right of Jane, under Mr Durie's settlement, was heritable or moveable. For Jane Durie, the mother, it was

Pleaded; 'The distinction of heritable and moveable,' says Lord Stair, 'is 'derived to rights and obligations, as the matter thereof is heritable or move-'able;' b. 2. tit. 1. § 3.