

House of Lords, 11th March 1793, Hay Balfour against Scot, Div. 10. *b. t.*; David Drummond might have effectually declared this debt a burden on his executry by will; and the presumption is, that he intended it should be so, when, by dying intestate, he allowed his succession to be regulated by the law of his domicile.

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Two reclaiming petitions were, (17th May and 7th June,) refused without answers.

Lord Ordinary, *Justice-Clerk Braxfield*, For the Petitioners, *J. W. Murray*. Clerk, *Menzies*.  
D.D. *Fac. Col. No 81. p. 187.*

1802. *June 16.* WIGHTMAN *against* DELISLE'S TRUSTEES.

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PHILIP DELISLE, a native of Scotland, at an early period of life settled as a merchant in Calcutta. During his residence in Bengal, he had three children by a native of the country.

The testament of a Scotsman resident in the East Indies is regulated by the law of England.

In the year 1785, he executed a testamentary settlement and deed of trust, by which he devised to certain persons in India 'all and every my estate and effects, of whatever kind or nature soever in India.' After directing a sum to be put out at interest for behoof of the mother of his children, and bequeathing several legacies, these persons are desired to transmit all the remainder of his estate and effects in India to trustees in Scotland, 'to whom I do hereby give and devise the same, together with all other my real and personal estate whatsoever, and wheresoever, upon and subject to the following trusts.' They are then directed to make payment of several legacies and annuities, and particularly of a legacy of L. 1500 to his sister, Mrs Ann Wightman; 'and after payment thereof, then in trust, as to the entire residue of my estate, of what kind or nature soever, or wheresoever, for my three natural children, Mary Delisle, Thomas Delisle, and Philip Delisle, share and share alike, to be paid to them by my said trustees, in manner and at the time herein after mentioned, and provided for; and with respect to such residue, my will and desire is, that the same shall be placed out, and invested by my said trustees, in some of the public funds.'

About ten months after the date of this settlement, Delisle purchased a house in Calcutta, and not long after certain grounds and gardens at Similah, and died upon the 15th July 1788, without having altered or republished his will. By the law of England, therefore, it seems these purchases devolved upon the heir-at-law.

Mrs Anne Wightman, Delisle's sister, and nearest relation, brought an action before the Court of Session against his Trustees, to have it found, that she had a right to these subjects in preference to the executors claiming under the will; and the Lord Ordinary appointed the parties to state their case in memorials,

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and to produce the opinion of English counsel upon the point at issue. Upon advising these memorials and opinions, his Lordship pronounced the following interlocutor: ' Finds it sufficiently instructed, That by the law of England, as extended to the British settlements in India, in which the testator Philip Delisle, at the time of making his last will and testament in August 1785, and at his death in July 1788, had his domicile, the subjects in Calcutta and at Similah, acquired by him after making said will, were not carried thereby, but devolved on the pursuer Mrs Wightman, as his heir *ab intestato*, and that she was entitled to take them up in that character, and at the same time to claim the legacy bequeathed to her by the said will: Likewise, finds it sufficiently instructed, that by the said law of England, the pursuer, by taking up the said subjects, did not become liable to relieve the rest of the testator's estate contained in said will, of his debts, or any part thereof, although contracted for and on account of the subjects so taken up by her; but that, on the contrary, the funds conveyed by the will are primarily liable for all such debts: In respect of all which, repels the defences; and as the subjects in question have been sold, and the proceeds are in the hands of the defenders, the trustees under the will, finds, That they, the said defenders, must account for the same to the pursuer; and ordains them to give in an account accordingly, and to produce the vouchers thereof.'

The Trustees reclaimed to the Court, *pleading*, That this was a case of approbate and reprobate, and that Mrs Wightman, after accepting the legacy in terms of the settlement, was barred from insisting in her claim.

But the Court being clearly of opinion, that the law of England must decide the case, refused to listen to any argument founded upon the law of Scotland, and adhered to the interlocutor of the Lord Ordinary\*.

Lord Ordinary, *Glenlee*.  
Alt. *Hay*.

A&C. *Hume*.  
Agent, *Jo. Anderson*, W. S.

Agent, *Jo. Renton*, W. S.

*Fac. Col. No 47. p. 96.*

\* There was also upon the same day another case, Austin against Austin, concerning a settlement in India, decided according to the opinions of English counsel, agreeable to the doctrine laid down by the Court in this case.