1778. *January* 14, and *March* 5. JAMES DAVIDSON *against* MARION ELCHERSTON.

FOREIGN.

Succession *ab intestato*, in moveables situated in a Foreign country.—*Situs* of Bank-Notes.

[*Faculty Collection, VIII.* 1 ; *Dictionary*, 4,613.]

BRAXFIELD. The effects are locally at Hamburg: the Court may give an opinion, but can give no execution. I think that the decision, in the noted case of *Brown of Braid*, was erroneous: the local situation of the subjects must be the rule for determining succession. *Mobilia habent situm* in moveables as well as heritage, though not so stable a *situs*. When a proprietor omits to dispose of his subjects, they are under the protection, and at the disposal of the country where they lie: the same is the case as to his effects. Where a man habilely declares his will, the law of every country will give force to it. In the case of heritage, it is an undeniable proposition that the succession must be governed by the law of the country where the subject is situated: the same is the case, it should seem, as to moveables: there is an *aditio hæreditatis* in both cases: intestate succession is not founded on the *præsumpta voluntas* of the deceased: his will is no more than to leave the effects to the distribution of the law of the place where the subjects are situated.

By the argument of presumption, his heritage and moveables should go the same way; and yet, in every view of the case, the contrary must often happen.

JUSTICE-CLERK. This case must occur frequently in a commercial country. I cannot see the difference between heritable and moveable, in a matter of succession. A man's estates must be subject to the law of the country where they are situated: they cannot be recovered until a proprietor is found, and that person must be a proprietor acknowledged by the law of the country. Taxations, crimes, transmissions from the dead to the living,—all must extend, as to their consequences, over every subject in the country where the taxation is raised, the crimes committed, or the conveyance made,—be the subject the property of a native or a foreigner.

COVINGTON. The proper sense of the brocard, *mobilia non habent situm*, is, that they do not establish a *forum*, in whatever country they may be. The commentators have mistaken the brocard, and carried it too far. In the case of *Van de Bampden* this very thing occurred, and was remedied by Act of Parliament. It is a man's own fault, if, having subjects in different countries, he does not regulate them by will. The embarrassment, in any other view of the law, is endless. Thus, for example, some things are moveable in one country which are heritable in another. This would create endless confusion, if there was not one uniform rule to be followed. As to *nomina debitorum*, they are incorporeal, and have no other *situs* but the place where the sums due are lodged, that is, where the debtor is.

KAIMES. It is one thing *who* is to judge and another by *what* law he ought to judge. We cannot dispose of goods which are at Hamburgh. We might, indeed, declare; but it would not be consistent with the dignity of the Court to declare, without having power to enforce. With regard to *nomina debitorum*, or debts, they are incorporeal, and have no *situs*. But *that* does not occur *here;* for the only thing approaching to debts are bank-notes of the two banks established by law, and their notes have been held a legal tender, or equivalent to specie. But *here* there are particular circumstances: Suppose a man should die in England, on a jaunt either for pleasure or for the recovery of his health, and he should have a hundred guineas in his pocket, Ought not the English judges to decree the sum to the heir by the law of Scotland? The present case is very similar. The deceased was accidentally at Hamburgh at the time of his death: he had no reidence *there*, and no purpose of continuing there.

GARDENSTON. The brocard, *mobilia non habent situm*, if it has any sense at all, has been well explained by Lord Covington. I wonder how the present case ever came to be a question at all. Although the man had never been at Hamburgh, if he had had effects *there*, it would have been sufficient ground for my judgment. With respect to the question of jurisdiction, the custodier has brought the goods into court; and therefore the Court may judge. The only difficulty is as to bank-notes. The determination of that question must depend on the place where the fund is. The instrument of debt is at Hamburgh, but the fund is in Scotland.

MONBODDO. *Mobilia* have a *situs*, but not so permanent a *situs* as heritage. We contrive to give them a permanent *situs* by the fiction of an arrestment *jurisdictionis fundandæ causa*, and *that*, indeed, implies a previous *situs*. My difficulty was, that the deceased had only a transient residence at Hamburgh; but I think that still he had a residence. I join with Lord Gardenston as to the opinion that *nomina* or bank-notes ought to be regulated by the law of Scotland.

PRESIDENT. The maxim, that *mobilia non habent situm*, has been extended too far by the lawyers of the Low Countries. How can heritage be judged by one law and moveables by another? How can we, or any judges, determine, unless by our own law? As to the noted case of *Brown of Braid*,—it was a report on a bill of advocation, judged by a thin bench, and so much disapproved of that the parties compounded matters. That judgment was condemned in *Morison's* case, observed by Lord Kilkerran, 1749, and, still more directly, in *Lorimer's* case, 1770. The judgment of the House of Lords as to Van de Bampden's money went on the same grounds. That *præsumpta voluntas* is the rule I admit; but that presumption is that the party meant to suffer matters to be regulated by the law of the country where he dies intestate. I think that *nomina debitorum* are in the same situation as other moveables; but money lent in a country will be regulated by the law of that country.

KENNET. My doubt was as to the residence of the deceased, and I thought that his transient absence from Scotland ought not to vary the case.

HAILES. I had the same doubt: it is obvious and forcible. But then it must be considered that it is impossible to draw the line; and, if you do not establish

one general rule, every case will fall to be differently determined. In this case, for instance, it is not proved what the deceased intended to do: and, if the account given of him by Davidson is true, he never would have ventured to return to Scotland; and yet Davidson contends that he must be held as resident in Scotland. Thus, instead of a rule for determining such cases in general, you will have arguments and facts and inferences, dubious or contradictory, in every case. As to the jurisdiction of the Court, I am satisfied that it has none. It is said that the custodier of the money has appeared in Court, by bringing a multiplepoinding. He had no business to do so: and, now that he has done it, it signifies nothing; for what does all this amount to? It is the opinion of the Court that the succession must be determined by the law of Hamburgh, and we are called to determine what that law is; that is, to do the very thing which is the primary reason for our finding that foreign law must be the rule. For any thing that we know, the State of Hamburgh may have a right to a share in the succession, *ab intestato*, by way of a tax; or there may be parties, not yet appearing, whose interest is preferable to that of any of the competitors.

On the 14th January 1778, "The Lords found that the succession must be regulated by the law of Hamburgh, and therefore dismissed the process."

Act. Ilay Campbell. *Alt.* D. Armstrong.

Reporter, Auchinleck.

Diss. as to bank-notes of the Old and Royal Banks, Gardenston, Covington, Monboddo, Stonefield.

1778. *March 5.* BRAXFIELD. It is of no consequence whether the notes *in medio* are the notes of banks established by public authority or the notes of any private merchant-company, payable to the bearer, without any deed of transmission. I cannot distinguish between this case and that of any other *corpus*. In the case of *Thomson* and *Tabor*, it was found that the instruction of debt was a mere voucher, and that it was necessary to have recourse to the debtor; but if Cumming, the holder of the bills in that case, had received payment in bank-notes, the notes might have been habilely arrested in his hands, and there would have been no occasion to resort to the debtor. Suppose a gentleman in Caithness to die possessed of L.1000 in Edinburgh bank-notes, where ought they to be confirmed? In Caithness certainly, and not in Edinburgh, for they pass from hand to hand like money, or any other *corpus*.

On the 5th March 1778, "The Lords found that the bank-notes were to be considered as any other moveables, in the question of succession;" adhering to their general interlocutor of the 15th January 1778.

Act. J. M'Laurin. *Alt.* R. Cullen.