1805. *March* 5. CAMPBELL *against* BOURCHIER, and Others.

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Whether the effect of an adjudication is to render the debt wholly heritable, if the debt be partly secured over property not subject to the jurisdiction of the law of Scotland?

ALEXANDER CAMPBELL of Werton, in the county of Middlesex, was creditor to Macfarlane of Macfarlane, to the extent of £1000, and held a personal bond for that sum, executed in the Scotch form, payable to him, his heirs, executors and assignees.

The affairs of Macfarlane having gone into disorder, he conveyed certain estates belonging to him in Jamaica, and also the estate of Arroquhar, and others in Scotland, to trustees, for the benefit of his creditors, with the usual powers, to sell and divide the fund, according to their respective debts and preferences. Mr. Campbell acceded to this trust; but some of the creditors refused to concur in the measure, and proceeded to adjudge the Scotch estates. Upon this, the acceding creditors assigned their debts to a trustee, for the purpose of leading an adjudication; and decree was obtained by them in the month of August 1781.

In June 1781, Mr. Campbell, who was domiciled in England, made a will in the English form, by which he devised the greater part of his fortune to Thomas Bates Rous, and others, as executors in trust, for certain purposes. To his brother, Campbell of Ardchattan, his heir-at-law, he left an annuity of £200 during his life, and certain legacies to his children.

Mr. Campbell died soon after executing this settlement; and the estate of Macfarlane in Scotland was brought to a judicial sale in 1784. The dividends upon Mr. Campbell's debt, arising from the price of this estate, amounted to £286, and were claimed by Ardchattan, as his brother's heir-at-law, upon the ground that the debt had been rendered heritable by adjudication, and, therefore, being Scotch heritage, could not be disposed of by a testamentary deed. In this the executor acquiesced. Various dividends were likewise received from the Jamaica property, to the extent of upwards of £800; and a final dividend having been at length declared, Macfarlane's trustees required to be discharged. And here the question occurred, Whether a discharge should be granted by Campbell's executors, or by his heir-at-law? To ascertain this point, an action was raised by the executors against the trustees, who, at the same time, brought a process of multiplepoinding against the executors, and Robert Campbell the heir-at-law.

The Lord Ordinary conjoined the processes, and reported the cause. The heir

Pleaded: Succession in heritage must be regulated by the *forum rei sitæ*. It has accordingly been found, that money due to an Englishman, upon an heritable bond in Scotland, cannot be conveyed by testament; Melville against

No. 5. Drummond, July 3d, 1634, No. 41. p. 4483; Durie against Coutts, November 30th, 1791, No. 140. p. 5595; Davidson against Kidd, December 20th, 1797, No. 142. p. 5597. A subject is to be accounted heritable or moveable, with regard to succession, according to its situation at the time of the person's death whose succession is in question. The sum, therefore, *in medio*, must be considered as it stood at the time of Mr. Campbell's death, secured by adjudication on the estate of Arroquhar.

By the law of Scotland, a moveable debt becomes heritable by the accession of an heritable security, either voluntary or judicial. The law does not admit of any division of the debt, so as to make it partly heritable and partly moveable; but the whole becomes heritable, from whatever fund payment may ultimately be recovered; Erskine, B. 2. Tit. 2. § 14.; Kinnimond against Rochead, November 6th, 1739, No. 187. p. 5590; Munro against Alexander, May 21st, 1794, No. 103. p. 5548. Consequently, the sum *in medio*, was not comprehended under the personal estate of the late Mr. Campbell, and could not be conveyed by his testament, but devolved upon the heir-at-law.

This doctrine cannot be at all affected by the domicil of the creditor. The *jus crediti* is not to be confounded with the funds out of which it is to be paid. The latter may be heritable or moveable; or they may be partly the one and partly the other, according to circumstances: The *jus crediti*, however, cannot partake of both qualities, but remains one and the same. It is a mistake to suppose, that Mr. Campbell's interest in the estate of Arroquhar, amounted only to the dividend which has been received from it, in consequence of the judicial sale. His interest was equal to the sum contained in the personal bond, with the annual-rent and accumulations for which the adjudication was led. The personal right in the bond was merged in the adjudication; and any action competent against the person or effects of the debtor, is merely a privilege bestowed by law on the holder of the adjudication, and an accessary to it. Every part of the debt was equally secured upon the estate of Arroquhar, though it was too much exhausted by other securities to be able to discharge the whole; and consequently the whole debt must be held to be heritable.

To make any alteration in the law according to the domicil of the creditor, and to hold, that the debt was partly heritable, and partly moveable, would have the effect of preventing a foreigner's heritable succession in this country from being distributed according to any fixed rules, and would make it depend on accident, the interference of third parties, the will of his debtor or of his executors.

Answered: Debts are incorporeal in their nature, and incapable of having any actual *situs*. It was long a matter of dispute whether, in point of succession, they were to be regulated by the law of the creditor's domicil to whom

the right attached; or that of the debtor upon whom the obligation lay, and where the debt was to be made effectual. But it has been now finally settled that the law of the creditor's domicil must be the rule of distribution.

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The creditor Mr. Campbell, though a Scotsman by birth, was for many years domiciled in England, so that the law of England became the rule of distribution in the whole of his personal succession. But not only is the debt in question subject to the law of England, with respect to succession, but the fund *in medio* is an English fund, being the proceeds of the debtor's estate in the Island of Jamaica, which at the time of the creditor's death was unsold. In every view, therefore, the succession to this fund must be governed by the law of England.

There is no occasion, accordingly, for disputing the doctrine pleaded by the heir-at-law, with regard to debts partly secured by adjudication, being wholly heritable by the law of Scotland. But that is a doctrine entirely confined to the law of Scotland, and peculiar to it. In England, a debt continues personal, though secured by mortgage. The opposite doctrine is peculiar to the municipal law of Scotland; Voet, L. 1. T. 8. § 27; having no foundation either in the *jus gentium*, or in the nature of the thing, and which therefore ought to have no influence in the succession of persons whose domicil is not within Scotland. A creditor domiciled in England or Scotland, may have securities for the same debt, not only in these countries, but in every quarter of the world. The countries in which he has these securities, may each have laws of succession peculiar to itself; and it is impossible that the succession to the whole debt can be regulated by the law of each country, where there is a security for it. Where there are real securities in one or more countries, the real estate, or what is drawn from it, will devolve according to the law of heritable succession in that country; but the only rule for the distribution of the surplus, must be according to the domicil of the creditor, being a mere personal debt; and it is not denied, that according to the law of England, the executors are entitled to the fund *in medio*.

"The Lords, (February 2, 1804), upon report of Lord Cullen, and having "advised the mutual informations for the parties, prefer the executors to the "sum *in medio*, and remit to the Lord Ordinary to proceed accordingly." This interlocutor was pronounced by the narrowest majority.

Upon advising a reclaiming petition, with answers, there being still great difference of opinion on the Bench, and the case involving a question of general law, the Court appointed counsel to be heard in presence.

Counsel were accordingly heard.

After which, the Court adhered to the former interlocutor, preferring the executors to the fund *in medio*.

The Lord President, and some other Judges who were for preferring the heir-at-law, conceived that it was contrary to principle to hold any debt to be

No. 5. partly heritable and partly moveable; that accordingly the law of Scotland held this debt to be wholly heritable, and that the domicil of the creditor could not alter the legal effect of a Scotch heritable security, which must be governed by the same rules, whether the creditor was a native or a foreigner. The majority of the Court admitted the doctrine to be well founded, so far as regarded the law of Scotland, but were of opinion, that the Scotch law could not be admitted as the only rule in deciding this case. It was observed, that the plea maintained by the heir-at-law in this case, would lead to consequences altogether inconsistent. Suppose a creditor were to lead an adjudication of heritable property belonging to his debtor in this country, and at the same time obtain over a tenement in England, belonging to his debtor, a real lien of the same nature, the two estates being differently devised, there was no reason for holding that the English law should cease with regard to the tenement in England, merely because the creditor had availed himself of the law of Scotland, by adjudging an estate there. The only mode by which questions of this sort can be extricated, is by giving effect to the law of each country, with regard to that part of the debt recovered from property situated within its jurisdiction. This had been done in the present case, the heir-at-law having received the proceeds of the Scots estate, and the executors the proceeds of the estate in Jamaica.

To this observation, it was replied, That the case put, seemed to relate to the succession of the debtor, and not to that of the creditor; and besides, it supposed the nature of the debt to be changed by some step taken in England or Jamaica, as well as by the adjudication in Scotland, which, were it true, would make the case still more clear in favour of the creditor's heir. But, in fact, the nature of the debt was changed by the adjudication alone, being changed from personal into heritable, and this was precisely the state of it when the original creditor died; in consequence of which the right to the debt, and the whole debt, passed to the heir, as the only person that could make up a title to it. The instrument of debt itself is therefore to be delivered up to him as his property; and he alone can discharge it. He alone was entitled to make a claim upon the Scots estate of the debtor for payment; and in order to draw the dividend which actually accrued to him out of the price, it was necessary for him to claim, not for a part of the debt only, but for the whole. He was likewise bound to convey the whole debt to the purchaser, as a collateral security for his purchase; saving always his own right of recovering the balance, which still remained due to him of the debt, out of the other funds and estate of the bankrupt-debtor, whether real or personal, or wherever situated, after applying his share of the price arising from the heritable estate in Scotland, which was all that he could get out of that estate. It is a matter of indifference to the debtor, whether, upon the death of the original granter, the right of recovering

payment belongs to one person in right of the creditor, or to another. This is a question merely among these heirs themselves; and no instance ever occurred, or can be figured, of one and the same debt being divisible between an heir and an executor, unless in consequence of collation, or by some special deed of the ancestor directing it to be so done. The debtor may be *in bona fide* to pay to any person who comes with an ostensible title, whether heir or executor, and it may be hard to make him pay twice, but there is no such question here; for the money recovered is *in medio;* and the sole question is, to what heir it belongs, which question can only be resolved in one way. If the right was moveable at the ancestor's death, it belongs to his nearest in kin or executor. If rendered heritable by the adjudication, it passes to his heir; and that this last was to be the effect of the adjudication, we must presume that the creditor was fully aware, when he gave orders for attaching a land estate in Scotland in that manner for his payment.

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Lord Ordinary, *Cullen*. For Heir, *Erskine, Cranstoun*. Agent, *Ar. Swinton*, W. S.
For Executors, *Solicitor-General Blair, Ross*. Agent, *Jas. Thomson*, W. S.
Clerk, *Mackenzie*.

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