No 108.

THE LORDS, however, 19th February 1793, repelled the plea of prescription, in respect of the claim entered upon the bills in question in Fordyce's sequestration; and repelled also the objection to the competency of the court.

Upon advising a second petition and answers, the COURT, influenced by the understanding and practice of merchants on the subject, found, 'That the time 'requisite for completing the prescription in question, only began to run from 'the third or last day of grace, and therefore repelled the plea of prescription.' *See* PRESCRIPTION.

Lord Ordinary, *Alva.* Act. *Solicitor General Blair, and M. Ross.*
Alt. *Tait, John Clerk.* Clerk, *Sinclair.*

D. D. *Fol. Dic. v. 3. p. 231.* *Fac. Col. No 72. p. 157.*

*** This cause was appealed:

THE HOUSE OF LORDS, 11th November 1796, ORDERED AND ADJUDGED, That the several interlocutors complained of in the appeal be reversed, except as to so much of the interlocutor of 19th November 1793, as finds, that the time requisite to completing the prescription in question only began to run from the third or last day of grace, and therefore repel the plea of prescription; without prejudice to any claim which Douglas, Heron, and Company may make for payment of the two bills out of the estate of Baron Grant, or out of such part thereof as have come to the hands of Andrew Grant, and for which he ought to have accounted in a suit for carrying into execution the trusts of the will of the said Andrew Grant.

DIVISION X.

Succession by what Law regulated.

No 109.
Succession to moveables in a foreign country, belonging to a Scotsman residing in Scotland, is regulated by the Scots law.

1744. *November* 28. BROWN *against* BROWN.

IN September 1743, Captain William Brown of the Scots Royal regiment of foot, son to Adam Brown late Provost of Edinburgh, having died at Edinburgh without issue, and intestate, John Brown, his only surviving brother, confirmed executor to him, and *inter alia* gave up in the inventory certain personal securities which the defunct had occasionally acquired, while the regiment to which he belonged was quartered in Ireland, and which he had along with him at

Edinburgh when he died, consisting of two Irish government debentures, and bonds and promissory notes, all granted in Ireland, and after the Irish form. No 109.

Thomas Brown of Braid, nephew to the defunct, brought an action against the Executor, before the Commissaries of Edinburgh, wherein he insisted to have it declared, that the half of the debts for which securities were granted in Ireland did belong to him, and that the executor ought to be decerned either to account to him for the same, or to denude himself of the testament to that extent in favour of him the pursuer; on this ground, that, by the laws of Ireland, the *jus representationis* is admitted in the succession of moveables, whereby the nephew and niece take, along with the uncle and aunt, and that the succession to effects in foreign countries is to be governed by the law of the country where the effects happen to be situated.

And as it was admitted by the defender, that by the law of Ireland, as of England, the uncle and nephew succeed equally in moveables, the debate turned upon this general point; By the law of what country the succession to a defunct's moveables was to be governed, whether by the law of the country where the moveables happen to be at the time of his death, or by the law of the country where the defunct had his domicil?

And, after full debate, the Commissaries pronounced the following interlocutor:

'The Commissaries having considered, &c. and that the deceast Captain Brown was *origine* a Scotsman, and never had any proper or fixed domicil elsewhere, having only attended his regiment in the different places to which it was called from time to time, until he at last returned to Scotland his native country, where he resided some months before his death at Edinburgh, and that the said debentures, and other *nomina* in question, were found in his possession at his death; find that the succession to the said Captain Brown's moveable estate is to be regulated by the laws of Scotland, and that the right to his *nomina* belongs to the defender as his sole nearest of kin, whether these *nomina* are granted by single persons or bodies politic, and whether the granters of them live in Scotland or Ireland; and having considered the debentures in question, which pass by indorsation, and are payable to executors, &c. together with the act of Parliament, 5th Geo. II. referred to in the said debentures, and that the funds appropriated in the said act for payment of the L. 300,000 (thereby authorised to be borrowed) are of a personal and moveable nature, and that the time for demanding the capital sums, as well as the annualrent thereof, was elapsed several years before the indorsation in favour of the defunct; find that the sole right to the said debentures, and sums thereby due, belongs to the defender, and therefore assoilzie him from this process.

The cause being brought before the Lords by a bill of advocation, it was urged for the pursuer, that as effects which happen to be locally in a foreign country are to be recovered by actions before the courts established in that jurisdiction, so the judges are to determine according to the rules and statutes by

No 109. which the subjects in that territory are to be governed; and, therefore, when the matter comes to be litigated before the Courts in Scotland, where the effects are not and cannot be brought, the Judge ought to determine according to the laws of the other country where the effects are to be recovered; otherways jarring decrees might be pronounced in the different territories, which would be attended with great inconveniencies. And if the law stand so as to moveables, properly so called, there is yet more reason that it should stand so as to *nomina debitorum*; for, whatever difference there may be among lawyers as to moveables, strictly so called, every lawyer admits, that *res immobiles* are governed *secundum leges loci* where they are situated, and *nomina*, which are *jura incorporalia*, are in some sort in a middle state between the two, *quæ*, as Mævius expresses it, *nec, proprie loquendo, ad mobilia vel immobilia pertinent.*

2*do*, Whatever foreign lawyers may have said upon this subject, the practice of this Court was said to be with the pursuer, for which reference was made to Lord Stair, page 11. and the decisions by him there quoted; and a recent case was also referred to between Duncan of Lundie and Murray of Ayton*, whose wife was sister and nearest of kin to Adam Duncan, factor at Rotterdam, in which Lundie the nephew claiming a share of the executry, according to the laws of Holland, where the *jus representationis* in moveables takes place, the Lords found, that the nephew had no claim, and preferred the sister, who was executrix by the law of Scotland.

And, in the *last* place, whatever opinion the Lords might entertain as to the principles that have been pleaded with respect to proper moveables and ordinary bonds and bills, yet the two Irish debentures were said to come under a different consideration; for, as they are a debt of the government, and payable out of the funds established in Ireland, they are to be considered among those *mobilia quæ loco immobilium habentur*, as they are fixed down to that country, where, and where only they can be demanded, as much as the stocks in England are fixed in England; and no Court in England would find that bank-stock, for example, or South-sea stock, did descend according to the law of any other country than that of England.

That the circumstances in the Commissaries' interlocutor were of no weight; for, if any argument arises from the debentures being payable to executors, it should rather be that the executors mentioned in the obligation are the executors according to the law and understanding of the country where the obligation was granted: Nor is it at all material that the time for demanding the capital and annualrents was past before the indorsation; as the original creditor, by letting the money lie after the term of payment past, so the purchaser, by taking the indorsation, shewed his intention that the sum should remain upon the government security.

Answered for the defender; That the present question, in respect of the practice of the Courts in Scotland, is at least undecided; for, as to what is observed from Lord Stair, and the decisions by him quoted, they do not apply, as

* *See* Appendix.

being either in the case of an heritable bond conveyed by testament, which the law of Scotland does not permit, as it is *res immobilis* and governed by the *lex loci*, where the subject is situated, or in the case of nuncupative testaments made abroad, which the law of Scotland does not allow. And as to the case of Duncan of Lundie, not to mention that the matter was only once laid before the Lords upon an imperfect minute, and, after the first and only interlocutor, transacted between the parties, there was in that case no other question, but who should have the office; and stand the point of right how it would, the Commissaries could not give the office but to the party, who, by the law of the country, was entitled to it. No 109.

As therefore the question is new in respect to the custom of Scotland, as nothing is to be found in our decisions or law-books directly determining it, recourse must be had to the laws and practice of other countries, and to the testimonies of foreign lawyers, especially as the question may not improperly be said to concern the law of nations. And the general and received doctrine of the foreign lawyers on this subject may be reduced to these propositions: 1*st*, That in all countries the succession to heritage is to be governed by the *lex loci ubi res sita est.* 2*dly*, That proper *mobilia* are not considered *habere situm*, but to follow the law of the country where the owner has his domicil, and to which it is presumed that sooner or later he intended to transfer them. 3*dly*, That the same thing is true concerning *nomina debitorum*, that these are governed by the law of the domicil of the creditor, and not of the debtor. 4*thly*, That there are certain moveable subjects *quæ habentur loco immobilium*:

That these propositions might be proved by multitudes of authorities, but that it should suffice to refer to Voet, and the many authorities by him cited, Appendix to the title, *De Constitutionibus Principum*, § 11.; and title *De Rerum Divisione*, § 30. where particularly with respect to *nomina* his words are, 'Cum 'ergo actiones personales, saltem, ex communi consensu, eæ quæ 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 dominio et patrimonio actiones sunt, domicilium fixit.' And as thus the rules are fixed *inter gentes ex comitate*, so they are founded in reason; for, how absurd would it be to suppose, that, where a man had money or effects in all the different parts of the world, his presumed will, upon which the succession *ab intestato* is founded, should be held to be as different as the peculiar laws or constitutions in the several parts of the world where his effects lie or his debtors live; when, on the contrary, it is every man's presumed intention to gather in and bring home the goods or sums of money belonging to him that were thus dispersed, or sums owing to him by persons living in foreign parts.

And as to the debentures, *answered*, That they are by no means of the nature of those moveables that lawyers say, *pro immobilibus habentur*, of which the examples given by Voet are *in servis adscriptitiis, fructibus pendentibus, arboribus*

No 109. *necdum rutis aut cæsis, &c.* Nor have the debentures any resemblance to the shares in the capital stock of the bank, the South-sea Company, or any trading company, which being fixed by their charters in a certain country, the shares in their stock might possibly be accounted among the moveables *quæ immobilium loco habenda sunt;* but they rather resemble the bonds or notes of one of those trading companies, which, why they should not fall under the general rule, that obligations or personal securities for money are accounted part of the creditor's moveable estate, no good reason can be assigned; for it can make no difference whether such money be due by a single person or body-politic, or whether it be the bond of a city, burgh, or kingdom; it is still no more than an obligation to pay money, which, though it can in the case of a city or kingdom be only sued for in the kingdom, that does not alter its nature; for neither can a common obligation be sued for, but in the kingdom where the debtor resides, unless he should occasionally come out of it, which may never happen.

So far is true, that no judgment of this Court can determine the Judges of Ireland, where ultimately execution must be had; but as it is to be presumed that the Judges of Ireland will give judgment agreeable to the law of nations, so this Court cannot refuse to give judgment in any cause when properly brought before them, and they are in their duty when they give it agreeable to law.

Upon this debate the Lords 'remitted to the Ordinary to refuse the bill of advocation.'

Fol. Dic. v. 3. p. 221. Kilkerran, (Foreign) *No 1. p. 199.*

*** D. Falconer reports the same case:

Captain William Brown, of General St Clair's regiment, having died here intestate, John Brown, merchant in Edinburgh, his brother, was confirmed executor *qua* nearest of kin to him, and gave up in inventory two Irish government debentures, each for L. 100 Sterling, a bond for L. 100, and two promissory notes, each for L. 100, all granted in Ireland, and in the Irish form.

Thomas Brown of Braid, nephew to the defunct, pursued the executor for the half of the said sums, as being to be regulated by the law of Ireland, which allows of representation in moveables.

The law of Ireland was not disputed, but whether the succession was to be regulated by that or the law of Scotland; on which point the Commissaries found, 'That considering that Captain Brown was *origine* a Scotsman, and never had any proper or fixt domicil elsewhere, having only attended his regiment in the different places to which it was called from time to time, until he at last returned to Scotland his native country, where he resided some months before his death at Edinburgh; and that the said debentures and other *nomina* in question were found in his possession at his death; that the succcession to his moveable estate was to be regulated by the law of Scotland; and that the right to his *nomina* belonged to the defender, as his sole nearest of kin, whether these

nomina were granted by single persons, or bodies politic, and whether the granters of them lived in Scotland or Ireland. And having considered the debentures in question, which past by indorsation, and were payable to executors, &c. together with the act of Parliament 5th Geo. II. referred to in the said debentures, and that the funds appropriated in the said act, for payment of L. 300,000 (thereby authorised to be borrowed) were of a personal and moveable nature, and that the time for demanding the capital sums, as well as the annualrent thereof, was elapsed several years before the indorsation in favours of the defunct; found, that the sole right to the said debentures, and sums thereby due, belonged to the defender, and assoilzied.' No 109.

A bill of advocation was offered by Braid; and it being reported he seemed to give up, that by the opinion of most foreign lawyers, not only proper moveables, but *nomina* were regulated by the law of the domicil of the proprietor; but *alleged*, that, by the law of Scotland, it was otherwise; that Stair, l. 1. tit. 1. observed, the law of Scotland regulated the rights of Scotsmen dying abroad, where they had resided, as was found in the case of Colonel Henderson's Children, No 40. p. 4481.; and Melvill against Drummond, No 41. p. 4483.; that it does not difference the case that the Captain was a Scotsman, because the lawyers who maintain that moveables do not descend, according to the law of the country where they are situated, make the domicil the rule. Stair also mentions a more recent case of William Shaw, factor in London, in which it was found, that a nuncupative testament confirmed in England, where he had his domicil, was null, Shaw against Lewis, No 47. p. 4494. The question was lately debated between Duncan of Lundie and Murray of Ayton *, when it was found, That though Adam Duncan had his domicil and died in Holland, yet the laws of Holland did not take place, which allowed a representation, but those of Scotland.

With regard to the two Irish debentures, by the act of Parliament, a security was to be granted, and the debenture is accordingly to the person advancer of the money, his executors and assigns, which could only be understood to be meant, both by the granter and receiver, according to the meaning of the country where the transaction was made. And the argument is the stronger, that the security is granted in consequence of an act of Parliament; and as the money is payable out of funds established there, the debt seems a moveable, pinned down there like stocks in England or Scotland, which are certainly *destinatione* fixed to the kingdom. And though the time for demanding the money was come, that shows the defunct's intention and *animus*, that it should remain on the government security. A kingdom, like a private person, cannot be sued out of the kingdom; it has no effects to arrest, to found a jurisdiction; and therefore the placing the money on a public security, puts it in the same class with *res adscriptitiæ glebæ*, and a stocking on a plantation, which would be held *loco immobilium*.

* *See* APPENDIX.

No 109. *Answered*, The question is to be determined *jure gentium*, by which *mobilia sequuntur personam, et nomina debitorum* are *inter mobilia*. The decisons from Stair are not to the purpose; that in the case of Colonel Henderson's Children, being concerning heritable bonds; the other case is founded on the municipal law of Scotland, which does not allow of witnesses as sufficient evidence of a testament; and besides, that is in the case of a Scotsman dying at London, and this is that of one dying in his native country. The case of Lundie was only once laid before the Lords, and afterwards taken up; and proceeded upon the defunct's being a Scotsman, and having but an occasional domicil in Holland. The reason of the lawyers' opinion, that the domicil of the creditor is to be preferred, is his presumed will, which is to have all his effects about him; and it were absurd to imagine he inclined to have as many different successions, as there might be countries where his effects lay.

The indentures consist of a receipt by the deputy receiver of Ireland, of L. 100 from A. B. for his Majesty's use, on account of a loan, for which a fund is settled by act of Parliament, and which is to be repaid to the said A. B. his executors, administrators and assigns, with interest till payment. By the act of Parliament, the method of payment is directed, the funds first to be applied to the interest, and the remainder as a sinking fund to the principal; and it is provided, that the proprietors of such debentures as should be outstanding at Christmas 1738, might demand their money; which time was elapsed before Captain Brown's purchase; so that they nowise partake of an irredeemable annuity, or have any characters of being *destinatione* perpetual; nor are they like stock in any trading company, but rather the bonds or notes of such company; and there is no difference betwixt a debt due by a body politic and a private person.

The word 'executors' is no more determined as to its sense, by being in the debentures, than it would be in a private bond; the creditor makes these either by his testament, or his *præsumpta voluntas* determined by the laws of his country, in which the debtor has no interest.

Some of the Lords thought the greatest difficulty was in giving judgment concerning subjects not within the jurisdiction of the Court: They agreed the case was to be determined by the law of nations, and by it the domicil of the creditor to be the rule; and therefore refused the advocation.

Reporter, *Lord Strichen.* Pet. *Ch. Erskine.* Resp. *W. Grant.*

D. Falconer, v. 1. p. 11.