SECT. VII.

Effect in Scotland of an English Verdict of Lunacy.

1749. *June* 21.

MORISON, BAYNS, and PENELOPE his Wife, and HAMILTON their Factor, *against* The EARL of SUTHERLAND.

No 105.
A Scotsman in London having been found lunatic, a commission issued under the Great Seal, authorising certain of his relations to manage his affairs. They raised an action against a debtor in Scotland for payment of a debt contracted in England. Objected, that the verdict of the Inquest was no evidence of the lunacy; and the commission from Chancery was no authority to empower the pursuers to manage the lunatic's estate in Scotland. The pursuers then produced a letter of attorney from the lunatic. To this it was objected, that the commission was proof of the letter being granted by a lunatic, although its effect could not be carried so far as to support the pursuers title.

GEORGE MORISON of London, having, upon a writ obtained from the Chancery of England, *De lunatico inquirendo*, been by the inquest found lunatic, and though he had lucid intervals, incapable to manage his affairs, a commission issued under the Great Seal of Great Britain, granting to Walter Bayns and Penelope his wife, sister to the said George, the management of his estate real and personal; who brought a process by and in name of John Hamilton their attorney, against William Earl of Sutherland, for payment of the sum of L. 2100 Sterling, contained in a bond granted by the Earl at London in July 1743, to George Morison, after the English form, for the penal sum of L. 4200.

It was *objected* to the pursuer's title, that neither the verdict of the Inquest in England is evidence of George Morison's lunacy, nor the commission by the Chancellor of England of any authority to impower the pursuers to manage Mr Morison's estate in Scotland: That the proceedings in the Court of Chancery, and orders of the Lord Chancellor, are of no authority out of the Chancellor's jurisdiction, which no more extends to Scotland than it does to Germany.

And accordingly the Lords, on the 21st June 1749, on report of Lord Elchies, found, " That the pursuers had no sufficient title carry on the process."

For as to what was pleaded from the authority of certain foreign lawyers, particularly Rudenburgius, in his Treatise *De jure conjugum*, C. 2. and others referred to by Voet in his commentary on the 7th §. Tit. *De Statutis*, that the *statuta personalia*, statutes which impose qualities upon the person *in loco domicilii*, are to have their effect and be regarded *ubivis loci*, the Lords were of opinion with Voet, who unanswerably refutes the doctrine *loco citato*. They considered such *statuta* to have no effect *extra territorium jus dicentis;* and in confirmation of this, some instances were put: Suppose a man born in Naples, or in Sicily, by the law of which countries he became major at the age of 18: He succeeds to an estate in Scotland, and, before he is 21, makes up titles, and offers it to sale; or he makes a voluntary settlement of it in prejudice of his next heir, and dies before he is 21: Nobody could purchase safely in the one case, nor would the settlement subsist in the other. Or suppose, before the Union, a man to have been forfeited in England; it could not have been pre-

No 105.
The Lords found that the pursuers had no sufficient title. This judgment was reversed on appeal; for this reason, that the action might have been originally brought in the name of the creditor himself; and that being afterwards made pursuer, his right could not be prejudiced by the concurrence of the commissioners.

tended, that his moveables in Scotland fell to the Crown; all upon the same principle, that *statuta personalia* have no effect *extra territorium;* and on that same ground, neither could the verdict of the Inquest in England be held to be a proof in Scotland, that Mr Morison was a lunatic, nor the tutors appointed to such lunatic by the Chancellor in England have thereby any power over an estate in Scotland.

By the law of Scotland, the tutory of a lunatic, idiot, or furious person, is in the nearest agnate, and failing him a tutor is given in Exchequer; by the law of England, it is in the Crown; and the Barons of Exchequer in Scotland, and the Chancellor in England, exercise the King's prerogative with equal authority, and none of them are subject to the orders of the other. Not to mention further, that possibly the same thing that would infer lunacy in England might not infer idiotry or furiosity in Scotland. And *lastly*, As it is *ex comitate* only, that the judicial proceedings of one country have any regard paid to them in another country; and that upon the case being stated by both parties, by appointment of the Ordinary, to the most noted lawyers in England, it was resolved, that a verdict or retour in Scotland, or elsewhere, finding a party lunatic, would be no evidence in any court in England, and that a guardian appointed to such lunatic in Scotland or elsewhere, would not be entitled to carry on an action in England in behalf of the lunatic, nor to manage any estate belonging to him in England, so there can be no *comitas* that is not mutual, and *quod quisque juris*, &c. can on no occasion better apply.

There was an incident in this case which occasioned another question. The pursuers suspecting, after the first debate in the cause, that the title would not be sustained, did, previous to any interlocutor, apply to the Lord Chancellor, setting forth the state of the case, and the objection made to them in Scotland, and that they were advised that the same might be removed, if a letter of attorney were granted by George Morison himself, but that access could not be had to him without his Lordship's authority; therefore, praying they might have access to him, in order to their procuring such letter of attorney. Accordingly, the Lord Chancellor gave order to Sir Nicholas Baillie, Baronet, to whom the custody of the person of the lunatic had been committed, to give access to the pursuers, in order to their obtaining such letter of attorney from him. In consequence of which, a letter of attorney by Morison to John Hamilton, writer to the signet, was made out and signed by him, proceeding upon the narrative of the objection made to the pursuers title in the courts of Scotland, and of the above order of the Chancellor, and his own willingness to concur in the suit.

This letter of attorney being here produced, it was *argued* for the pursuers, that if George Morison was not admitted to be lunatic in Scotland, there could lie no objection to the letter of attorney signed by himself; but still, notwithstanding this letter of attorney, the above interlocutor was given, finding the pursuers had not title sufficient to carry on the process.

No 105.

At first sight, this may appear a little odd, that the proof of lunacy should not be sustained, and yet that the same proof should be laid hold of to set aside the letter of attorney signed by the man himself; but it was nevertheless so found: For, as the letter of attorney proceeded on a narrative of his lunacy, and of the access given to him by order of the Chancellor (and without which, the custodiar of his person could not have given access to him) it was therefore *felo de se*, carrying along with it the evidence of its being void and null, as granted by an insane person. Nay, it was so far carried in the reasoning, that *esto* the letter of attorney had not proceeded on such narrative, it would have been competent to obtrude the verdict of the Inquest, and Chancellor's several commissions for the management of his person and effects, as proof of its being granted by a lunatic, and therefore void; as still those proceedings are proof in England of the lunacy, and of course of the incapacity of the person to grant any deed whatever.

It occurred on this occasion, that it would be hard, if there lay no remedy in such a case as this; and though it was not the business of the Court to advise, yet as arguments *ex absurdo* are not to be neglected, so much was said, that upon a commission issuing from this Court, his idiotry or furiosity might be cognosced, as was lately done in the case of Baillie of Walstoun about the year 1742.*

Some other points fell occasionally to be spoke to in the reasoning on this case, which it may not be improper shortly to mention, though they could receive no judgment.

Concerning real estates, all lawyers are agreed, that in whatever country they lie, they can only be governed, whether as to acquisition, administration, transmission by deeds *inter vivos*, or succession, by the law of the country where they are situated.

But as to moveables, lawyers are not agreed; some are of opinion, that as moveables *non habent sequelam*, as they express it, wherever they are locally situated, they are to be considered as in *loco domicilii* of the creditor, and that *jura incorporalia, viz. nomina debitorum, habentur loco mobilium.* So Voet in his Appendix to the Title, *De constit. princ.* § 11. and Tit. *De rerum divisione*, § 30. and others by him quoted.

Others reject that brocard, that *mobilia non habent sequelam*, as an abstract notion not agreeable to the nature of things, and maintain that even moveables are to be governed *secundum leges loci* where they are situated. That every country hath its peculiar laws with respect to succession in moveables, as well as in heritage: Thus a brother-german in Scotland excludes his father and his brother consanguinean in the succession to his brother-german's moveable estate; the surviving brother and sister exclude the children of the deceased brother or sister, and the mother does not at all succeed. In England again, the rules of succession lie quite another way; the father excludes the brother, the mother succeeds equally with the brother, the children of the deceased brother or sister

* *See* General List of Names.

No. 105. take equally with the surviving brother or sister, the brother uterine takes equally with the brother consanguinean. Now supposing one to die in England, leaving a moveable estate in England, and another in Scotland, and leaving a father and a brother, should the father sue in Scotland, the brother would be preferred to the subjects in Scotland, and the father in England would be preferred to the subjects there; and that there is no manner of inconsistency in a man's having different successors, according to the different laws of the countries in which his moveable estate is situated, more than in his having different heirs in his heritable estate. And as to the *nomina debitorum*, they consider them as situated in the country where the debtor and his estate is situated; because there only they can be sued for, and the Judge can only give execution agreeable to the laws of the country where he judges.

And to these last opinions the Court seemed to lean, though very different from the judgment given between the Representatives of Brown of Braid, No 109. p. 4604.

The above judgment was, upon an appeal, reversed; upon the Lord Chancellor's reasoning to this purpose, That had the process been originally brought in the name of Mr Morison himself only, as it ought to have been, the defender could have had no objection, for the same reason that had prevailed with the Court below to sustain the defence against the process brought at the instance of the Commissioners, that the lunacy in England could not be objected, as having no operation in Scotland; and as he was also pursuer, the using the name of the Commissioners in the process could not vitiate the process at his own instance: The very thing, which, as is above observed, the Lords had in their eye, and yet were not moved with it, for the reason above given.

Fol. Dic. v. 3. p. 229. Kilkerran, (Foreign.) *No 7. p. 209.*

*** D. Falconer reports the same case:

George Morison of the Middle Temple, London, was found by verdict of a jury in England, on a writ under the Great Seal, 'to be a lunatic; that he 'did enjoy lucid intervals, but not so as to be sufficient for the government of 'himself and his estate.' Whereupon the custody of his person was committed by the Chancellor to Sir Nicholas Baillie; and the custody and management of his effects to Walter Baynes of the Middle Temple, and Penelope his wife.

The committees of George Morison's estate insisted before the Court of Session in Scotland, against the Earl of Sutherland, for payment of L. 2100 Sterling, due to him by the Earl's bond in the English form. To which it was *objected*, That there was no sufficient authority to carry on the process; the verdict taken in England was no proof in this country of the creditor's lunacy, which term also was not known in our law, and might signify something, dif-

ferent from either fatuity or furiosity, sufficient by the English law to take from him the administration of his effects, but which would not have that effect here. But, supposing the term equipollent to one or other of ours, and his incapacity proved, yet the Chancellor's commission could not give the committees a right to the management of his effects in Scotland. No 105.

Answered, The state of any person must be determined by the laws of the country where he resides; as it is agreed by lawyers, that *statuta personalia* have a general effect, *Rodenburgius de jure conjugum, c.* 2. & 3. *Grotius consult. Holland. Par.* 3. *Vol.* 2. *cons.* 341. *Christinæus, Vol.* 2. *Dec.* 3. and the pursuer's moveable effects must be considered as in the place of his residence, liable to be disposed of by him, or, if he is incapable, by those under whose guardianship he is. Agreeable to which it was decided, Nasmith against Nasmith, No 2. p. 4046., that a minor residing in England needed not have other curators appointed him in Scotland for calling in his effects there.

Replied, The distinction of *statuta realia* and *personalia*, is not admitted by other lawyers; according to whom all judges are bound to determine by the laws of their own country. *Voet. de statutis, No* 7. *Gaill.* & *Perezius:* Or supposing this pursuer were held to be of unsound judgment, on the verdict found against him, still the Chancellor's commission will not extend beyond his territory; and it were absurd that these committees, by altering the site of their ward's effects, should alter the destination of his succession, it having been found, in the case of Adam Duncan,* that his effects descended *ab intestato*, according to the law of the country where they were situated.

By the opinions of English lawyers of authority obtained in this cause, no person in England would be considered as lawful committee of any person's estate, on any appointment in Scotland, France, or elsewhere.

Upon this pleading and advice, Walter and Penelope Baynes applied to the Lord Chancellor in England, and obtained from him an order to the committees of George Morison's person, to allow them access thereto, that they might get from him a letter of attorney, for carrying on the process in his own name; and having got such a power, put it into the process, and craved to have it sustained on the one or other title.

Objected, The pursuers have alleged that George Morison is lunatic, and cannot make use of any powers from him.

Answered, If George Morison is not to be considered in Scotland as under the guardianship of his committees, the commission from himself must be sustained, as the defender denies the verdict is any proof of his lunacy.

Replied, Whether he is lunatic or not, it is plain he is used as such, being detained in captivity, and not allowed to act according to his own judgment; and, if he really is in a state of incapacity, he may be cognosced according to the law of Scotland, and have a tutor appointed him, who will manage his effects situated there.

* *See* General List of Names.

No 105. The Lords found, That there was no sufficient title produced to carry on this action.

Reporter, *Elchies.* Act. *Lockhart.* Alt. *R. Craigie.*

D. Falconer, v. 2. No 70. p. 76.

SECT. VIII.

English Administrator, whether liable to action in Scotland.

1782. *November* 26. Hugh Ross *against* Mrs Ross.

No 106.
In a process of reduction, the defender was found not obliged to produce an English will, which had been proved and deposited in Doctors Commons.

Upon the death of Mr Ross, his estate of Kerse, in Scotland, devolved on Hugh Ross, his eldest son, subject to an annuity in favour of his relict, who was a native of Scotland, where she likewise possessed a landed estate. His moveable succession in England was regulated by a latter-will and three codicils, which were proved in Doctors Commons, and deposited in that court as the warrant for letters of administration.

Mrs Ross having found it necessary to deduce an adjudication against the estate of Kerse, for her annuities; Mr Ross commenced an action of reduction-improbation against her, in order to set aside, as a forged deed, one of the codicils executed by his father in her favour; *contending*, in support of the competency of this action, that the defender, a native of Scotland, possessed of heritable property here, and who was at that time insisting in an adjudication against his estate which was situated in Scotland, was obliged to submit this writing to the cognisance of the courts of this country.

The Lord Ordinary found "That the defender was not obliged to produce the writing called for." And to this judgment, upon advising a reclaiming petition for the pursuer, with answers for the defender,

The Lords unanimously adhered.

Lord Ordinary, *Westhall.* Act. *Geo. Fergusson.* Alt. *Blair.* Clerk, *Menzies.* C. *Fol. Dic. v. 3. p. 230. Fac. Col. No 71. p. 110.*