

No 37.

1797. January 31. HENDERSON *against* WILSON and MELVILLES.

A FACULTY to alter reserved in a regular entail may be validly exercised by a deed executed in England, and authenticated by the forms there established.

*Fac. Col. No 14. p. 30.*

\* \* \* See this case, *voce* TAILZIE.

No 38.

The heir of a person domiciled in England, is liable for heritable debts on his landed property in Scotland, without relief from his executor, although, by the law of England, such debts would have ultimately fallen on the latter.

1798. June 7. MRS SARAH DRUMMOND, and her ATTORNEY, Petitioners.

DAVID DRUMMOND, merchant in London, died there, possessed of a landed estate in Scotland, over which he had granted an heritable security. Having died intestate, his brother James, likewise of London, succeeded as heir to the landed estate, and he, along with his mother and sisters, were jointly entitled to the executry.

James, with consent of his mother, took out letters of administration. He afterwards sold part of the landed estate in Scotland, and paid the heritable debt, for which he was allowed credit in the account of the personal property rendered by him in the prerogative court.

His mother and sisters afterwards brought an action against him, concluding, that the heritable debt should not affect their share of the executry.

James Drummond having died during the dependence of it, his widow, Mrs Sarah Drummond, as guardian to his son, and her attorney, sisted themselves as defenders.

THE LORD ORDINARY ' found, that by the law of Scotland, when a sum of money is secured upon lands by an heritable bond, and infestment, the lands are held to be the principal debtor; and, in respect that the estate belonging to David Drummond, over which the heritable bond in question is granted, was taken up by James Drummond as heir to his brother, and that the same is of much greater value than the sum in the heritable bond, found, that James Drummond is ultimately liable for payment of that heritable bond, without relief against the personal estate of David Drummond.'

Against this judgment, the defenders, *inter alia*,

*Pleaded*; By the law of England, this debt would have been ultimately a burden on the executry of David Drummond; and as it is now settled, that succession to personal property is regulated by the law of the domicile of the deceased; 7th June 1791, Hog against Hog, affirmed on appeal, Div. 10. *b. t.* 30th November 1791, Durie against Coutts, *IBIDEM*; the burden to which it is subject must be fixed by the same rule. On this principle, it has been found, that the heir of a person domiciled in England may claim part of his moveable succession, without collating his heritable property in Scotland;

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.

No 38.

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.

No 39.

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,