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ADVOCATE.

ERROR in the COURT of EXCHEQUER in Scotland.

DAVID PATRICK, . . *Plaintiff in Error;*
HIS MAJESTY'S ADVOCATE, . *Defendant in Error.*

House of Lords, 23d April 1792.

CONSTRUCTION OF STATUTES—DUTIES ON MALT LIQUORS—EXEMPTION CLAUSE.—Where the exempting clauses in the previous statutes were omitted in a new act, remodelling the duties on the sale of malt liquors: Held that, in order to continue such exemptions, it was not necessary that these should be expressly repeated in the new act.

An information was filed against the appellant, in the Court of Exchequer, to recover a penalty of £50, for having

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as to this last, there is still some confusion as to the effect of the English bankrupt statutes here.

" The general question about intestate succession seems likewise to be now understood and at rest. The determinations of Lord Hardwicke are founded upon principles of law, upon expediency, and upon the authority of writers in general law; and the English courts having adopted his rule of *lex domicilii*, which was agreeable to our practice 40 years ago, and to the authorities of some of our best writers. Though departed from in some recent cases, we ought now, without hesitation, to return to the decision in the case of Brown of Braid, and to hold that rule as established in time coming.

" In the cases of Elsherson *v.* Davidson, and M'Lean *v.* Henderson, the Court was misled, by supposing that the determinations in England stood in favour of the *res sitae*. This was owing to some mistaken idea about Lord Banff's succession, where a short and hasty opinion had been given by Sir Dudley Ryder, pointing at the *res sitae* as the rule, but the truth is, that Lord Banff, who was a seaman, had no fixed domicile, and died in Lisbon, leaving a furnished house in London, and his money in the funds, so that although he was a Scots peer, and had some real estate in Scotland, yet there was more ground for considering England than Scotland as his *locus domicilii*. See Session Papers, vol. 59. No. 68.

" The circumstances of Lord Dacre's case are not known. See Voet. lib. tit. 4, part 2, § 8 and 11. Lib. i. tit. 8, § 30. Lib. v. tit. 2, § 47. Lib. xxviii. tit. 1, § 44.—Vinnius, Select Quest. lib. ii. tit. 19. Christeneus, p. 812.—Vattel, lib. ii. c. 8, § iii. Rodenburg,

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retailed certain spirituous liquors and strong waters, without first taking out a license. Trial was led, and a special verdict settled, stating that the defendant did, within the period mentioned in the information, retail spirits made and

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de Jure Conjugum, p. 20. See also case of Mrs. Morris against Wright, Session Papers, vol. 51, No. 124. It was by that time discovered that the decisions of the English Courts were not, as supposed in the case of Elsherson, vol. 34, No. 81, (Session Pap.); but the Court thought they could not well retract. The case, however, of Morris was appealed, and afterwards settled between the parties.

"In the present case, the difficulty arises from this, that there was a will, and if the case of intestate succession turns upon presumed will, it may be thought that *express will* should prevail, especially as moveable effects have in certain respects a local situation, though in others they are said to follow the person, and it may be thought somewhat strong to deny effect to a will formally executed, upon account of a municipal rule in another country, where the testor lived, but not in the country where the effects are, and where execution upon the will is desired, upon which last principle the Court of Session seems to have gone in case of a bastard, and in the case of a nuncupative will, Dict. vol. i. p. 320.

"But, notwithstanding these observations, it would rather seem, that questions concerning succession in general, in the case of moveable or personal effects, should rather depend upon the *lex domicilii* than that of *rei sitae*. Moveable goods may be transiently in another place than that of the donor's residence; but it cannot be his meaning that they should remain fixed there any longer than till he has an opportunity of bringing them home, so that whether he dies testate or intestate as to such effects, he cannot be supposed to regulate himself by any other law than that of his own country, in the transmission of them to his successors after death.

"The case is still clearer as to *nomina debitorum*, which are *jura incorporalia* attached to his person, and in their nature scarcely admitting of a fixed situation.

"Every right and interest of the creditor ought to be regulated by his own law. The *jus exigendi* is in him, and that right he is entitled to convey by the forms of his own law, and likewise to transmit to his successors *a testato vel ab intestato* in the manner which his law directs, though with respect to the debtor, when either the creditor, or his heirs or assigns, have occasion to take measures for recovering their money, they must go to the forum to which he belongs, and of course must be subject to the forms and solemnities of that law.

"The present question is, to whom the effects belong, not in what manner they are to be recovered; and it may even be doubted whe-

distilled from malt, in Scotland commonly called and known by the name of Aqua Vitæ or Whisky, but not other spirituous liquors. Against this special verdict the defence stated was, that in regard to such spirits made from malt, there was an exemption under the acts of parliament.

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ther the late Mr. Hog made any will in prejudice of the claim. He made a settlement, conveying to his eldest son all and sundry debts and sums of money, &c. belonging to him at his death, which should not be otherwise disposed of. This is a sweeping clause, carrying every residue, but not interfering with special rights. It is similar to the case of Sir L. Dundas' general settlement, which was not found to reach an estate formerly settled by him.

" Mr. Hog's children had, by the law of this country, a certain right in his personal effects, which became completely vested immediately upon his death, without any other form or title. This right he could not take from them by any testamentary provision, and although there can be little doubt that he meant to deprive his daughter, Mrs. Lashley, of her legitim if he could, yet the mere residuary conveyance to his eldest son is not even a proof of his intention, and, at any rate, if not within his power, must be set aside. The right to legitim attaches upon all the personal effects wherever situated, the law making no distinction. The will, at the same time, has its effect, with that exception, and therefore it may be proved in Doctor's Commons, but the executor under the will is nevertheless liable to account to those having interest according to their legal rights, and if it should become necessary to apply to a judge in England to enforce that obligation, the judge ought to inquire what rights his family, and others concerned, have, according to the law of Mr. Hog's country. He will sustain the deed, if formal according to the law of Scotland, though not precisely according to the law of England ; but he must take the whole of Scotland together, and not divide it into parts.

" Sometimes it may be difficult to discover where a person's residence is, as in the case of Lord Banff. But this being discovered, the other consequences follow.

" The most difficult case is that of a testament in Scotland, bequeathing heirship moveables, or bonds secluding executors in England, or mortgage there. As to the two first, there seems to be little doubt that the heir would take them, as entitled to do so by the law of Scotland. As to the third, the doubt is, whether it is real or personal ? It is real with us, and personal in England."

LORD ESKGROVE.—" Right of legitim is a legal and effectual right *in suo genere.* It may indeed be defeated in different ways. The father, no doubt may dispone his estate, or lay it out in a different

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By the act 9 Geo. II. c. 23, licenses were required to be taken out by all retailers of spirituous liquors, with two exceptions in favour of, 1st Physicians, apothecaries, surgeons, or chymists, as to any spirituous liquors they may use in

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manner. But *quoad* the legitim every man dies intestate, and he cannot hurt that claim."

LORD HENDERLAND.—"The question is, whether you will extend a municipal usage in Scotland to effects in England, in opposition to the will of the defunct. To say that the testament has no effect in England, is a begging of the question. Lord Hardwicke's decision founded on expediency."

LORD ROCKVILLE.—"I think the law of the domicile must be the rule. It may be said that the law of deathbed may be got the better of by not leaving matters to the operation of it"

LORD DREGHORN.—"I have long been satisfied that the *lex domicilii* was the rule, and that, where there were different domiciles, the law of the nativity is to be preferred. It would be inextricable if one's succession were to go as the effects happen to be scattered over different countries. As to the case where there is a will, I think it makes no difference. No good reason for distinction. As to effects in England.—Statutes have effect, and do go beyond the territory, unless there be something *contra bonos mores*, or repugnant to the principles of morality or religion, as in case of Negro. Suppose the crown was demanding the moveables in England, in opposition to the brother uterine, the judge in England may hesitate to do so, because it is against the rule of natural justice."

LORD SWINTON.—"I am clear that the *lex domicilii* is the rule."

LORD DUNSINNAN.—"When he placed his money in the funds he did not mean to withdraw it from the law of his own country, or to alter his right."

LORD ANKERVILLE.—"The legal provisions introduced to supply want of special ones. But if the effects are disposed of by a regular deed, this ought to prevail."

LORD HAILES.—"Our own judgments not yet altered by the House of Lords."

LORD JUSTICE CLERK.—"Upon reconsidering the case of intestate succession, am now of opinion that the *lex domicilii* is the rule. This founded on reason. Fiction of all the effects being here, is founded upon his presumed will, and *a fortiori* ought to give effect to his declared will. Doubt therefore as to testate succession where will regulates. It is in the power of father to disappoint legitim."

Judgment.—"Find that the claim of legitim reaches to the English effects as well as the Scotch, notwithstanding the will."

making up medicine; and, 2d "That nothing in this act "contained shall extend to charge with any of the duties "directed to be paid or levied as aforesaid, any spirits made "or distilled from malt, and retailed and consumed in

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Interlocutor 29th November 1791.

LORD PRESIDENT CAMPBELL.—"First point. The question is properly stated in Ans. p. 11, &c. Parties do not differ upon the point, what is the municipal law of succession in England, and what it is in Scotland; but singly upon this, whether the law of the one country or that of the other should be the rule, where the domicile is in the one country and the effects in the other?

"Neither is there now any difference, at least there ought to be none, in the case of intestate succession; for it is now fixed as a rule of general law with regard to personal estate, that the *lex domicilii must* prevail. It only remains, therefore, to be fixed whether the general rule takes place in opposition to a will, when the law of the domicile either denies or abridges the power of testing, and when the law is otherwise in *loco rei sitae*, or *vice versa*, where the power of testing is affected by the law of the *loci rei sitae*, but not by that of the domicile.

"In the last case, it seems to be admitted that the restraints imposed by the law of the *res sitae* cannot operate. Thus, if an Englishman happens to have effects in Scotland at his death, his own residence being in England, the restraints in Scotland arising from legitim, &c. will produce no effect to the prejudice of his right of testing in his own country, even with respect to his effects in Scotland.

"This reduces the question to a narrow compass, for it seems to lay out of the question the *lex rei sitae* as having any effect in questions of succession, whether *a testato vel ab intestato*; and the petitioner, aware of his difficulty, endeavours also to lay out of the question the *lex domicilii*, and to set up the power of a will as supereminent against both.

"What then if the law of both countries agreed in imposing the restraint? Some of the effects in this case are said to have been in the French funds at Mr. Hog's death; and it is believed the law of France is the same with the law of Scotland as to the legitim. The petitioner's (Mr. Hog) argument goes to this, that the will in his favour is to carry these French effects, and the legitim is to be defeated, though it be the law both of Scotland and France. The absurdity of this is obvious, and there is no way of getting out of the dilemma except by making choice of one or other of the two laws, where they are different, or by following them both, where they are at one in determining whether the will is to be controlled or not, and to what extent, or, in other words, to establish some general

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16 Geo. II.

"Scotland, commonly called or known by the name of "aqua vitæ" By a subsequent act the above act was repealed, and a new license duty of 20s. imposed instead of £50. This act contained express exemptions in favour of

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rule of the law of nations, to decide *for* the will or *against* it, according to circumstances; for it would be strange to maintain that no law shall control a will, whether it be of the one country or the other, or of both, where the domicilium and the *res sitæ* happen to be different.

"All the foreign authorities, including the English, are at one upon the subject. Those of Scotland have wandered, but as it is a question of general law, opposed to municipal law, it is impossible we can have a rule in Scotland different from that which obtains in other countries.

"Neither did our ancestors make any distinction between moveable effects situated within Scotland, and elsewhere. The *communio bonorum* between husband and wife operates as a general copartnery without limitation of place, and the interest which arises in the children upon the father's death, which they cannot be deprived of by any testamentary deed, is equally without limitation. It is an universitas. The question is, to whom the effects belong? and this being found out, the rights of parties must be regulated accordingly. The testament being null as to the legitim, it no longer stands in the way.

"Second point. The argument upon this head in the answers, p. 92, &c., and likewise in the memorial drawn by Mr. Blair, is unanswerable, (namely, that the renunciation of their claims by the other younger children of the deceased Mr. Hog operates in favour of Mrs. Lashley, his surviving daughter;) and even if there was any doubt upon the principle, the point is now so fixed by uniform authority, that it would be a dangerous precedent to throw it loose."

Judgment—"Adhere, except as to article of the 3 per cent. annuities, as to which order memorials."

Interlocutor 23d December 1791.

Question, Whether the Government Annuities were Heritable, in a Question about the Claim of Legitim?

LORD PRESIDENT CAMPBELL.—"The act itself, by which they (the government annuities) were established, declares them to be personal estate, which seems to be decisive of the question. It gives them a certain quality which must attach upon them throughout.

"The statute does not mean either to establish legitim in England, or to take it away in Scotland, nor does it inquire into the

physicians, &c. and the retailers of liquors made from malt, called aqua vitæ. The acts 17 Geo. II. c. 17, § 17; 24 Geo. II. c. 40, make further regulations; and in the last of which there is an express exception in respect of spirits distilled from malt, retailed and consumed in Scotland under the name of *aqua vitæ*. The subsequent acts 19 Geo. III. c. 25; 21 Geo. III. c. 17; 22 Geo. III. c. 66; and 27 Geo. III. c. 30, increased the amount of license duty; but they did not contain, as in the former acts, the express exemption or provision with respect to spirits distilled from malt. But by a subsequent act, 30 Geo. III. c. 38, § 2, the previous acts 16 Geo. II. and 24 Geo. II., and also the 21 and 22 Geo. III. were declared to cease and determine, and in room thereof other regulations regarding the *rate* of license duties were imposed. Nothing was mentioned with respect to spirits made from malt, called aqua vitæ, but there was a clause expressly declaring, "That all powers, authorities, rules, regulations, "restrictions, exceptions, provisions, clauses, matters, and "things which in, or by acts of parliament, in force immediately before the passing of the act for the regulating "the retailing of the said liquors respectively, and *not being* "*expressly altered, repealed,* changed or controuled *by this* "*act,* or not being repugnant to any of the matters, clauses,

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consequences of the fund being personal. This is left to the common operations of the law. The loan was, in its original nature, personal, being money lent to government, and when it was found expedient to make a certain arrangement with respect to the duration of that loan, and of repayment of the debt, it would have been unjust had any change of its nature taken place, and accordingly this is expressly guarded against as one of the fundamental conditions of the transaction itself, by which these annuities are created.

"The case of the transferable bonds issued by Douglas, Heron and Company, under the sanction of an act of parliament, which declared them personal though heritably secured, is extremely similar. It has never been held that these were personal in the case of legitim, as well as to every interest and purpose whatever.

"As to the French annuities, the circumstances of them are not sufficiently explained by either party, and perhaps they ought not to be presumed to stand upon a different footing, unless it is clearly made out. At same time, from the French law, they seem rather to be held as immoveable."

Judgment—"Found the government annuities moveable, and falling under the legitim. Remit to Ordinary as to French funds."

Vide Lord President Campbell's Session Papers, vol. lxiii.

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" provisions and regulations in this act contained, shall be " and continue in full force." On this general saving clause exemption was pleaded, under the previous acts, in favour of liquors made from malt, called aqua vitæ. But judgment went out in favour of the plaintiff, His Majesty's Advocate.

Against the judgment of the Court of Exchequer in Scotland the present appeal was brought in the form of a Writ of Error.

Pleaded by the Appellant.—When the legislature has once created an exemption, exception, or provision, saving from payment of a tax, in favour of any particular article or description of persons, to which and to whom, independent of such exception or provision, the act imposing the tax would apply, and comes afterwards to increase or diminish the duty, or to regulate the exaction thereof, there is no necessity, in order to continue the exemption, that it should be verbatim repeated in the new statute. If the former act is *not repealed*, the exemption will remain in force without any new provision or express clause to that effect; and although the legislature, in remodelling such duties, may find it necessary to repeal the former acts, yet the exemptions or exceptions therein may be effectually renewed by a general clause, declaring, as is done in the present case, that all exceptions or exemptions in the former acts not hereby expressly repealed, shall continue in force; and therefore it is a position quite untenable, that all former exemptions in previous acts, not expressly renewed and inserted in the later act are to be considered as abrogated or repealed.

Pleaded for the Respondent.—The last act, 30 Geo. III. c. 38, repealed all former duties on excise licenses for retailing distilled spirituous liquors, and imposed a new duty in lieu thereof. This new duty is imposed in the most general words, " That *all* and every person or persons who " shall retail distilled spirituous liquors;" and no exemption whatever is inserted in the act. The general saving clause in 30 Geo. III. can only be held to apply to the exemption in favour of physicians—the universities—the vintners' company in London, and other corporate towns, but not to the exemption applicable to liquors made of malt retailed and consumed in Scotland. Exemption was not to be implied or to be deduced by any inference from the words of the act. It must expressly appear, and cannot be admitted where the meaning of the legislature is not clear beyond all doubt. Besides, the reason which existed for the ex-

emption when the tax was first imposed no longer applies. The license duty then was £50; now, it is scarcely so many shillings. In the circumstances, it would be unjust to hold that the legislature meant to tax one class of retailers and exempt another. The principle, therefore, ought to hold, that wherever the exemption of the previous acts is not renewed by the later, they ought to be considered as virtually repealed.

After hearing counsel, it was

Ordered that the judgment in the Court of Exchequer in Scotland be *reversed*, and that judgment be given for the defender in the original action.

For Appellants, *Henry Erskine*, *Allan Maconochie*, *Wm. Dundas.*

For Respondents, *Arch. Macdonald*, *R. Dundas*, *Sir J. Scott.*

[M. 7884.]

JAMES OGILVIE, Collector of Excise . *Appellant;*
THOMAS WINGATE, . . . *Respondent.*

House of Lords, 13th June 1792.

LANDLORD'S HYPOTHEC — CROWN'S PREFERENCE — WHETHER CROWN HAS PREFERENCE OVER LANDLORD'S HYPOTHEC?—Held, in the Court of Session, the landlord preferable to the crown. Reversed in the House of Lords, and case remitted to inquire more particularly into the crown's title, and process whereby the effects in question were supposed to be subjected to the king's title.

James Burgess possessed a farm belonging to the respondent situated in Fife. He also carried on the business of a distiller and maltster; and being in arrear with his distillery and malt duties, the appellant, collector of excise, obtained judgment against him for the duties due to the crown.

Thereupon the respondent, his landlord, sequestrated for the current rent of crop 1781, and warrant to sell was issued, when George Luke, excise officer, in virtue of the above judgment for the malt duties, attached the same subjects, and warned the landlord not to sell, as such was