1804.

GRAHAM
v.
WEIR, &c.

COLONEL THOMAS GRAHAM of Balgowan, Executor of Lady Christian Graham, formerly Hope, ... } *Appellant;*

WILLIAM HOPE WEIR, Esq., general Disponee of the Hon. Charles Hope Weir, deceased; and the Right Hon. CHARLES HOPE, his Majesty's Advocate for Scotland, trustee of the late Lady Charlotte Hope or Erskine, - - - - } *Respondents.*

House of Lords, 20th February 1804.

CONSTRUCTION OF CONTRACT—ERROR—EXECUTRY—DOMICILE.—In regard to the succession of the Marquis of Annandale, the parties who were interested in his executry, after his decease, entered into an agreement, whereby they agreed, that if any of them should predecease the Marquis before their shares became vested in them, that nevertheless their shares should go to their children or next of kin, instead of the survivors. The agreement was general in its terms, and did not distinguish between Scotch and English executry. It was subsequently found that the Marquis' domicile was in England. One of the contracting parties afterwards contended, that the contract did not refer to the executry distributable according to the law of England, but only to the Scotch executry. Held the terms to be general, and to comprehend all the executry of the Marquis, whether in England or Scotland, without distinction.

The Marquis of Annandale was possessed of large heritable estates both in England and Scotland. At an early period of life he became lunatic, was cognosced, and his estates in both countries placed under management.

A large moveable fund was thus accumulated, which, after all deductions, and an annual sum of £1800 paid (in the proportion of £981 out of the English estate and £819 out of the Scotch) for the lunatic's support, was placed out at interest,—the proceeds of the English estates in the public funds, and the proceeds of the Scotch estates in heritable or moveable bonds in Scotland; but the management of these estates was kept totally distinct. The former under the Court of Chancery, according to a decree made in Chancery by Lord Chancellor Hardwicke in 1751, which the appellants contended was founded wholly upon the construction, that there would be two executries—an English and Scotch executry, divisable according to two different laws; and that this construction was assented to, understood, and acted upon by the parties. The latter by the Earl of Hopetoun, who drew the interest, and frequently changed the securities as he thought proper. His Lordship's lady

was the only sister then alive of the Marquis, and entitled to succeed to his real estates on his death without issue, and intestate.

The following parties, the children of the Countess of Hopetoun, were interested in the Marquis' executry, after his decease, viz. the Hon. Charles Hope Weir, Lady Christian Hope or Graham, and Lady Charlotte Hope or Erskine. They entered into an agreement, whereby they agreed, that if either or any of them predeceased the Marquis before their share of the executry became vested in them, that their next of kin should, nevertheless, be entitled to their share; and bound themselves accordingly, in the event of any one of them predeceasing the Marquis, before such vesting, to make payment, or convey over, one-third of the said executry, either to the next of kin, or to their executor or assignees. Dec. 23 and 27, 1784.

Nothing was mentioned in the agreement about the English or Scotch executry; the terms used being general, without distinguishing the one or the other; and the parties understood that the whole would descend according to the law of Scotland.

The dowager Marchioness of Annandale was still alive, and had married a second time Colonel Johnstone, with whom she had children, viz. Richard Bimpde Johnstone, Charles Johnstone, Charlotte Henrietta Johnstone, who became brothers and sisters *uterine* to the lunatic, the Marquis of Annandale, and his sister, the Countess of Hopetoun, the latter being children of the dowager's first marriage with the late Marquis of Annandale. It had been decided in Chancery that these brothers and sisters uterine were, by the law of England, entitled, along with the Countess of Hopetoun, to an equal share of the Marquis' executry. While the latter was entitled also to the whole real estate in Scotland.

The above agreement, on the other hand, proceeded on the footing that the executry was divisible according to the law of Scotland, and that if any of the contracting parties predeceased the Marquis, their executors could claim nothing by the law of Scotland—the whole going to the survivors, upon the assumption that the *lex loci rei sitæ* would govern the distribution. Lady Christian Graham, at the death of the Marquis, was the only survivor of the contracting parties.

But, in an action of declarator raised by the brothers uterine, to have it found that the deceased's domicile was in England, and that they were entitled to share, by the law of England, in the executry, it was found, by decree of the

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Court of Session, "That George, Marquis of Annandale, "was domiciled in England, and that his personal estate, "wherever situated, must be distributed according to the "law of England. Find that, in this case, the same divides "into three equal parts; and that one thereof belongs to "the petitioner, Sir Richard Bempde Johnstone, another "third to Charles Johnstone, brothers uterine of the said "Marquis, and the remaining third part to Lady Christian "Graham," &c.

Before the above judgment had been pronounced the present actions of declarator had been raised—one at the instance of William Hope Weir, as representing his father, Charles Hope Weir, who had predeceased, against Lady Christian Graham, founding on the contract above set forth, and concluding to have it found that he had right to one-third of the proportion of the Marquis' executry, whether situated in Scotland or England. The other at the instance of the respondent, the Right Hon. Charles Hope, as trustee and executor of Lady Charlotte Erskine, conceived in same terms, while Lady Christian Graham raised a counter action of declarator against the respondents, concluding to have it found, in case it was adjudged that the Marquis' executry fell to be distributed according to the law of England, and that she, as sole nearest of kin, by the law of Scotland, was not entitled to succeed to any thing in that character, not even to the personal estate within Scotland, but only as one of the Marquis' executors in England, according to the law of England, then that the foresaid contract would have no effect, and formed no claim against the pursuer.

All these actions being conjoined, the question was,—Whether the written contract or agreement of December 1784, between the late Mr. Charles Hope Weir and his two surviving sisters, Lady Christian Graham and Lady Charlotte Erskine, was intended to be confined to the moveable executry of their half uncle, the late Marquis of Annandale, situated within Scotland only, and distributable by that law; or was intended to comprise the entire moveable succession wherever situated, whether in England or Scotland; And whether there was any error in the essentials of the contract, as to the law by which such executry was distributable, such as voided the contract?

The Court, on report of Lord Meadowbank, pronounced
May 15, 1801. this interlocutor: "Having advised the informations for the "parties, in the conjoined actions of declarator, the Lords "assoilzie William Hope Weir, and the Right Hon. Charles

" Hope, Esq., now his Majesty's Advocate, as trustee for " the deceased Lady Christian Erskine, from the whole " conclusions of the declarator brought at the instance of " Lady Charlotte Graham, now deceased, and now insisted " in by Brigadier General Thomas Graham, her only son " and representative, and decern; and in the actions of de- " clarator brought at the instance of William Hope Weir, " and the Right Hon. Charles Hope, as trustee foresaid, " against the said Lady Christian Graham and Brigadier " General Thomas Graham, decern, conform to the conclu- " sions of the respective libels; but find expenses due to " neither party."*

* Opinions of the Judges.

15th May 1801.

LORD PRESIDENT CAMPBELL said,—" This is a question upon the purport of a contract for dividing an intestate succession. As to the act 22 and 23 Cha. II. c. 10, it says expressly, that the right of representation goes no further in collaterals than in *children* of brothers and sisters, and it is presumed this does not include *grandchildren*—*i. e.* In Mr. Charles Hope's case, his children, who are grandchildren of Lady Hopetoun, the sister, and therefore that they would not take independent of the contract.—See p. 27. There might have been room for maintaining that this contract should have no effect at all, as it proceeded upon a misconception of the law, in supposing that the Marquis' executry would descend, according to the rules of intestate succession in Scotland, although his domicile was in England. But this plea has been waived. And it does not occur how the general words of the contract can be limited so as to make it apply to Scotch executry only, excluding what was in England."

LORD METHVEN.—" I am clear no such distinction can be made."

LORD ARMADALE.—" I am of the same opinion."

LORD CRAIG.—" So am I."

Advising, 16*th June.*

LORD PRESIDENT CAMPBELL.—(*Vide*, Former notes.)—" It was not till the year 1778, in the case of Elcherson, (Davidson *v.* Elcherson, Mor. 4613,) that the lawyers and judges took up an erroneous opinion, that the *rei sitæ* was the rule.

" In 1751, when this estate was first managed, it is not probable that Lord Hardwicke had formed an opinion contrary to the authority of Erskine, the decision of Brown of Braid, (28th November 1744, Mor. 4604,) and the legal authorities in England. It was more probable he was under a mistake of a different kind, viz. that Scotland was the domicile of Lord Annandale, a Scots peer, a native of Scotland, and where his estate lay, and that the place of his confinement, as an insane person, was not to be regarded. This accounts for his making no distinction be-

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On reclaiming petition the Court adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—Though the agreement 1784 is TECHNICALLY, expressly, and specially made referable to a succession so described as to be exclusively appropriate to the Scotch law; and though the three contracting parties entered into an agreement, after a decree of the Lord Chancellor Hardwicke, distinguishing between succession to the Marquis' Scotch executry and the English, yet the Lords of Session have refused to construe the agreement, as made with a view to any such distinction; and a written contract, which is limited only to one of two subjects, now stands adjudged by the Court of Session to comprise both these subjects. In other words, that the agreement includes and refers to the executry both in England and Scotland. The appellant maintains that this judgment cannot be maintained, because, on a sound construction of the contract, and keeping in view its meaning, and that principle upon which it proceeded, it was clearly shown that it had reference alone to the Scotch executry of the late Marquis of Annandale, and leaving the English executry to be distributable among the next of kin according to the English law. The whole language of the contract points at a succession distributable according to the law of Scotland. Its phraseology applies to succession only; and the whole object and meaning of it was to provide against the Scotch rule of vesting or non-vesting; and by an agreement to make it descend as if it had vested on a certain contingency. Hence, therefore, the respondents can claim nothing under the contract that is applicable to the Marquis' English executry—that as such part of his executry as was situated in Scotland must follow the domicile of the owner, which was England, all the executry in Scotland therefore was to be considered as English executry; but that, at all events, the

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tween Scots and English executry, as he seems to have understood that it would go together to the nearest of kin by the law of Scotland. Before the year 1784, indeed, the Court had pronounced the decision in the case of Elcherson, but whether Mr. Erksine, (the eminent professional gentleman who framed the contract), was aware of this, or thought the point settled, does not appear. A mistake, one way or other, if it has any effect at all, ought rather to set aside the contract altogether, than set up a distinction which the deed itself does not make. But there is no sufficient evidence of the mistake, or what the nature of it was."

agreement could not be held to extend beyond the Scotch executry.

Pleaded for the Respondents.—By the above agreement, Lady Christian Graham bound herself, in the event that has occurred, of her surviving the Marquis of Annandale, and her brother and sister, to convey and make over two just and equal thirds of the executry and moveable estate of the Marquis, falling by death to her, as survivor to the executors and assignees of her brother and sister. The words of the agreement are express and unambiguous, and indicate a clear intention to make *the whole* executry without distinction the subject of division. And although there may be technical terms used which apply only to Scotch executry, yet these phrases, so used, arise solely from the deed being drawn out and executed in Scotland, where such terms are common, and most certainly cannot operate to affect or explain away the real substantial nature and subject matter of the contracts, which had in view the whole executry in general. And it would be of the most dangerous consequence to allow a critical analysis of the technical terms used in the agreement, to show that they could apply alone to Scotch executry, to affect the clear and obvious meaning of the contract. Nor is it any answer to say, that, by the law, as then understood in Scotland, the contracting parties knew that the Scotch executry would descend upon the principle of *rei sitæ*, according to the Scotch law of succession, because the contract, whatever this may have been, is sufficiently broad to carry any and every interest in the English, as well as in the Scotch executry; besides, it was by no means clear that the *lex loci rei sitæ* was the law of Scotland at the time. It was a doubtful point then; and it was not until a few years thereafter, that in Bruce *v.* Bruce, and Lashley *v.* Hog, that the *lex domicilii* was fixed as the rule for governing in all such cases.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said:—

"MY LORDS,

Lord Alvanley.

"I rather wished that a noble and learned Lord, who was present at the opening of this cause, and paid much attention to the appellant's argument, had been present at the decision of it. I do not think it necessary, however, to move for a delay on account of his absence. I believe his sentiments to have been, that it was unnecessary for your Lordships to hear the respondents' counsel. The property at issue by this cause is of very great value. The parties are of the highest possible respectability, and the counsel on both sides

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have argued with much ability. Though I may not be inclined to give more than its due weight to this circumstance, that this judgment was unanimous, yet it weighs considerably with me, as it respects the interpretation of an agreement executed in Scotland by Scotch parties, and conceived in technical language of the law of Scotland.

"Having listened with much attention and anxiety to the argument maintained for the appellant, I cannot say that, in my opinion, I have heard any thing to convince me that the Court below had misconceived the meaning of the parties in this agreement. The rules of the House do not allow me, in a case of affirmance, to state the grounds upon which I think this judgment may be supported. I shall therefore content myself with moving an affirmance in the usual form."

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For Appellants, *Wm. Adam*, *Samuel Romilly*, *Francis Hargrave*, *Mat. Ross.*

For Respondents, *Sp. Percival*, *C. Hope*, *Wm. Alexander.*

(Mor. p. 8599.)

HARRY DAVIDSON, W.S., one of the Freeholders of the county of Stirling, } *Appellant;*

The HONOURABLE CAPTAIN CHARLES ELPHINSTONE FLEMING, . } *Respondent.*

House of Lords, 18th April 1804.

RETOUR—FREEHOLD QUALIFICATION—VALUATION OF LANDS.—Objections having been stated to the enrolment of a freeholder in the county of Stirling, in respect that he had not the requisite qualification in land to the amount and value required by act of Parliament. Circumstances in which this objection was repelled, his retour of service containing sufficient evidence of the value of the lands, distinct from the office of coroner, which office, it was alleged, was of no appreciable value.

At a meeting of the freeholders of the county of Stirling, for electing a commissioner to serve in Parliament for that county, a claim was presented for the respondent to have him enrolled as a freeholder, as heritably infeft in all and whole the lands of Easter Glenboig, together with the office of Coroner in the county of Stirling.

The appellant objected to this claim of enrolment, on the ground, 1. That no *mandate* or authority had been produc-