la singulis. It would have been a most absurd stipulation upon the part of Lord Ross, had he subjected his successors in the superiority in the damage which might be done to the vassal by his successors in the separate estate of the coal, with which his successors in the superiority were to have no connection. And nothing is more absurd and untenable in law, than to say that, independently of the absence of all express stipulation, the superior was at common law liable for the deeds of his vassal.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther.*

For Respondents, *R. Dundas, W. Tait.*

[M. 8193.]

THOMAS HOG of Newliston, Esq., *Appellant;*
REBECCA LASHLEY or HOG, and THOMAS LASHLEY, her Husband, } *Respondents.*

House of Lords, 20th April and 7th May 1792.

LEGITIM — LEX DOMICILII — DISCHARGE OF LEGITIM — HOW IT OPERATES — HOMOLOGATION — CHILD'S SHARE OF GOODS IN COMMUNION—HERITABLE OR MOVEABLE—GOVERNMENT ANNUITIES—FRENCH FUNDS.— A Scotsman by birth left his country early in life, and settled in London, and married an English lady there. He acquired a large fortune, and purchased the estate of Newliston in Scotland, to which he sometime thereafter retired, and died there. By will the appellant was left the whole heritable and moveable estate. The eldest daughter, the respondent, was married to Dr. Lashley, and, on her marriage, it was proposed to give her £2000 as her fortune. A correspondence was entered into, by which £700 of this sum was paid them on bond, and further correspondence was entered into in regard to the balance when the father died. The younger children had all discharged their father for their shares of the legitim. But the respondent claimed her legitim, and also a share of the goods in communion, as due at her mother's death, and she raised an action against the appellant, her brother, concluding for payment. Held, 1. That she was not

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barred from homologation or acquiescence. 2. That the claim of legitim was not excluded by Mr. Hog's last settlement. 3. That as the marriage articles did not bind his fortune, so they could not preclude the mother, had she survived, from claiming her legal share. 4. That the renunciation of their shares by the younger children operated in favour of the respondent, Mrs. Lashley or Hog. 5. That the personal succession must be regulated by the *lex domicilii*, which was Scotland, and therefore included the funds both in England and elsewhere; and that the Government annuities were moveable.

Robert Hog, afterwards of Newliston, was a native of Scotland, and left that country early in youth, and settled in London as a merchant, where he married an English lady, Miss Rachel Missing, and acquired a considerable fortune in business, besides obtaining £3000 with his wife.

On his marriage with Miss Rachel Missing, a contract of marriage was entered into, whereby the wife's portion was to be vested in lands in England, for behoof of them in life-rent and their children equally in fee. He afterwards purchased the estate of Newliston, near Edinburgh, at £18,000, to which place he soon afterwards retired. This marriage
1760. was dissolved by the death of Mrs. Hog in 1760, leaving three sons and three daughters.

Rebecca, the respondent, and eldest daughter, married Dr. Thomas Lashley, then a student of medicine at college, and a native of Barbadoes. The marriage, in consequence of having been gone into without the knowledge and consent of the father, created displeasure, and induced them to retire to Barbadoes. On this the father proposed to give his daughter £2000 of portion. They went to that island accordingly, but nothing more than £700 was paid, for which Dr. Lashley granted his bond; and some letters passed between the parties as to the remainder of his wife's fortune, in which expressions were used on the part of the son-in-law that indicated an acknowledgment that the £2000 was to be all the fortune or claim he could expect, with the exception of one letter, which expressed larger views, and hinted at a claim of a more extensive nature. On the part of Mr. Hog, his letters in reply, gave him to understand that the £2000 was to be all, and to make his daughter equal with "my other family." These propositions came to nothing; but, in 1771, Mr. Hog gave directions to pay Mrs. Lashley £65 per annum, being the interest of the £1300, the balance of the £2000, after deducting the £700 paid. He

afterwards executed a bond of provision for the £1300, as well as bonds of provision for each of his other daughters. He executed additional bonds of provision to all his daughters for £500 more, and was in the course of executing additional bonds for a further sum of £500 to each when he died.

Mar. 19, 1789.

His eldest son, the appellant, was, by general settlement in his favour, left the whole heritable and moveable estate, subject to payment of his debts, and of these provisions. His personal estate was considerable, and chiefly vested in a banking concern in London, and part in English and French stock or funds, which was to go, with the landed estate in Scotland, to the appellant. All the daughters, except Mrs. Lashley, had, on their marriage, accepted their provisions, in full of all they could claim and demand, on account of their legitim, and discharged their father accordingly. So had Alexander and Rodger, the younger sons, on receiving certain sums in full; but no discharge had been granted by Mrs. Lashley or husband. After their father's death, the latter rejected the legal provisions referred to; and raised the present action, setting forth, that at her mother's death Mrs Lashley, by the law of Scotland, was entitled to a proportion of the goods in communion, being a third, called dead's part, falling to her as one of her mother's next of kin; and that, at her father's death, she was entitled to one half of the whole personal estate of the deceased as legitim —her other brothers and sisters having accepted of the provision made by their father, and renounced and discharged their several claims of provision. Both claims she estimated at £30,000, or £15,000 each.

The defences stated were, 1. That both claims were barred by the bonds of provision granted to them, and their acceptance and homologation thereof, declared by their several letters produced in Court. 2. It was also excluded by the father's deed of settlement. 3. That the claim of legitim could not extend over the deceased's property in England and France; and, 4. That she could not avail herself of, or derive any benefit from the discharges and renunciations granted by the other younger children, so as to claim the whole legitim, but only a third thereof, there being two other younger children alive at the death of Mr. Hog, who would have received an equal share of said legitim but for their discharges and renunciation in favour of their father, granted on receiving sums in lieu thereof.

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By various interlocutors the Court found, 1. That the pursuer's were not barred by homologation, acquiescence, or acceptance on their part, and that the letters and correspondence adduced did not prove this. 2. That this claim of legitim was not excluded by Mr. Hog's last settlement. 3. That the marriage articles of Robert Hog with Miss Missing, as they did not bind the father's fortune, so could not preclude the mother, had she survived, from claiming her legal share. 4. "That the renunciation of their claim "of legitim by the younger children operated in favour of "the pursuer (Mrs. Rebecca Hog), and has the same effect "as the natural death of the renouncers would have had; "and as she is the only child who did not renounce, find "her entitled to the whole legitim; being one half of that "free personal estate belonging to her father at the time of "his decease."* 5. "That the succession must be regulated by the *lex domicilii*;" and, consequently, that this "claim of legitim extends to such personal effects in England or elsewhere, as well as in Scotland."* 6. The Court hereafter found, on further advising a reclaiming petition, "that the government annuities in England fall under the "pursuer's claim of legitim," but remitted to hear further as to the government annuities in France.* 7. Also remit to hear parties further upon the pursuer's claim, in right of her mother, to a share of the goods in communion at the dissolution of the marriage.

Dec. 2, 1790. Dec. 24, 1790. June 7, 1791. Nov. 29, 1791. Dec. 23, 1791.

An appeal was brought against those interlocutors as find, 1. That the letters and correspondence produced do not prove homologation and acquiescence sufficient to bar action. 2. That the respondent's claim of legitim is not excluded by the deed of settlement. 3. That the claim of legitim extends to personal estate in England or elsewhere, as well as in Scotland. 4. That the renunciation and discharge of the younger children operate in favour of the child not renouncing. 5. That the government annuities in England are moveable, and fall under the respondent's claim of legitim.

Pleaded (by MR. GRANT*) for the Appellant.*—This case is brought under the consideration of your Lordships, in order to settle some points of very general importance in the law of Scotland.

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* *Vide* Opinions of Judges of the Court of Session at the end of the case.

By that law, a person having neither wife nor child, may dispose of his property in what manner he pleases. In marriage, if there be no special contract to exclude it, a communion of moveables takes place between husband and wife. But if a man die, leaving a wife and children, one-third part of his personal property goes to his wife, which is called the *jus relictæ;* one-third part to the children, which is styled the legitim; and the remainder, called the *dead's part*, the owner may dispose of to whom he pleases. This right of legitim may be renounced, with or without a consideration; and upon such renunciation, the general doctrine seems to be, that the share of the child renouncing accrues to the other children, unless a contrary intention of the father has been manifested. From what has been said, it appears that the right of legitim goes to one half of whatever personal property the father dies possessed of, that is, not affected by the *jus relictæ.*

In this case, five points will arise.

1. What will be the effect of an implied renunciation, supposing it to exist in fact in this case? 2. Whether the right of the children to legitim may not be barred by a deed *inter vivos*, executed by the father in his lifetime. 3. Whether the share of a child renouncing does not accrue to the father, so as to enable him to dispose of it by will? 4. Whether, though the deed executed by Mr. Hog be ineffectual in Scotland, it will not operate as a will in England, so as to convey the personal property in that country, according to the deceased's intention? 5. If not on the ground that the *lex domicilii* is to prevail, then, whether the property in the English funds is not to be considered as immoveable property, and descendible to the heir, which would be the case of any fund in Scotland having a *tractus futuri temporis?*

If either of the two first points be decided for the appellant, it will render the consideration of all the latter ones unnecessary, as they both go to the whole question; but the latter questions only go to the quantum of the sum to which Mrs. Lashley will be entitled. Such are the questions arising out of the facts I am going to state to the House, (here Mr. Grant stated the facts.) The marriage of the late Mr. Hog was contracted in England, by parties resident in England and domiciled there; therefore there was no communion of goods between Mr. Hog and his wife;

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because a settlement was executed upon the marriage, having a respect to English property, and to a marriage in England. It further appears, that all the children were born in England; at their birth, therefore, no right to legitim could attach, but, if it were attached at all, it must have been subsequent to their birth.

At one period, since her marriage, it is clear that Mrs. Lashley had no idea of a right to legitim, for in her letter of 27th February 1771, she speaks of £65 being the interest at 5 per cent *for the remaining* £1300 of *my fortune*, which words certainly imply "all that she ever expected "to receive from her father, or thought she had any right "to;" and by such expressions, every idea of a mere temporary allowance to a child is removed. Mr. Hog himself certainly entertained the same idea, for, in 1775, he executed formal bonds of provision in favour of Mrs. Lashley and his other daughters, in which he mentions £2000 to be in full satisfaction of the legitim.

It must be admitted, that if this were entirely the case of a Scotch succession, and no will, there would have been a division amongst the younger children unless they had renounced. But in this case, the appellant, Mr. Hog proved the deed which was executed in his favour by his father in 1787 as a will of personal property in England. Soon after the death of her father, Mrs. Lashley brought this action. In the Court below, several defences were set up by Mr. Hog, the appellant.

First, it was contended that Mrs. Lashley's claim to the legitim was wholly excluded by her acceptance of the provision made by her father; and that the facts and circumstances in this case amounted to a renunciation.

The second answer made to her demand was, that Mr. Hog the father, had not left his property to be disposed of by the law, but that he had disposed of it by a rational deed *inter vivos*, which it was competent for him to do. These two defences, if either of them had prevailed, would have been an answer to the whole of Mrs. Lashley's demand.

But it was further contended below, by way of partial defence, that as there was property in England, upon which the deed executed by Mr. Hog could operate as a will, that property must be excluded from the claim of legitim.

It was further insisted, that a renunciation by the other

children had no effect to increase Mrs. Lashley's share of legitim, but only gave Mr. Hog the father, a power to dispose of it.

Lastly, It was contended, that the property in the English funds would go to the heir, and not to the executor; for it was either affected by the will, which gave it to Mr. Hog, the appellant; or if the law of the domicil prevented the will from having its due operation, the same law must be resorted to, to show how it must descend; and that law in this case would carry it to the heir.

These were the points rested upon below; but I must admit they were all decided against us, and I am now to trouble your Lordships with arguments in support of them.

The first point is, as to the effect of Mrs. Lashley's acceptance. The correspondence contained in the second and third pages of the appellant's printed case, proves, by the uniform expressions, Mr. Hog's intention to give Mrs. Lashley the same, and no larger fortune, than he bestowed upon his other daughters; and also Mrs. Lashley's intention to accept it as her *fortune*. Fortune is a word of particular import, and is always used to signify the whole sum that a parent means to bestow upon a child.

The renunciation of various rights may be collected from facts and circumstances as well as by deed, unless there be some express law to the contrary; which is not pretended to exist in this case. The other children of Mr. Hog's were executing formal deeds of provision, and in them, a clause of renunciation was inserted. She not being with her father, did not execute an instrument, and therefore, there is no formal renunciation; but words are frequently used by Mrs. Lashley and her husband tantamount to it. In her bills drawn for £65 per annum; she mentions it *as interest due to her*, which proves she could not be speaking of a bounty or temporary provision. Mr. Hog having acquiesced in the statement of £2000 as her fortune, if an action had been brought against him or his executors for that sum, they could not have defended themselves against such a demand. If so, the obligation must be mutual, and I contend, that Mrs. Lashley is debarred from her legitim, because she consents to accept of £2000 as her fortune. But, supposing your Lordships to hold that there must be an express renunciation, then I contend;

Secondly, that by a rational deed executed *inter vivos in*

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liege poustie, not upon death-bed, the father may exclude the legitim. Mr. Erskine (Book III. tit. 9, § 16), says "That rational deeds granted by the father in relation to his moveable estate, if they be executed in the form of a disposition *inter vivos*, are sustained, though their effect should be suspended till his death." Is there any thing irrational in all Hog's settlement?

Erskine's position is supported by adjudged cases; The case of Johnston *v.* Johnston from Fountainhall, mentioned in Kaimes' Dict. of Dec. vol. 1, tit. Legitim, p. 545.

To the same point is the case of Lady Balmain, in the same page, which was to this effect: A disposition by a husband to his wife of the stocking that should be upon his mains at the time of his decease, being objected to by his children, as in prejudice of their legitim, being of a testamentary nature revocable, as not having been a delivered evident; it was answered, that the form of the deed, is *per modum actus inter vivos*, whereby a present right is conveyed, though suspended till the grantor's death, and being done in *liege poustie*, it cannot be reached by the law of death-bed, and there lies no other bar to the father's power of alienation.

These cases are in point, and no contrary determination has been stated, where the claim of the children has prevailed against a rational disposition of the father. Formerly, a man could not disappoint the heir as to the descent of real estate, but the power of disposal as to such property has increased, by merely using words of disposition instead of words of devising. If the shackles are thus taken off as to real estate, it is strange that they should still be continued upon personal property. To establish so absurd a principle, your Lordships will think it necessary to be furnished with a long chain of concurrent authorities, and even that will hardly he sufficient, in a matter so contrary to reason. In the law of Scotland, till lately, the *lex loci rei sitæ* was supposed to be the law that was to govern, and all the decisions are uniformly that way; but now, by a decision of your Lordships in Bruce *v.* Bruce, the rule of the *lex domicilii* has been established. Therefore, even if the decisions were against me, which I have shown they are not, your Lordships ought to decide for the appellant, upon the principle of removing, as much as possible, all restraints upon property, and the disposition of it.

Vide ante.

Thirdly, As to the effect of the renunciation of the other

children. When a father advances a fortune to one child, that child and the father are the parties to the contract, and the other children have no right to interfere. If any advantage results from that agreement, the father ought to have the benefit of it, and he ought also to have the power of disposing. I admit it is laid down in general, that the share renounced goes to the other children wholly, and not to the heir; but all the cases decided on that point are where the father dies intestate, and where that is the case, he is presumed not to have chosen to exercise the right he acquired. From making no disposition, it is evident he meant to benefit the other younger children; and whether a child shall or shall not be barred of legitim, is entirely a question of intention; for even where a father makes a provision for a child, he may exempt such child from the necessity of collating such provision. The only case material upon the subject is that of Henderson *v.* Henderson (Dict. of Dec. vol. I. p. 545), and that is apparently against me. But, in that case, there was no renunciation, and therefore I contend that there is no case in which a child has renounced, and the father has made a will acting upon that renounced share, to be found against me.

The fourth question is, how far the deed executed in Scotland by Mr. Hog will be effectual in England as a will, so as to bind the property in England? I am bound to admit, after the decision of the House in Bruce *v.* Bruce, that the *lex domicilii* is the rule of decision that must prevail, as to the disposition of property, where the party dies intestate. For it certainly would be extremely inconvenient that many different rules should prevail in the disposition of property belonging to the same individual. It would also be probably inconsistent with the intention of the proprietor, for where he dies intestate, it may be presumed that he approved of the law of domicil. But how is this rule to be preserved, where the property is in another country, and the law of the domicil can only extend to its own territories, so as not to be able to compel the foreign state, where the property actually lies, to enforce it? It is done in this way: the foreign state adopts the law of domicil, not as a rule binding upon them, but as the presumed will of the deceased; or they resort to a fiction, by saying that moveables have no *situs*, but are attached to the person of the owner. It is necessity only that obliges a court of justice to resort to either the

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one or the other of these means. But the case is very different where a disposition is made, which would be effectual to transfer property in England, if the property be exactly there. For, supposing a man has made a disposition, effectual by the law of the country where the property happens to be, what reason or necessity is there to resort either to the presumption of implied will, or to the fiction? The law of Scotland does not deny to the owner the power of disposition, but only the form in which it is conceived: now, that is a mere local regulation, and ought not to bind the courts of any other country.

I agree with the argument, that it would be impolitic in the commercial world that the *lex loci* should govern the disposition of property accidentally there, in a course of commerce. The opinion of Lord Hardwicke in Thorne *v.* Watkins, 2 Ves. 35, turns entirely upon the policy in a case of intestacy. But where a man makes a will, the question of policy does not arise.

Fifthly, As to the property in the English funds. It is a clear principle of the law of Scotland, that annuities are considered as heritable, and descend to the heir; and therefore if the *lex domicilii* is to prevail, you must apply it to the whole of the property, which will exclude Mrs. Lashley from any share of that property which is in the English funds. It is true, that by the law of England, such property is considered as personal, but then that must be with reference to cases in England, the parties being English, and domiciled there. It does not seem to have been a question much agitated by writers on general law, what rule is in general to prevail, Whether the *lex domicilii* or *lex loci*, as to the point whether the property is to be considered moveable or immoveable. Pothier (vol. III. p. 528, § 85), in treating of the communion of goods between married persons, clearly states the point, and declares it to be settled that the law of domicil where the creditor resides, is the rule that is to prevail; and that decision seems to be agreeable to reason. If that rule prevails, then Mrs. Lashley cannot claim legitim in the English funds, because they were not the subject of legitim, but descend to the heir.

These are all the grounds of defence upon which a partial or total reversal of the judgment is prayed.

April 30, 1792.

Mr. ANSTRUTHER spoke on same side.

Pleaded by the Lord Advocate (DUNDAS) *for the Respondents.*—I am to trouble the House in support of a judgment which, except upon one point of testate or intestate succession, was an unanimous one in the Court below. The points are five:

1. Homologation, by the law of Scotland, is, where a party by actual or presumed acceptance, releases or confirms a contract. But, in order to make such an act binding, it must appear that the party releasing or confirming, did so with full knowledge of what he was doing. Now, in this case, the letters that have been produced do not even state that the legitim was at all even a subject of consideration. The sum of £2000, so much spoken of, was merely a matter of bounty from the late Mr. Hog. The case did not admit of homologation, for Mrs. Lashley's legal claims were never even stated or taken notice of in the whole correspondence. The sum of £700 was so far from being in part satisfaction of the legitim, that it was money lent, for which Mr. Hog took a bond, that he might at any time, even to the time of his death, have put in suit and enforced. If the £65 was meant as the annual interest of Mrs. Lashley's fortune, it is strange that Mr. Hog should still talk of the £700 as a debt, which he does in all his letters. As late as the year 1772 he speaks of the £65 per annum as an annuity and bounty during pleasure. Erskine (Book III. tit. 9, § 23.) expressly declares, that a virtual renunciation of the legitim will not do, in the following terms, after stating that it may be renounced by a child, even without satisfaction: "As this right of legitim is strongly founded in nature, the renunciation of it is not to be inferred by implication. It is not to be presumed, either from the child's marriage, or his carrying on a trade by himself, or even his acceptance of a special provision from the father at his marriage, if he have not expressly accepted of the provision in full satisfaction of the legitim." This right, though it be not necessary, in order to decide the case, to discuss the nature of it, seems to me to partake more of the *jus crediti* than a right of succession; although that *jus crediti* may certainly be defeated in the lifetime of the father. This brings me to the second point; namely, Whether Mrs. Lashley's claim to the legitim is

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barred by an act of her father, Mr. Hog? I contend that the instrument produced, so far as the moveable property is concerned, is really a testament and not a deed *inter vivos*. Now, it is clear from the authority of Mr. Erskine (Book iii. tit. 9, § 16), that a husband, though he should be in *liege poustie*, cannot dispose of his moveables to the prejudice of the *jus relictae*, or right of legitim, by way of testament, or, indeed, by any revocable deed. The question then is, whether the deed in question falls under the description of a deed *inter vivos*? It is certainly good as to heritable estate; but, when he comes to dispose of this personalty, it is a mere testament, for he appoints executors, &c. The cases quoted do not affect my argument; for these were cases of rational deeds *inter vivos*; but I insist upon this as being a new testament of personal property.

4th May 1792.

The third point is, as to the effect of the renunciation by the other children of Mr. Hog; and I contend that the benefit of that renunciation does not tend to the profit either of the father or of the heir, but tends to increase the legitim. It has been much argued here and below, upon the policy and expediency of the measure. But after authorities so numerous, and of so much weight, and the variety of decisions in support of those authorities, it is impossible to recur to arguments of general policy. The renunciation of the legitim is not understood as a bargain between the father and the child renouncing; but the child, by anticipation, receives his legitim, and therefore, it is but justice that those who remain should have their share. The authorities quoted in the case of the respondent, p. 10, are all unanimous.

The first is the instructions given for the guidance of the Commissaries as to the confirmation of testament in 1606, Lord Stair, Book iii. tit. 8, § 46. Lord Bankton, Book iii. tit. 8, § 15. Erskine, Book iii. tit. 9, § 23.

These authorities all concur in establishing the rule, that a child's renunciation of the legitim has the same effect in regard to the younger children, as the death of the renouncer, so that his share divides equally among the rest. This doctrine was admitted in its full extent by all the judges in Scotland in this case, except one (Lord Dreghorn), who has argued on the contrary side, upon principles of policy and

upon grounds of expediency, which are wholly inadmissible in this case.

The fourth point is, whether or not the will of Mr. Hog is to have an operation upon the property in England, notwithstanding the law of the domicile. In the case of Bruce *v.* Bruce, (*Vide* ante p. 163,) the House of Lords certainly did state an opinion upon the general point of the law of domicile, in a case of intestate succession; but the same rule must apply to a case of testate succession. If it be admitted that moveables are supposed to be where the owner is domiciled, then the case is clearly with my client, because then the will can have no effect; for if this will were produced in Scotland, it could not defeat the legitim. Can a court of law, by a mere transmission into another country, give validity to an instrument which it could not have in the country where the party executing it resided?

In the case of Kilpatrick, before Lord Kenyon, then Master of the Rolls, (Respondent's case, p. 7), the matter was viewed in this very light; and the only question was, whether the will was good by the law of Scotland? Whenever that point was ascertained, the decree proceeded according to that law.

In Dirleton's Doubts (Respondent's case, p. 8), it is said that "*testamenti factis* ought, in all reason, to follow the "person."

Lord Kames (same page) puts a case as to the *jus relictae*, and concludes with an observation equally applicable to this point. "At any rate, the *jus relictae* must have its effect as to his moveables in Scotland; and it would be a little strange to say, that his transient effects should be withdrawn for no better reason than that they happen accidentally to be in a foreign country, where the *jus relictae* does not obtain." Nor does this doctrine at all militate against the truth of the position, that when a person follows property into a foreign country in any process, he must conform to the modes pointed out in that country where the debtor resides.

Fifthly, as to the question, whether the money lodged in the 5 per cent. annuities is to be considered as moveable or immoveable? It is said, that if the law of domicile is to be resorted to on one point, namely, as to the testate or intestate succession, so it must on every other; and then it is insisted, that by the law of the domicile, this particular species of property would be considered as heritable, and conse-

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quently must descend to the heir. But we contend that if these funds had been locally situated in Scotland, they would still have been deemed moveable. There are, by the law of Scotland, certain particular rights having a *tractus futuri temporis*, and carrying a yearly profit to the creditor, without relation to any capital sum or stock that are heritable. But the funds in question have not a *tractus futuri temporis* within the meaning of this law; for, in order to make such a subject heritable, it must be a substantive right, without relation to any *capital sum or stock.*

This question occurred in the beginning of this century and again in 1735; and it was then solemnly decided, that the shares of the Bank of Scotland are not heritable; but simply moveable. The five per cent. annuities fall precisely within Mr. Erskine's description of that species of property which is not to be considered as having a *tractus futuri temporis.* See the whole passage from Book ii. tit. 2, § 6, quoted in Respondent's case, p. 8.

Besides, if there were any doubt upon the law of Scotland, this is a British debt, and the act 25 Geo. III. c. 32, § 7, declares it to be personal estate.

Mr. SOLICITOR GENERAL (afterwards Lord Eldon) on same side.

The clause of legitim, by the law of Scotland, is exactly similar to the orphan's share in the custom of London; and it is singular that there is hardly any question which has been agitated as the right of legitim, that has not also arisen with respect to that custom; and every decision upon it has been conformable to the decisions in Scotland.

The first point is, whether my clients, the respondents, are barred by any homologation or acceptance?

The legitim cannot be barred by an implied assent; and upon this point, without entering into a discussion of the law, I rely upon the fact. In the whole of the correspondence relied upon for the appellant, no contract appears for any precise sum to be given for the legitim; and even if a sum were mentioned, no terms are imposed, nor even hinted at, that have the smallest connection with legitim. The bond referred to by Mr. Hog, in his letter of September 1768, was reserved by him in his repositories to his last moments, and might have been put in suit at any time. When, in another place, he proposes the sum of £2000 as an equal share with his other daughters, he does not even state their renunciation of their claim of legitim, or his expectation

that Mrs. Lashley would do the same. In another letter Mr. Hog speaks of his bounty to Mrs. Lashley: and so late as 1772, he says he *will continue his bounty* so long as her behaviour merits it. In one of the deeds of provision also he recites that £700 was due by Mr. Lashley upon bond; so that he himself never considered it as an advance in satisfaction of the legitim. Indeed the idea of giving up the legitim never was the subject of consideration of these parties.

LORD CHANCELLOR (THURLOW) asked whether it was admitted that the husband, after marriage, might renounce the wife's share of legitim.

MR. SOLICITOR GENERAL.—I do not admit it; for if a husband renounced his wife's share under the custom of London, and she survived her husband, I doubt very much whether she would be barred by that renunciation.

The second point is, whether Mrs. Lashley is barred by any act of her father, Mr. Hog. A great many acts might be done by a freeman of London, to defeat the custom; but if he did any act, which turned out to be a will, it was held to be a fraud upon the custom, and therefore void. So held in the case of Tomkyns *v.* Ladbroke, 2 Vezey, 561, where Lord Hardwicke said, that a freeman may, by act in his life, and even *in extremis*, give away any part of his personal estate, provided he divests himself of all property in it; though if he reserve to himself a power over it, that is considered as void. The act of the father was of a testamentary nature, and therefore must be judged to be an act in fraud of the custom; so in this case the deed executed by Mr. Hog was in fraud of the legitim, and therefore void. I cannot forbear to mention in this place, some other peculiarities in the custom of London, which apply to other parts of the cause. It appears that the custom attached upon property not locally situated within the city, so that the will of a freeman would no more operate upon it than if within the walls. 4 Burn, Eccles: Law, tit. Wills, p. 378.

In the year 1734 it became a question whether a composition with the wife for her customary part would accrue to the benefit of the father or the child? It was held that, in such case, it should be taken as if the wife were dead, so that the father would have one moiety and the children the other. 1 P. Wms. 644. In 2 Vez. 592, Lord Hardwicke enters into the history of the cases, and holds it to be settled that a composition with the wife, has the same effect as

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if she were dead. If then, the father takes no particular or exclusive benefit by a composition with the wife, it should seem strange if a contrary rule prevailed on a composition with the children.

In this case, it is argued, that as the father might easily have defeated the right of legitim, the mode he has adopted will do as well as any other, although the law of the country has said directly to the contrary. The question is, Has he done that act, which the law has required him to do, in order to defeat this right? Will this deed, coupled with the bond of provision, exclude the right of legitim? The bond alone will not do, because it remained in his bureau till the moment of his death; and as to the deed, no single judge in the court below had a doubt upon it. The deed, as to the personal estate, is merely in the form of a Scotch testament. A deed, with a power of revocation, vests a present interest, subject, however, to be defeated by the act of the donor; but a deed, to have no effect till the death of the donor, is very different. The cases quoted on this subject are not analogous to it. Johnstone's case, if it were analogous, is of doubtful authority. Lady Balmain's case is not applicable; and the last case upon the subject, of Henderson *v.* Henderson, is decisive against both the former.

The third question goes as to the extent of the legitim; and it seems that, in a case of intestate succession, Mrs. Lashley would be clearly entitled to legitim, both as to the English and Scotch effects. Taking it for granted that the case of Bruce *v.* Bruce in the House of Lords, has decided the point, that the law of domicile must be resorted to as the rule in a case of intestate succession, it seems to me to apply much stronger in a case of testate succession. If the *lex loci* is to govern in a case of the latter sort, is it to be the *lex loci rei sitae* at the time when the will is made, or at the time when the owner dies? If the law of the domicile is not to prevail, how many different laws are? For if it be not, the disposition of property must depend, not upon the will of the owner, but on the situation of the various persons in whose hands his effects may happen to be placed; nay, it may depend even upon their caprice or will, rather than upon that of the owner; for a creditor will have nothing to do, but to change his place of abode, and the will of the owner is again defeated.

But I contend that this cannot be the rule; for if a man makes a will, though he uses words which, in the country

where the personal property happens to be, would convey every thing, yet it will be restrained in its operation by the law of the domicile. In other terms, if a man in Scotland devises *all* his personal estate, and the law of the country only permits him to devise the half, neither would it convey more in England. The law of Scotland upon this point is clear and decisive; the passages have been read to you by the Lord Advocate, and they are all stated in the respondent's case, p. 8. The law of England is no less plain upon this point, and is fully stated by Lord Hardwicke in Thorne *v.* Watkins, 2 Vez. 35. And in that case Lord Hardwicke evidently meant to allude either to a case of testate or intestate succession; for he speaks of probate or administration.

The case of Kilpatrick at the Rolls, must carry great weight, for although the case was not argued at the bar with much pertinacity, yet Lord Kenyon considered the subject, and founded his decree upon the report of what the rule of the Scotch law was, and that was the case of a will.

In the case of the *jus relictae*, as well as of the *legitim*, there is good reason for declaring that the law of the domicile shall prevail; for parties contracting matrimony may be reasonably supposed to have a view to these advantages and benefits which the laws of their country, by virtue of that relation, entitle them to expect. There ought, then, to be the highest authority to say, that a man who is, and continues to be domiciled in Scotland, shall not be enabled, by placing his property in the English funds, to disappoint the reasonable expectations of his wife, who by the law of his and her domicile, is entitled to one half of his personal estate where there is no children: or, if there be any, to defeat both her and them of their legal claims.

The fourth point is, as to the effect which the renunciation by the other children shall have. I contend that it is in the nature of a bargain made by the father with the child renouncing, for the benefit of the other children. It is a contract that the child renouncing shall not claim any part of the father's fortune; but it is not a contract that the father shall claim the renounced share, instead of the renouncer. It is unnecessary to argue this point as an abstract proposition, because it has been decided over and over again; and therefore it is too late to argue upon the reason of the thing, or upon the policy or expediency of such a rule having been adopted.

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Fifthly, As to the question, whether the property of the late Mr. Hog in the English funds is to be considered as moveable or immoveable property? it has been assumed, in argument, that if these funds were in Scotland, they would be deemed heritable property; but that is a position which I absolutely deny. Rights of this nature, which are deemed to be heritable by the law of Scotland, are such as carry a yearly profit, without relation to any capital sum or stock. But your Lordships know that the five per cent. annuities depend upon the capital stock; for it is in respect of his capital stock, that the holder of it is entitled to an annuity. If he propose to transfer it, he does not transfer an annuity, but the *stock*. The legislature has expressly declared that his fund shall be considered as personal, and shall go to the executor. Shall a different rule prevail in Scotland, from what the wisdom of parliament has pointed out? Shall they go to the Scotch executor, as trustee for the heir at law, and to the English executor, for the benefit of the next of kin, under the statute of distributions? Upon this point the authority of Mr. Erskine (Book ii. tit. 2, § 8,) is express, where he says, that "the shares of the proprietors in any public company or corporation constituted either by statute or patent are considered as moveable."*

7th May 1792.

Mr. GRANT heard in reply.

The LORD CHANCELLOR (THURLOW) moved to affirm the judgment of the Court below.

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *T. Erskine, W. Grant, J. Anstruther.*

For Respondents, *Sir J. Scott, Lord Advocate Dundas, Alex. Wight, Wm. Adam, John Clerk.*

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* Opinions of Judges of Court of Session —*Vide* p. 250.

LORD PRESIDENT CAMPBELL.—"This is a claim of legitim out of English effects. Questions which concern the laws of different countries, and where, in case of variance, a general rule must be laid down, are always of importance, and often of nice discussion.

"Many points have been settled concerning the constitution of obligations in foreign countries, prescription of rights, limitation of actions, foreign decrees, the operation of foreign statutes, &c. though