1802.

HOG, &c. v. THWAYTES, &c.

portion of the expense for one species of heritors, and another for another species; but that it is proper to lay the burden on the whole heritors, including the feuars of the town, according to their real rents.

"I therefore move that the interlocutors be reversed, and that it be declared that the expense of building the church is a parochial burden, which ought to fall equally on all the heritors according to the real rents of their estates."

LORD THURLOW,—

"I believe it ought to be noticed in the judgment, that it is not meant to affect those cases which have been regulated by custom time out of mind."

LORD CHANCELLOR,—

"In that case, it may be intimated in the judgment, that there was no such custom in this parish."

On his Lordship's motion this was ordered accordingly.

Ordered and adjudged that there being no custom to regulate the proportion in which the heritors are to contribute to the rebuilding the church, the interlocutors complained of be reversed, in so far as they assess the rates at which the parishioners are to be charged to the rebuilding the church. And it is hereby declared, that such charge is a parochial duty, and that it ought to be defrayed by all the *owners* of *lands* and *houses* in proportion to their real rents. And it is further ordered that the said cause be remitted back to the Court of Session in Scotland to proceed accordingly. And it is further ordered and adjudged that the said interlocutor as to the rest be affirmed.

For Appellants, *Jas. Gordon, Arch. Campbell, jun.*

For Respondents, *Wm. Adam, W. Robertson.*

NOTE.—Unreported in the Court of Session.

[Mor. App. Legitim, No. 2.]

REBECCA HOG, otherwise LASHLEY, Spouse of THOMAS LASHLEY, Esq., and Him for his interest, ... } *Appellants;*

WILLIAM THWAYTES and Others, assignees of ALEXANDER HOG, London, and THOMAS HOG, Esq. . . . . } *Respondents.*

House of Lords, 24th June 1802.

LEGITIM—DISCHARGE OF—ELECTION.—In the succession of the late

Roger Hog of Newliston, a younger son, Alexander, was set up in business in London, and had got several sums from his father for that purpose. He had granted a discharge to his father for £1500, stating it as "the portion bestowed on me by him;" but there was no express discharge of the legitim. After his father's death, there was found in his repositories, a discharge by his father of a subsequent sum of £4000, got by Alexander as a loan, but which the father declared to be an additional provision, and in full of all he could ask in name of legitim. This discharge, after his death, was handed over to Alexander Hog's assignees, and accepted by both. Held, in the Court of Session, that neither by the discharge granted by Alexander before his father's death, nor by what took place subsequent thereto, had he cut off his right to legitim. In the House of Lords, the interlocutor was affirmed, in so far as it held, that his legitim was not cut off by the discharge granted during the deceased's life, but reversed on the other point; and held, that the assignees, by the facts proved, inferring acceptance of this discharge, had released this claim after his death.

The appellant, Rebecca Hog, was the eldest daughter of the late Roger* Hog of Newliston. She was married to the other appellant, Mr. Lashley, but no marriage provision was given at that time, though some time thereafter, Mr. Lashley got in loan, first £700, and afterwards, £300.

At her father's death she was left by him two bonds of provision; one for £1300, and one for £200; the former bearing to be in satisfaction of her legitim. But being advised that she could derive greater benefit by renouncing these bond provisions, and claiming her legitim, she brought an action for that purpose. This claim to legitim became of more value, from the predecease of some, and the renunciation of others of the family, who had accepted voluntary provisions in satisfaction of their claims.

Accordingly, a previous question, reported ante vol. iii. p. 248, settled, 1. That the deceased being domiciled in Scotland, his personal estate situated in England, or elsewhere, was to be regulated by the law of Scotland. 2. That the shares of those children, who accepted voluntary provisions from their father, divided among the remaining children who had not discharged their legitim. 3. That the appellant was entitled to the *whole* legitim.

---

* In the report of the first Appeal, ante vol. iii. p. 248; and in Mor. Dict., p. 4628, "Robert" is printed by mistake, instead of "Roger."

1802.

HOG, &c. *v.* THWAYTES, &c.

When this decision was pronounced, the assignees of *Alexander* Hog, (who had become bankrupt, but who was one of the children alleged to have discharged his claim), preferred a claim to one half of the whole legitim.

Alexander Hog carried on business as a grocer in London. He entered into partnership with another individual, the father giving him £1500 as his whole portion and patrimony, and £700 further in loan. Other sums were advanced, and a discharge granted, stating, "Grant me to have received Dec. 31, 1768. "from the said Roger Hog, my father, the sum of £1500, "*as the portion bestowed on me by him.* As also, I acknow- "ledge to have received the sum of £100 in payment of two "legacies left me by Alexander Hog, my uncle. And which "money, above written, so received by me from my said "father, I have put into the Company stock and trade with "D. Cameron and A. Farquhar, grocers in London, with "whom I am joined in trade, and of both which sums of "£1500 and £100 received by me, I discharge the said "Roger Hog, my father; and I oblige myself to reiterate "and renew these presents when I arrive at the age of "twenty-one years."

Alexander Hog's affairs not prospering, frequent applications were made for loans, and large sums were advanced. And, at his father's death, Alexander owed his father £4000, for which he had granted two bonds of £2000 each.

On that event, his repositories being searched, there was found a discharge regularly executed by his father, narrating the two bonds, and subsuming a resolution to discharge them, in lieu of an additional provision of £4000 which he intended to have made in Alexander's favour. It contained this clause,—"I hereby declare this discharge in lieu of the "foresaid provision of £4000 which I intended to have "given him, to be in full of all legitim, part, portion natu- "ral, or bairns part of gear, which he or his foresaids may "legally claim out of my executry, by and through my "death, in any manner of way."

Immediately after Mr. Hog's death, John Robertson, the family agent, went to London with this discharge, which he put into the possession of the respondent, Alexander Hog's assignee; and, in return, Mr. Thwaytes executed the following holograph receipt, upon a certified copy of the discharge, and delivered it to Mr. Robertson.

"*London*, 30*th April* 1789.—Received by me, assignee "under the statute of bankruptcy of Alexander Hog, grocer, "London, from Thomas Hog, Esq. of Newliston, by the

" hands of Mr. John Robertson, writer in Edinburgh, a dis-
" charge granted by Roger Hog of Newliston, Esq., to the
" said Alexander Hog, of which the three preceding pages
" is an exact copy.

" For self, JOHN HOWES and JOHN FREEMAN.

(Signed) " WILLIAM THWAYTES."

Alexander Hog himself also indorsed on the same certified copy, discharge as follcws:—

" *London*, 30*th April*, 1789.—I approve of the above men-
" tioned discharge having been delivered to my assignees.

(Signed) " ALEXANDER HOG."

In these circumstances, the questions raised in the present case are, 1. Whether Alexander Hog's right of legitim was barred by any renunciation on his part, or on the part of his assignees? 2. Supposing it to be barred, Whether the discharge operated in favour of Thomas Hog, the heir at law of Roger Hog of Newliston, or in favour of the appellant, the only remaining child, who had not discharged her legitim? The present multiplepoinding was brought to try these questions. By an additional case for the appellants, it was, in the 3d. place, submitted, That even though Alexander Hog's right of legitim should not be held to have been effectually discharged in their favour by the releases or discharges now founded on, still the appellants were entitled, under the interlocutors of the Court of Session, finding Mrs. Lashley entitled to the whole legitim, and affirmed by your Lordships, upon the former appeal brought by Mr. Thomas Hog, to recover from him the full half of the free personal estate belonging to the late Roger Hog at the time of his decease.

The second of these two questions was not determined in the Court at this stage, its consideration being superseded by the following interlocutor pronounced on the first. " On report of Lord Dreghorn, find, That Mr. Hog, the raiser of " the multiplepoinding, is only liable in once and single " payment. Find, That Alexander Hog's claim of legitim " was not cut off during the life of his father, nor by what " passed after his father's death; and therefore sustain the " said claim, and remit to the Lord Ordinary to proceed " accordingly, and to do further in the cause as he shall see " just." June 2 and 3, 1795.

On reclaiming petition, the Court adhered. Nov. 24, 1795.

In regard to the third of the above points, the Court, on report of Lord Dreghorn, had pronounced this interlocutor,

1802.

HOG, &c. *v.* THWAYTES, &c.

(7th June, 1791):—"Find, that the renunciation of their "claim of legitim by the younger children of the deceased Mr. "Hog, operated in favour of Mrs. Rebecca Hog, and has the "same effect as the natural death of the renouncers would "have had; and as she is the only younger child who did "not renounce, find her entitled to the whole legitim."

The Court, on a reclaiming petition, adhered; and on appeal, the House of Lords affirmed, 7th May 1792.

From these, the appellant rested a plea of *res judicata*, that the *whole* of the legitim was hers. And the Court of Session having pronounced the interlocutor above quoted, of 2nd and 3d June 1795, the appellants put in a reclaiming

1795. petition; but the Court (25th November), adhered. And they also *pro forma* presented a bill of suspension, but which was refused (26th July 1800.)

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—As the right of Alexander Hog to his legitim was cut off by the discharge which he granted in the year 1768, in which he acknowledges the receipt of £1500 as the portion bestowed on him by his father, he is debarred from claiming any legitim. The respondents argue, that, in order to discharge this claim, the discharge must be *express*, and so in the present case it is. He discharges expressly the portion bestowed upon him by his father—which word portion is one of the *voces signatæ*, to signify, in the law of Scotland, *legitim*,—and, accordingly, this legitim is often called portion natural. No *verba solemnia* are requisite. It is enough that the intention of parties be clear from the deed to discharge the legitim; and, in this instance, both the intention and the language of the discharge are clear. But even supposing this discharge, granted during the father's life, were insufficient, still the respondents are barred, by their renunciation of Alexander's right of legitim, after the father's death, in accepting with his consent, a discharge of the debt, which he owed to his father, amounting originally to £4000, which discharge was qualified by an express condition, that it was granted "in full of all legitim, dead's part, portion natural, "or bairns' part of gear." Nor is it any answer to say, that they being Englishmen, were not informed of the consequence of accepting this discharge in the law of Scotland, because they had every opportunity and plenty of time to take advice, and acquaint themselves with the Scotch law on the subject. But the deed itself informed them on the sub-

ject; for it expressly bore, that acceptance was to operate as an extinction of the legitim. And the whole legitim therefore goes to the appellants, which is a point no longer open, after the judgment and appeal in the former case.

Pleaded for the Respondent, Thomas Hog.—If it shall be held that Mrs. Lashley, on the ground of the decree of the Court of Session, affirmed in the House of Lords, is entitled to the whole legitim, whether situated in Scotland or elsewhere, and that this matter is not now open, the respondent, Thomas Hog, contends, that as the reason upon which this judgment proceeded, namely, *as she was the only younger child who did not renounce,* that matter must be held as finally settled; and it therefore cannot now be made a question, Whether Mrs. Lashley is entitled to the whole legitim? It must follow, that the respondent is only liable in once and single payment. It must follow further, that if Mrs. Lashley receives the whole, she must discharge the whole legitim, and warrant that discharge, according to the law of the country under which she claims it. On every view of the case, therefore, Alexander Hog, *quoad* the respondent, Thomas Hog, is to be viewed as one of those children who renounced their legitim.

Pleaded for the Assignees of Alexander Hog.—By the law of Scotland, in order to bar the claim to legitim, a clear, formal, and express discharge of that claim must be produced. It is a valuable right, founded on nature, and is never by implication, or by deeds, or facts and circumstances, which only raise up an inference, held to be renounced. The discharge granted by Alexander Hog in 1768 was inoperative, as he was then under age; and the mere delivery of a discharge, signed by the deceased, of a debt which Alexander owed him, only raised up an implied discharge, which the law does not hold sufficient. Besides, this discharge was never accepted of by the respondents, in the true meaning and sense of an abandonment of Alexander Hog's claim to legitim, but merely as a document of debt on the estate, and the acknowledgment signed by the assignees and Alexander, related merely to the custody of the instrument, and nothing more. They were therefore entitled to claim Alexander Hog's share of the legitim.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

"My Lords,

"This cause came before your Lordships by the appeal of Rebecca

1802.

HOG, &c. *v.* THWAYTES, &c.

Lashley, and her husband, Thomas Lashley, for his interest, complaining of an interlocutor pronounced by the Court of Session, in an action of multiplepoinding, in which her brother, Thomas Hog, was pursuer.

"The circumstances of the case are these:—Roger Hog, the father of the appellant and of Thomas Hog, died in 1789. Soon after this event, an action was raised by the appellants against the respondent, Thomas Hog, as heir to his father, as representing him in some one or other of the passive titles known in law, and as universal intromitter with his goods and gear, stating, that he was indebted to the pursuer, Rebecca, in the sum £15,000, as her share of the goods in communion at her mother's death, as one of the executrices of her mother, (this part of the summons is at present under the consideration of your Lordships in another appeal.) It states also, that he was indebted to her in the further sum of £15,000, as her share of the means and estate of her father at his death, together with interest on these two sums, from the date when they ought to have been paid, till payment.

"Thomas Hog's defences were, that the claims were barred by the rational and ample provisions made by the father in favour of the appellant and his other younger children, which were accepted of by them.

"Mrs. Lashley claimed, as one of the six children of her mother; but she claimed the whole of the legitim at the death of her father, suggesting or insisting, that all the other children had discharged their claims. In his defence, Mr. Hog put on record his belief, that the other children had renounced, but at same time insisting, that the benefit of such renunciation accrued to him; and he contended that Mrs. Lashley also had renounced her legitim. He insisted on the points also in which Alexander Hog was interested, viz., that any claim of legitim was excluded by the trust deed of settlement executed by the father in *liege poustie*. That the effects in England were not liable to any claim of legitim; that, with regard to the effects in Scotland, the renunciation of the children must operate in his (Thomas') favour, and that the father was domiciled in England at the time of his wife's death. These, as also the consequence of the father having invested a considerable part of his personal property in the name of his son, are the subject of argument in the other depending cause.

"On the 2nd December 1790, the Court pronounced an interlocutor, finding that Mrs. Lashley's claim of legitim was not barred by any thing done by her, and remitting to the Lord Ordinary to hear the parties upon the effect of the discharge of the legitim by the other children.

"It is difficult to conceive that Alexander and his assignees did not know of this decision.

"On the 7th of May 1792, a judgment, in an appeal by Thomas

1802.

HOG, &c. v. THWAYTES, &c.

admitted the averment, and that he had assets wherewith to pay it—if a decree were pronounced in consequence for payment of the debt, whether it were paid or not paid, what would be the result of a claim by another creditor? If it were paid, no other creditor could call on that creditor for a participation of the sum recovered; but he would have his claim against the executor. If it were not paid, and the executor should pay any other part of the money to any other creditor, the first creditor might still, nevertheless, insist for the whole, and no bill of review could be brought. He should have made the usual inquiries for creditors. I cannot leave this part of the case without noticing, that though some of the judges of the Court of Session expressed their surprise that there could be any doubt of the propriety of the judgment in the case of the multiplepoinding, I yet think that very considerable difficulty hangs about it; and I know that a noble and learned Lord, now near me (Lord Thurlow) concurs in that opinion.

"With regard to the transaction of Alexander with his father, during the father's life, and of himself and his assignees since his father's death, in a suit between the brother and sister, I should hold, on the principles of the doctrine of election, that Alexander had renounced. The claim of Alexander for legitim was not made till the cause between Thomas and Rebecca was finished, though he and his assignees knew that they could make such claim. Under these circumstances, what is the effect of the transaction before and after the father's death?

"During the lifetime of his father, circumstances occurred which raise a considerable question, whether he was not barred during the life of his father. If not, they will be of weight in viewing the later transactions which took place.

"It was stated, in the Court of Session, that the assignees had acted properly in not saying a word till the case was over. One judge, indeed, wondered that there was a different opinion in regard to this notion. When I mention the circumstances of the case, you will see that this was not a mere acquiescence, but in some degree a case of election. What would have been the consequence had the money been paid out of the hands of the executors? Or, is it morally fit or proper, that one child should take benefit at the expense of another, while struggling perhaps with poverty? Would you suffer the assignees, without having provided for the expense, to benefit by the expense of Mrs. Lashley? Will you not rather consider this in a moral point of view, as evidence of the understanding of parties?

"On 29th November 1768, Roger Hog wrote a letter to Alexander, telling him, he intended to pay up his patrimony, without interest, 'which,' he says, 'is the sum I always allotted to you.' On 31st Dec. 1768, Alexander executed a discharge of the sums received

as the *portion bestowed on him* by his father. He was only a minor at this time. The entries in Roger Hog's books cannot be evidence of anything; and it is obvious they were no evidence against the daughter, Rebecca.

"On 1st March 1779 and 1st September 1780, Alexander obtained two loans of £2000 each, making £4000, from his father, for which he granted bonds in the English form. On 30th December 1783, Roger executed a deed in which, after reciting these bonds for love, favour, and affection, and other weighty causes, he resolves, in lieu of provisions, to discharge these two bonds, declaring that this should be in full of all legitim, &c. This discharge he kept in his own hands, and it was found in his repositories at his death. On the question, Whether Alexander had discharged the legitim in Roger's lifetime, I am of opinion that the fact of the father's executing this discharge amounts to a demonstration, that he could not mean that the discharge of 1768 amounted to a discharge of the legitim. For these reasons, there is no ground to say that the legitim was barred in the lifetime of Roger Hog. Indeed, Roger's proving the bonds as debts on Alexander's bankrupt estate in England, is proof of a demand of 20s. in the £; and if the bankrupt receives his certificate, the payment of the dividends on his estate is full payment of the debt; for a man proving under a statute of bankruptcy, forgoes all other modes of payment than that under the statute, so as to destroy all other remedies for payment.

"Having received the first dividend, Roger Hog died; on this event, it is to be supposed that these assignees, as representing the bankrupt, the son of a Scotsman, would have a general knowledge of the rights of the bankrupt; and, among others, his claim on his father's estate. It was their duty to have examined whether he still retained these rights. But the matter does not rest here. They received, *in gremio* of the father's discharge for the £4000, information that the child of a Scotsman had a claim, unless he had disposed of it in the lifetime of the father. For, at the father's death, his son, Thomas, very properly, and in the due execution of his duty, informed the assignees of the existence of the instrument, and sent it to them. Not only was the attention of the assignees, but also of the bankrupt, drawn to this deed; for when the discharge was carried to him by Mr. Robertson, the agent of the family, and put into the possession of Thwaytes, he gave a receipt for it, which states that it is subjoined to an 'exact copy' of the discharge. He who stated the copy to be exact, could not but know the contents of the deed. Alexander wrote that he approved of this receipt at the bottom of it. They who transmitted this discharge, must have considered that Alexander's claim was thereby barred. There is great danger in allowing persons, who have no interest in the subject in dispute, to be plaintiff in a multiplepoinding, raised for the purpose of bringing forward claims like this. If Mrs. Lashley had failed in

1802.

HOG, &c. v. THWAYTES, &c.

obtaining the legitim, I cannot but apprehend that we should have had a probability of seeing more of the circumstances of the case than are now before us; if Alexander had started up and said, I did not discharge, though Mrs. Lashley has: pay *me* the legitim. Though it has therefore hung on my mind that a multiplepoinding is a dangerous proceeding in cases like this, yet there is another danger much greater, and that is, to get rid of authorities.

"But this matter does not rest on the understanding of Thomas alone, but also on that of the assignees. They understood, that after they had received the discharge, Thomas, as executor to Roger, had no right to any future dividends, as he no longer stood as a creditor on Alexander's estate, and they therefore paid the dividends among the other creditors, passing him over.

"It is matter of astonishment to me, that there can be any doubt that, in making this bargain, they agreed to take the dividends, in lieu of the legitim, rather than speculate on its uncertain amount, being at the same time in doubt whether, independent of the discharge, Alexander would have been able to sustain his claim to the legitim. And there was nothing to prevent their making such a bargain. If this had been a question in the Court of Chancery, being one of election, and dealt with for three years together, they would be bound by it. But they say they were at liberty to do this; if the dividends amounted to the legitim, well and good, if not, they contend that they were entitled to demand more. By all our books, however, they are not so entitled; and, in many cases, it has been so decided by my predecessors, that this amounts to an election. But it is not clear that this was an imprudent act on their part; if the Court had held that the law of the *situs* was to rule the distribution, and, of course, all the property in the bank that was not liable to claims of legitim, the claim would have been very small indeed. It was even a doubt whether Alexander had not discharged in his father's lifetime. Besides, it is not material, in a case of election, to inquire whether they made an improvident bargain or not, it is sufficient that they made it with deliberation.

"Put the case, that Roger Hog had died insolvent as to every thing but Alexander's debt, after the assignees had applied this, would Alexander have afterwards said that this contract was not an election?

"I have always been clear upon this point; but having been counsel in this cause, nothing but necessity should have obliged me to decide it. But even now, I act on the deliberate and well weighed opinion of another noble and learned Lord" (Thurlow.)

It was ordered and adjudged, that the interlocutors complained of, in so far as they find that Alexander Hog's claim of legitim was not cut off during the life of his father, be affirmed; and that the said interlocutors be reversed, in

so far as they find that Alexander Hog's claim of legitim was not cut off by what passed after his father's death, and in so far as they sustain the said claim. And it is hereby declared and found, that the assignees of the bankruptcy of the said Alexander Hog were competent to release such claim, and that it appears, by facts proved in this cause, that they have released it. And it is further ordered and adjudged, That as to the rest, the said interlocutors be affirmed. And it is further ordered, that the cause be remitted back to the Court of Session to proceed accordingly.

For Appellants, *Wm. Alexander, J. Clerk, Geo. Cranstoun.*
For Respondents, *Ed. Law.*

NOTE.—A separate appeal and cross-appeal on other points of the succession was heard for five days, but adjourned to next Session, (1803); and then again adjourned to Session (1804).—*Vide infra.*

[Mor. App. 1. Royal Burgh, No. 6.]

THE INCORPORATION of FLESHERS of the CITY of EDINBURGH, ... } *Appellants;*

THE LORD PROVOST, MAGISTRATES and TOWN COUNCIL of the CITY of EDINBURGH, } *Respondents.*

House of Lords, 24th June 1802.

BURGH—PETTY CUSTOM—RIGHT TO LEVY—USAGE.—The Magistrates of Edinburgh had a right of exacting dues on all cattle brought into the market of the House of Muir. The fleshers of Edinburgh were in use to resort to that market, and bought the cattle, which they brought into Edinburgh for the purpose of slaughter and consumption. As buyers at the House of Muir market, they stated that they enjoyed an exemption from the duty leviable on cattle brought into Edinburgh. But when the House of Muir market ceased to be resorted to, and the graziers and owners of cattle sold to the fleshers directly, without resorting to any market, the magistrates then changed their mode of levying these dues, (without consent of the legislature), by laying the custom upon all bestial brought into Edinburgh, whether for the purpose of being there *bought* or *sold*, or for the purpose of being *killed* and *consumed*. In a suspension by the fleshers, combined with a declarator by the magistrates: Held, that the magistrates were