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

THOMAS HOG of Newliston, . . *Respondent.*

(*Et e contra.*)

House of Lords, 10th and 12th July 1804.

DOMICILE—JUS RELICTÆ, OR GOODS IN COMMUNION—LEGITIM—DEDUCTIONS—BANK STOCK—TRANSFER—TRUST—PROOF OF—COMPETENCY OF CROSS APPEAL.—In the former branch of this cause, Mrs. Lashley was successful in claiming legitim. She also claimed a share of the goods in communion, as due at the dissolution of the marriage, in right of her mother, who died in 1760. This branch of the case was one of the questions remitted. In answer to this claim, the respondent contended that the domicile of the deceased Roger Hog, at his wife's death, was in England, and therefore, as neither by the law of England, nor by the contract of marriage entered into there, any such claim could arise, she was not entitled to claim such. In disposing of the whole remaining points in the cause, the Court of Session held, 1. That the domicile of Roger Hog, at the time of his wife's death, was in Scotland. 2. That there was no ground for Mrs. Lashley's claim for a share of the goods in communion, in right of her mother, as at the dissolution of the marriage by her death. 3. That in accounting for the legitim, the respondent was entitled to state himself as creditor for the value of the Kingston property belonging to him, uplifted by the father, as also for a bond for £1000, granted to him and his wife in conjunct fee and liferent, and to his children in fee, and was entitled to deduct these from the amount of the moveable estate; but was not entitled to deduct the expense of confirmation in Scotland, and probate in England. 4. That Mrs. Lashley could not claim both the voluntary provisions settled on her, and also her legitim; and therefore, what she had received of the former must be deducted, along with the annuity paid to her, and the bond debt of £700 due by her husband. 5. That the 120 shares of bank stock transferred to and vested in the respondent's name, previous to his father's death, were not subject to Mrs. Lashley's legitim. In the House of Lords, the first point, as to the deceased's domicile at the time of his wife's death, was affirmed. The second point was reversed; and held Mrs. Lashley entitled to her mother's distributive share of the goods in communion as at her death. The third and fourth points were affirmed;

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excepting as to the expenses of confirmation. In regard to the fifth point (bank shares), the House of Lords specially found, that these, in so far as it should appear they stood in the name of the respondent, under an agreement or understanding that he would invest the same on land to be entailed; and also such shares, the dividends of which, notwithstanding the transfer in the respondent's name, were uplifted and received by the deceased, were to be considered subject to Mrs. Lashley's legitim, and interlocutor reversed in so far as inconsistent with these declarations, and affirmed, in so far as agreeable thereto; and remit made to ascertain the last point, and the amount of her claim in right of her mother.

The standing orders of the House of Lords, 8th March 1763, require cross appeals to be given in within one week after the answer put into the original appeal; and this not having been done, the cross appeal dismissed.

1737. Mr. Roger Hog, a native of Scotland, settled in London as a merchant, and married an English lady there in 1737. She had a portion, consisting of personal estate of £3500; and, on marriage, an antenuptial contract was entered into, by which Mr. Hog, in consideration of this tocher, became bound to settle £2500 of this sum in the purchase of lands, to be taken in the names of trustees therein named, to be holden by them for the behoof of husband and wife in liferent during their respective lives, and after the several deceases of the said Roger Hog and Rachael Missing, his intended wife, "then to the use and behoof of such child or "children of the body of the said Rachael Missing by the "said Roger Hog lawfully to be begotten; and for such "uses, intents and purposes only, and for such estate "or estates, either in fee simple, tail," &c.

A power was reserved to the wife to make such disposals, appointments, &c. as to the same, notwithstanding her coverture, by any deed or writing; and, in default of such writing, it was to be equally divided between their children so begotten, "share and share alike."

In terms of this contract, a property was purchased in Kingston upon Thames, and conveyed to the said mentioned trustees for the foresaid purposes. After realizing a considerable fortune, Mr. Hog resolved to retire to Scotland, and, with that view, purchased near Edinburgh, in 1752, the estate of Newliston, where, from that time, it was alleged by the appellant, he chiefly resided until his death

1789. in 1789.

But, in the interval, the Kingston estate was conveyed by

Mrs. Hog to her eldest son, the respondent, reserving his father's liferent use.

Mrs. Hog died at Newliston in 1760, leaving Thomas, the respondent, Roger, Alexander, Rebecca, the appellant, Rachael, and Mary, by which event a dissolution of the marriage took place. At this period the bulk of Mr. Hog's personal estate was in England, where he continued to carry on business, and had a share in a banking house. He renewed this partnership in July 1765 for a period of five years, and assuming at same time his second son Roger as a partner. He still retained his London house. About the same time the Kingston property was sold, after the respondent Thomas came of age, and the price, amounting to £2604. 5s., was vested in the hands of his father. 1760.

Rebecca married Mr. Lashley in 1776, when her father proposed to give her £2000, if the father of Mr. Lashley would settle a similar sum.

It has been seen in a former case, that the issue all died except three, Thomas, Rebecca, and Alexander. It has been also seen that Mr. Hog, previous to his death, was in the habit of making large advances to his children, in name of portion, and which they accepted "in full satisfaction of all they could ask or demand, by and through his decease, or the decease of their mother, in name of legitim, or otherwise," but Mrs. Lashley had not *accepted* such.

He died at Newliston in March 1789, leaving by settlement certain lands therein mentioned, together with all his personal property, (some of which was in Scotland, some in England, and some in France), to his eldest son, the respondent, burdened with the payment of debts, legacies, and provisions to younger children; the residue to be employed in purchasing land to be entailed to him and a series of heirs, in the same manner as was already done in regard to the estate of Newliston.

Mrs. Lashley was left a provision of £1500, but, as has been already explained in a previous case, she repudiated this provision, and successfully claimed her legitim, and was found entitled to the whole, upon the principle that the other children had discharged theirs. It was at same time decided that the shares of the children who had renounced did not accrue to their father, but fell under the division in common with his other personal property. And it was further decided, that Government stock, or annuities in England, belonging to the deceased, were personal; but June 7, 1791.

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Present Question.

the case was remitted to the Lord Ordinary to hear parties further as to the other annuities in the French funds, which point was superseded. They likewise remitted to the Lord Ordinary to hear parties upon Mrs. Lashley's claim, in right of her mother, to a share of her father's personal property as at the dissolution of the marriage. An appeal was taken against these judgments, but the interlocutors were affirmed.

Ante 7th May 1792.

The present questions arose on a *resume* of the case before the Lord Ordinary, in terms of the remit of the Court of Session; and, pending the discussion thereof, the appellant's brother, Alexander Hog, brought his action and claim for a share of the goods in communion as at his mother's death, and also for his share of the legitim from the estate of his father, which was finally disposed of by appeal, and the claim totally rejected. The following questions were debated in the present case, 1. Whether Mrs. Lashley had a good claim, in her mother's right, to a share of the personal estate of her father at the dissolution of the marriage? 2. What was the true amount of Mr. Hog's personal estate at his death, subject to the appellant's legitim?

This part of the case disposed of by the separate appeal, reported ante vol. iv. p. 364.

In regard to the first point, the respondent contended, 1st, That Mr. Hog's domicile, at the *dissolution* of his *marriage*, was in England, whatever his domicile might have been at the time of his death. And, consequently, his domicile was in a country where the right of *jus relictæ* could have no place. 2d. That Mr. Hog being confessedly domiciled in England when his marriage was contracted, the patrimonial rights of the contracting parties, and their heirs, *at its dissolution*, must be regulated by the law of that country. 3. That Mr. Hog's marriage settlement excluded his wife's *jus relictæ* virtually or by implication. In answer to these, it was maintained by the appellant, 1. It was difficult to point out a criterion of general application for ascertaining the domicile of a person who dwells occasionally with his family and household in different places. In such a case, intention of permanent residence seems to be one of the chief characteristics. All the evidence of intention which can be collected from Mr. Hog's correspondence shows, that in 1760 he had taken his final resolve to remain with his wife and family in Scotland, where he was then residing, and where he had principally resided for the six years preceding. In all his letters to his friends in business, and other friends, from 1750 downwards, he expresses his pur-

pose of settling there. In 1752 the estate of Newliston is purchased. He disposes of his dwelling house in England in 1754, and they were residing at Newliston in 1760, at the dissolution of the marriage by Mrs. Hog's death. He was therefore domiciled in Scotland. 2. The *status* of parties during the subsistence of the marriage, depends indisputably on the law of the place where they permanently reside. The wife, during her coverture, is subject to her husband's domicile, which changes with his domicile, wherever that may be. Here it was changed voluntarily and of free choice by both; and this change could not be absent from the understanding of the wife, even on entering into marriage with a Scotsman, so that this domicile being changed, during the subsistence of the marriage, from England to Scotland, the rights of parties must be determined according to the law of their domicile at the dissolution of the marriage, which was undoubtedly Scotland. 3. That according to that law, a wife who accepts a conventional provision, is excluded by special statute from her right of terce. Yet her *jus relictæ* still subsists, unless a renunciation be expressly stipulated.

The Lord Ordinary, on this branch, pronounced this interlocutor: "Finds that the contract of marriage betwixt July 2, 1793.
"the late Mr. Hog and his wife, is not so conceived as to
"bar, either in England or Scotland, a claim to legal pro-
"visions; finds that Mr. Hog, at the time of his wife's
"death, had two domiciles, one in London, and another in
"Scotland, and that the last was the principal; finds, that
"by the law of England, in which country Mr. Hog and his
"wife married, and in which they were both domiciled at
"the time, a communion of goods does not take place in that
"country as it does in this, and that a claim is not competent
"there, as it is here, to the executors of the wife, for a cer-
"tain share of the moveable estate belonging to the hus-
"band at the time of her death; finds that the transference
"of Mr. Hog's principal domicile to Scotland did not ope-
"rate any alteration of the right of him and his wife, as
"married persons, pre-established by the law of the country
"in which they had contracted; therefore finds the pur-
"suer has no claim, in right of her mother, to any share of
"the moveable estate belonging to her father at the time
"of her mother's death, and so far assoilzies the defender
"from the action, and decerns." On representations from

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Mar. 5, 1794. Nov. 25 and 26, 1794.

both parties, the Lord Ordinary pronounced an interlocutor to the same effect.

On reclaiming petition, the whole Lords pronounced this interlocutor: "Finds that the deceased Mr. Hog, at "the dissolution of his marriage, had his domicile in Scot- "land; and, before answers as to the question, How far "Mrs. Hog's executors, at the dissolution of the said mar- "riage, had a right to a third of the goods in communion, "and the petitioner's title to a proportion thereof with in- "terest? appoint counsel for the parties to be heard "thereon in their own presence, upon the day "of ."*

Interlocutor 25th Nov. 1794.

* Opinions of the Judges:—

LORD PRESIDENT CAMPBELL.—"The question turns on the marriage settlement and other deeds of the deceased Mr. Hog of Newliston. The contract was entered into in England, by parties resident there at the time. It was an English deed; and we ought to know what was the import and effect of it there, Whether, by the nature of the settlement, the provision to Mrs. Hog was taken in satisfaction of all demands; and, Whether the after change of residence made any difference?

"As to the question of fact, whether Mr. Hog's residence was in England or Scotland at the period of his wife's death, it seems difficult, in a case of this kind, to go upon the idea of his having a double residence. We must adopt the law either of the one place or the other as the rule, and not the law of both, and, therefore, if the *lex loci domicilii* is to regulate the question, we must find out where his domicile was, and fix it either in Scotland or in England.

"In fact it was in Scotland, at the period of Mrs. Hog's death, though he also had a house in England, and, with the assistance of partners and clerks, was carrying on trade there.

"But, granting this to be the case, the question of law still remains behind, and is attended with considerable difficulty, whether, and how far Mrs. Hog, and her nearest of kin, were barred by the nature of her marriage settlement executed in England, from making a claim *jure relictæ* upon the personal effects belonging to her husband in Scotland, or wherever situated?

"Sir John Scott's opinion, annexed to one of the papers, is, that she was not barred from making any legal claim competent to a widow by the law of England, *i. e.* she was not barred from claiming a dower, *i. e.* a third of the rents and profits of any estate or heritage belonging to the husband, or her paraphernalia; for these are the only legal claims that she could have made upon her survivance, and, by

Mr. Grant had given a different opinion.

The respondent put in a reclaiming petition against this interlocutor, and the Court found, "That the pursuer (Mrs. "Lashley), in right of her mother, has no claim to any share "of the moveable estate belonging to her father at the time

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the same rule, it is presumed she would have had her terce out of the Scots estate, in which Mr. Hog died infeft; but she could have made no claim, by the law of England, for any part of his moveable or personal estate on account of the will; and, by the same law, the nearest in kin of the wife, in the event of her predecease, have no claim at all.

"By the nature, therefore, of this contract, and by the legal effect and construction which it would have been entitled to, had the question occurred in England, the present claim could not have been made effectual, as reserved entire to the wife or nearest of kin, or, in other words, they were not reserved entire by implication; or otherwise, if the question is to be judged of upon the construction of the marriage settlement, the language of which, according to Sir John Scott's opinion, seems to be just this: Mrs. Hog shall have the special provision which the contract gives her out of her own fortune, vested in trustees, or her claims of dower and paraphernalia entire, but we are unacquainted with what is called *jus relictæ* in Scotland, as belonging to the nearest in kin, and it is not the meaning of this contract to reserve this as a legal claim, or to say anything at all about it, as we do not know that such a right exists.

"It may be said, the question is not, whether this claim is reserved, but whether it is cut off; because, if it cannot be made out that it is expressly or virtually cut off, the law itself will reserve it as matter of course, in the same way as the legitim, and not being cut off either expressly or virtually, whether it was held to be entire, though in fact the marriage settlement contains a certain provision upon the children.

"The difficulty of the question lies here; and it is argued with some plausibility, that the case of the widow cannot be distinguished from that of the children, for that the legitim arises out of the communion of goods, in the same way as the *jus relictæ* does, being the result of that division which the law makes at the dissolution of the marriage, though the children's claim is suspended till the death of the father, as he is entitled to the use and administration of their share of his effects during his life.

"In the former question concerning the legitim, little or nothing was said upon the effect of the marriage settlement to bar the claim. The whole argument turned upon the effect of the will, which was found not to be sufficient. It was likewise considered as a question of succession, and the result of the judgment was, that Mr. Hog's personal succession fell to be regulated by the law of Scotland, the place of his domicile; as likewise all claims upon that succession,

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" of her mother's death, and therefore repel the said claim, " assoilzie the defender from the conclusions of the libel, " and decern." And, of this date, they adhered to their " interlocutor of date 25th Nov. 1794, finding that the de-

which could not be effectually barred by a latter will and testament; but the present question arises upon a claim, which, if it existed at all, certainly existed during Mr. Hog's life, and could have been made effectual against him, at the death of his wife, as a debt. It is not therefore a question of succession, but a claim of debt. But still it is a claim arising out of the communion of goods, and it is difficult to maintain, that if the right in the goods which eventually took place by the law of Scotland, were not barred *quoad* the children, they were nevertheless barred as to the wife and her nearest in kin.

" Perhaps more full opinions of English counsel ought to be obtained from England, as the opinions referred to do not go precisely to the point. The case of M'Kinnon and M'Donald, (24th Feb. 1763, Dict. vol. iii. p. 75,) was decided upon principles which go far to regulate this case, and the case of Dalton *v.* Riddell, 28th Nov. 1781.

Mor. 2278.

Mor. 6457.

" The question concerning the legitim was different. The legitim is truly a right of succession, and does not properly arise out of the communion of goods. It is an interest which the law gives to children transmissible *ipso jure*, but still of the nature of a succession, subject to the father's onerous debts, and not arising till his death. The wife's share may be made effectual against him during his life as a right of property creating a debt to her nearest in kin.

" But, in the present case, she has got her share by covenant, viz., the disposal of the greatest part of the fortune which came by herself, and which Mrs. Hog left to her eldest son, but might have left to any of her children, or might have allowed it to be taken by them as her nearest of kin. The wife may dispose of an interest in moveables by testament. She had a right to do so in this case, by the contract itself. By the nature of that contract, she accepted of the provision as a full compensation for any eventual interest that she or her nearest in kin might have in the moveable estate; for although one of the English counsel says that the dower was not thereby barred, it is not supposed that he meant to say the same thing as to the claim of thirds out of the personal estate, in the event of her surviving; and, at any rate, he certainly did not mean that her nearest in kin had any claim remaining to them out of the personal estate in the event of her predeceasing."

LORD HENDERLAND.—" A change of domicile is not to be presumed. Yet a man may have two domiciles. Mr. Hog's principal residence was in London; and was in Scotland only at stated times, *agri colendi causus*."

" ceased Mr. Hog, at the dissolution of his marriage, had " his domicile in Scotland; and remit to the Lord Ordinary " to proceed accordingly, and to do farther as he shall " suggest."

The appellant put in a petition against this interlocutor, July 7, 1795. but the Court adhered.

On the second branch of the case, (namely, the amount of the fund out of which legitim is due), four questions arose, 1. Whether certain shares of stock of the Bank of Scotland, although standing in the respondent's name at his father's death, were not to be held as his father's property at that period? 2. Whether the respondent was a creditor upon

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LORD JUSTICE CLERK (M'QUEEN).—" The English opinion seems to be right as to the legal claims not being barred. As to the domicile, a man may have two domiciles to a certain effect, viz. citation. But doubt if he can have two domiciles as to regulating his succession."

PRESIDENT CAMPBELL.—" I am for adhering upon the question of law respecting the effect of the marriage settlement; but I think Scotland was the domicile."

LORD ESKGROVE.—" I think this claim is barred. The legitim stood on a different footing."

LORD JUSTICE CLERK (M'QUEEN).—"The general rule is by *provisio hominis tollit provisionem legis.* Besides, I think the *jus relictæ* cannot be barred by implication, though circumstances will vary this rule; but it is unnecessary to inquire what the case might have been if no contract had been made. Here we have a contract, and must inquire, not only what is expressed, but what is *implied.* The rights of parties are ascertained by the covenant, and the law of England must determine the effect of that contract. Supposing the marriage had been dissolved within a year and a day, would she have nothing because this is the law of Scotland? Had she survived, she would have been entitled to the terce of the estate of Newliston, if Sir John Scott's opinion be right. As to the legitim, it is not similar. The marriage articles contained no general settlement of the succession; but only regulated the interests of husband and wife. Legitim is a right of succession to the children. As to the transmitting without making up titles, in one shape it does so transmit; but this is because a *jus crediti* arises to the children, against the heir or other person to whom they are left. But suppose the father dies intestate, and the funds are in the shape of outstanding debts due to the defunct, there must be a confirmation to force the debtors to pay."

LORD CRAIG.—" Of same opinion."

LORD DUNSINNAN.—" Of same opinion."

Vide President Campbell's Session Papers, vol. 78.

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his father's funds for the sum of £2604. 5s., as the price of the estate, near Kingston, left to him in fee by his mother, but sold by Mr. Hog, the liferenter, and also for the sum of £1000, being the portion of the respondent's wife, which was put into the hands of Mr. Roger Hog, who granted a bond for it to the respondent, and his wife in liferent, and their children in fee? 3. Whether the respondent is entitled to a deduction of the expense incurred by him in obtaining a confirmation in Scotland, and a probation in England of his father's will? 4. Whether the sum advanced by Mr. Hog in his lifetime to the appellants, with interest, should be imputed as part of Mrs. Lashley's share, in calculating the amount of her legitim?

In regard to the first point, Lord Dreghorn pronounced an interlocutor, (13th December 1791), finding "it compe-"tent for the pursuers to prove the alleged trust with re-"gard to the thirty-nine bank shares only *scripto vel jura-*"*mento*, reserving consideration of the question, how far "there is not already sufficient evidence of the trust, and "allows the pursuers to prove, *prout de jure*, any super "intromissions by the defender of funds of the late Mr. "Hog, besides that condescended on, and allows a conjoint "probation."

A proof was taken, from which it appeared, that with reference to thirty-nine shares of the bank stock, that these had been purchased by the father twenty years before his death, in his son's name, and with the special view of making him a bank director, the son giving the father a back letter, stating that these were held in trust. At the time when he was to be appointed a bank director, the son having stated that he could not take the oath that the property was his, in consequence of his back letter; the father then said that he would destroy the letter, and destroyed it accordingly, to allow him to be free to take the oath, and the son admitted this on oath. In regard to the other eighty-one shares, these had been purchased only some short time before the father's death.

Mr. Ramsay, the banker, deponed as to the eighty-one shares, that they were transferred absolutely to the son, "so that the stock became as much, and to all intents and "purposes the sole property of the respondent, as if his "father had given him the value in cash out of his pocket." He also deponed, that Mr. Hog afterwards told him, "that "he had made a transfer of his bank stock to his son, in

" order to prevent the possibility of its being attached as " mentioned in the letters, that is, of being affected by " the legitim?"

But it further appeared, in regard to some of the bank stock, the deceased had all along, up to the period of his death, received the dividends, and granted discharges for the same; and had always dealt with the whole stock as his own, in making up states of his affairs in his books.

" The Lord Ordinary having considered these minutes of de- May 23, 1798.
" bate, finds, *primo*, That 120 shares of stock of the Bank of " Scotland, transferred to and vested in the defender (re- " spondent), by the late Roger Hog of Newliston, anterior to " the death of the late Roger Hog, are not subject to the pur- " suer's claim of legitim. *Secundo*, finds, That the late " Roger Hog, by a general settlement, of date 5th February " 1787, disponed his estate, heritable and moveable, to the " defender, his eldest son; and that he appears at one " time to have intended to vest his property in Bank of " Scotland stock, in trust, to be laid out in the purchase of " lands, to be entailed upon the defender, though he after- " wards changed his mind, and transferred the same directly " and *inter vivos* to the defender; finds, therefore, that in " the circumstances of this case, there is no room for the " presumption of law *debitor non presumitur donare;* and " that the defender, in competition with those claiming a right " of legitim, is entitled, at the period of his father's death, to " state himself a creditor upon the moveable estate left by his " father, for the price of the estate near Kingston in Eng- " land, which belonged to the late Mrs. Hog, and left by " her to the defender, and which price was uplifted and " unaccounted for by the late Roger Hog; and that he is " likewise a creditor at the period of his father's death for the " sum of £1000 sterling, contained in a principal bond granted " by the said Roger Hog to the defender and his wife, " Lady Mary Hog, in conjunct fee and liferent, and to the " children of the marriage in fee, being the tocher which " the defender received with his wife, and which was lent " in these terms to the late Roger Hog; and finds, That " the said bond, and the price of the said ENGLISH estate, " as well as the other debts resting by the said Roger Hog " at his death, must, in the first place, be deducted from the " moveable estate of the said Roger Hog; and that the " claim of legitim can only attach upon the remainder of " said moveable estate. *Tertio*, Finds, that the ordinary

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" expense of obtaining confirmation in Scotland, or of ob-
" taining a probate in England by the defender, in order to
" carry into effect the late Roger Hog's will, being expenses
" which arose subsequent to the existence of the pursuer's
" right of legitim, cannot be a deduction from or burden
" upon the late Roger Hog's moveable estate, in computing
" the extent of the said claim, reserving to the defender to
" state in the present accounting, and before the account-
" ant, any liquid ground of debt which he may have, by
" decrect of any Court, for expenses against the pursuers;
" and the pursuers their objection. *Quarto*, Finds, that it
" is *res hactenus judicata* in this cause, that the pursuer
" cannot claim both the voluntary provisions settled upon
" her by her father, and also her legitim, by interlocutor of
" date the 11th day of March 1790, acquiesced in by the
" pursuer (Mrs. Lashley); and if the point was still open,
" it is impossible that she can, when insisting on her right
" of legitim, as she now does, lay claim to any part of the
" provisions granted to her by her father, which were qua-
" lified with the condition, that the acceptance thereof
" should be in full of the claim of legitim; and, therefore,
" finds, That such sums as were paid or advanced, by the
" late Roger Hog, to the pursuer, and her husband, in part,
" and to account for the provision of £1500 sterling, which
" he intended for the pursuer, must be deducted in the
" present accounting, with interest from the respective
" dates of such payments, from the said pursuer's share of
" legitim; finds, in like manner, That such sums as were
" paid or advanced by the late Roger Hog to his son, Alex-
" ander Hog, must, in like manner, be deducted in the
" present accounting from the said Alexander's share of
" legitim, and remits to Mr. John Buchan, accountant in
" Edinburgh, to make up a state of the funds of the late
" Roger Hog, subject to the claim of legitim, and of the
" amount of the sums due respectively to Mrs. Lashley and
" her husband, and to those in the right of Alexander Hog,
" and to report the same to the Lord Ordinary."

Four several representations against this interlocutor were refused. And, on reclaiming petition to the Court, the Lords found, "that the sums paid by Roger Hog to his " children, Alexander Hog and Mrs. Lashley, to account of " their provisions, with interest thereof from their respec-
" tive dates of payment, must be considered as debts due
" to the moveable estate, subject to the legitim, but that

June 8, 1798.
——26, ——.
July 11, ——
Nov. 12, 1799.
May 14, 1800.

"the said sums due by them respectively, are to be de-
"ducted out of their respective shares of legitim; and of
"consent of the defender, find, that interest is not to be
"charged upon the annual payments to Mrs. Lashley of
"£65 a year; and, with these alterations, adhere to the
"interlocutors of the Lord Ordinary reclaimed against."* July 26, 1800.

The appellants presented a bill of suspension *pro forma*, which was refused.

The appellants brought an appeal against the above interlocutors, 2nd July 1793, 5th March and 25th November 1794, 16th June and 7th July 1795, 13th December 1791, 23d May and 26th June, and 11th July 1798, 12th November 1799, and 14th May and 26th July 1800, the present appeal has been brought.

And Mr. Hog, in an appeal put in for him, which the appellants consider to be in the nature of a cross appeal, prays a reversal of the interlocutor 2nd July and 14th November 1793, 5th March, 25th November, and 9th December 1794, and 25th June 1795, may be altered, in so far as they find

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* THE LORD PRESIDENT CAMPBELL said,—"The first point here is as to the bank shares. The case of Major Agnew's settlement throws light on this question. As to the thirty-nine shares of stock, the fact seems to be clear that they were transferred absolutely to the respondent, for the real purpose of making him a bank proprietor and director, long before his father's death, and without any view to succession at all. As to the eighty-one shares, they were transferred a short time before his death, but while he was in *liege poustie*, and it is scarcely relevant to say, that he meant to disappoint the legitim. A father, when in *liege poustie*, may lawfully arrange his affairs so as not to leave any claim of legitim open, *e. g.* by lending upon bonds secluding executors. He has very ample powers over the goods in communion.

"The second point is with reference to the two debts of £1000 each, due by the son (Alexander) to the father. On this head, I think the interlocutor right, and there is no room for presumption.

"As to the third and fourth points, namely, collation. The parties seem to be agreed as to the principle, namely, that these advances must be brought back so as to increase the whole executry, they being truly debts due to the executors; and then, when the amount of the petitioner's legal claim is ascertained, deduction must be allowed of what he has got already. As to the annual payments of £65 Mr. Hog was in use to make to Mrs. Lashley, it is difficult to make any disputation about it."

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that the deceased Roger Hog, at the dissolution of his marriage, had his domicile in Scotland; and that the also above recited interlocutor of the 23d of May 1798 may be altered, in so far as it finds that the expenses of obtaining confirmation in Scotland, or a probate in England, by Mr. Hog, cannot be deducted from the moveable estate.

Pleaded for the Appellant (Mrs. Lashley).—As to the claim for a share of the executry, in right of her mother, at the dissolution of the marriage, it is clear that the rights of parties, as at that date, must be regulated by the law of the country where they were then domiciled, because not only their patrimonial interests, but their *status* during the subsistence of marriage, may have been affected by that law. There is no foundation for the opinion that the distribution of property which takes place at the dissolution of the marriage depends upon an implied contract between the parties when the contract was entered into; on the contrary, that distribution seems to arise from the mere act of the law peculiar to the domicile at the time. But, admitting this rule of implied contract to be well founded, the removal of a married pair from one domicile to another, creates a presumption that they thereby tacitly consent to alter the laws by which the distribution is to be made, especially when a probable change of domicile was foreseen at the marriage. There is no reason to suppose that a husband will fraudulently evacuate a wife's rights by a change of domicile, because the law of every civilized country would interfere to redress the injury. At any rate, that case is the converse of the present, where a wife, changing her domicile to gratify her husband, is excluded from participation of advantages peculiar to the jurisdiction within which he has chosen that she should reside.

Neither authority nor precedent is pointed out to justify the Courts in Scotland, in regulating the interests of parties domiciled there at the dissolution of marriage, to determine these by a foreign law. It has been decided in this case, that children of a marriage contracted in England, but dissolved in Scotland, and who were themselves born in England, became entitled, by their father's change of domicile, to the provisions of the Scotch law in regard to legitim; and there is no solid distinction in this respect between legal provisions in favour of the wife, and those in favour of her children. Besides, there is no express covenant in the marriage articles which would have excluded Mrs. Hog from her *jus relictæ*, if they had been entered

into out of Scotland, nor from receiving a share of her husband's personal property if the marriage had been dissolved in England; and, of consequence, these articles cannot be interpreted less favourably on account of her change of domicile.

As to the amount of the legitim, the respondent is not entitled to claim deduction therefrom of the bank stock, as there is no evidence that Mr. Hog transferred the actual property of any such stock to the respondent. The respondent's trust acknowledgment, which he admits on oath to have granted, applied to 39 shares at least, standing in his name, and this is not proved to have been cancelled. Mr. Hog's books, and accounts of his brokers, show that he originally paid for these 39 shares; that he always considered them as his own, and that he exercised various acts of ownership and property over them, particularly in drawing the dividends which they yielded, to the period of his death. It is proved by the clause in Mr. Hog's settlement, releasing the respondent from the trust obligation, and by his subsequent disposition to trustees, mentioned in the deposition of Mr. Ramsay, which was afterwards cancelled, that they belonged to Mr. Hog. The direct evidence therefore obtained, in regard to the 39 shares, creates a presumption that the transfer of the remaining 81 were equally fictitious, and made to defraud the legitim; and that presumption is converted into proof by the deposition of Mr. Ramsay; and in regard to the price of the Kingston estate, this, as appears from his father's books, although uplifted by his father, was again repaid to him in his father's lifetime.

On the cross appeal. By your Lordships' standing order of the 8th March 1763, it is ordered that a cross appeal shall not be received, unless it be presented within one week after the answer put in to the original appeal. The respondent put in his answer on 4th December 1800, and his appeal, (which must be considered as of the nature of a cross appeal), was not presented till 4th Feb. 1801; and, of course, not in due time, and that appeal, therefore, is incompetent. But, upon the question of domicile at the death of Mrs. Hog, to which it relates, Mr. Hog was domiciled in Scotland at the dissolution of the marriage, because he resided there at that time, had generally resided there for several years before, and did generally reside there afterwards, till the period of his death. His express intention of leaving England, and making Scotland his permanent home, is proved by all his letters, both before and after he

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left England, and always give it exclusively the appellation of his final home. His land estate was there—his family there—and he had sold his residence in England, and devolved his business there on a partner. As to the expense of confirmation, Mrs. Lashley cannot be liable for this, because she does not claim or take under the will.

Pleaded for the Respondent.—On the cross appeal. 1. In considering the question where Roger Hog was domiciled at his wife's death? your Lordships will be pleased to keep in view, that Roger Hog's domicile was once clearly fixed at London; and the question is, Have the respondents proved that he had changed his domicile before his wife's death, by abandoning and relinquishing his former domicile in London, and fixing a new domicile in Scotland in its place, as his sole or principal domicile? A domicile once established, may indeed be changed, but the change will not be presumed, and the domicile remains where it was once fixed, till there is proof of a clear indisputable change. "Non in dubio presumenda domicilii mutatio sic ut eam allegans tanquam rem facti probare teneatur." 2. In considering therefore the alleged change of domicile from London to Scotland, the definition of the domicile given in the Code will be attended to "Et in eodem loco singulos habere domicilium non ambigetur ubi quis larem rerumque ac fortunarum suarum summam constituit, inde (rursus) not sit decessurus si nihil avocet, unde cum profectus est peregrinari videtur, quod si rediit peregrinare jam destitit." Roger Hog's purchase of Newliston cannot be said to constitute a change of domicile. A person residing in London may purchase lands, in a remote county in England, in Scotland, Ireland, the West Indies, or America, without any intention of changing, far less any actual change of his domicile. In like manner one, for the sake of health or amusement, may reside occasionally at any estate which he has purchased, without intention of such a change. But if a merchant makes such a purchase, or has such an occasional residence in the country, retains his business in London, and lives sometimes there, for the prosecution of that business, the presumption against an intention to change becomes surely much greater. During all his excursions to Scotland betwixt 1753 and 1760, Mr. Hog had not only his counting house and trade, but also his dwelling house in London, to which he and his wife always returned; and though he stayed at one time about two years, and at another fifteen months at his country seat in Scotland, it was, as he states himself, partly for

Voet, vol. i. p. 99.

health, and partly for the purpose of superintending the education of his sons, whom he chose to educate in that country. An occasional residence in the country for health will not make a domicile. In like manner, it is well understood in law, that a student does not change his domicile by his residence at a college or other place of education; and it would be somewhat extraordinary if the domicile of his father should be held to be changed, because, from some paternal affection, or sense of duty, he may have accompanied his children for a time.

When Mr. Hog and his wife made their jaunts to Scotland, he was little turned of forty years of age, which is a period of life at which people would not think of relinquishing a successful business, or domiciliating themselves in a country incompatible with their business, especially with a young family, as Mr. Hog had; and during these jaunts to Scotland, he was equally concerned in his house at London as if he had been upon the spot. During his absence he was informed of all that was going on. Abstracts of the transactions of the house were transmitted to him; and from his letter book it appears he regularly gave his opinion and advice in regard to the business of the London house, as if he had been on the spot.

When he went back to London in November 1758, he himself declared that he did so with a fixed intention, not only of carrying on the transactions and business of his house at London, but of supporting that house for a series of years. Bad health again obliged him to retire to the country in autumn 1759, but, had he recovered his health in 1760, there can be little doubt that he would then have applied himself to business in London as formerly; and although he continued infirm, and incapable of giving the same application to business as formerly, still he left Scotland in 1760, and spent almost the whole of several subsequent years in England.

From the letters quoted, it is evident that the jaunt to Scotland, at the period of Mrs. Hog's death, which happened on the 16th of Feb. 1760, was principally owing to Mr. Hog's state of health; that his views were to place his second son, then a boy, in the house in London; and if he had any thoughts of retiring at a future period, still he was, at any rate, resolved not to do so till he had established his son in the house as his successor. It is further clearly instructed from the same letters, that at this period, in place

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of having any thoughts of being domiciled in Scotland, or retiring from London, and giving up his house, he was determined to retain that house for the seven years of his lease that were to run; and, in consequence of that house being held and understood to be his place of residence, he was actually elected *constable of the ward* to which it belonged, and compelled either to serve himself or by a deputy, which is totally incompatible with the idea of his being at this time domiciled in Scotland. This last, indeed, is a most decisive circumstance, for the submitting to burdens and offices is the very criterion of domiciliation. The present question being, Whether Mr. Hog was domiciled in Scotland at his wife's death in 1760? the circumstance of his becoming afterwards unquestionably domiciled there ought not to have the smallest influence upon it; and yet this circumstance is apt to mislead, and perhaps it has served more than any thing else to give some colour to Mrs. Lashley's argument.

But let us suppose he had died at London, or any where else in England, in the year 1761, or in any year between the year 1760 and the year 1765, when he first brought down his daughters to Scotland, and began to make a fixed residence at Newliston, and that the question had then arisen, Where was Mr. Hog's domicile? the appellant (in the cross appeal) apprehends that, without a doubt, the answer must have been that he was domiciled at London; and if this was the true answer then, it must be so now. As his known and ordinary domicile had been so long in London, and his dwelling house and business were *still there,* it would, with submission, have been impossible to maintain in 1760, that any thing had happened that could alter his domicile, or establish a Scotch domicile in its place, more especially when he was seen leaving Scotland and returning to England, where he remained several years after this period.

A letter has been founded on, addressed to his brother Alexander in 1752, showing that even at that time he had an inclination to retire to Scotland; but this only goes to show a predilection for his own native country, but nothing more. But an intention of ultimately coming to settle in Scotland in his old age, or when retired from business, does not interfere with or prevent his continuing domiciled in England in the meantime. And it was clearly laid down by your Lordships, in the late case of Bruce *v.* Bruce, that a person going out to India, and settling there only for a few

Vide ante.

years, with the view of making his fortune and returning home, does not possess the original domicile to which he intends to return, but has his domicile in India in the meantime, notwithstanding the most clear intention of ultimately leaving that country and returning to Britain.

In answer to the original appeal, the respondent argued, (as to the appellant's claim in right of Mrs. Hog, for a share of the goods in communion on her death), That in the reasons in the cross appeal, he had endeavoured to show that Roger Hog was domiciled in London when his wife died; but, supposing a different opinion should be held, yet the respondent apprehends, that as the marriage of Roger Hog was contracted in England, and written marriage articles entered into, the appellant's claim must be regulated by the law of England; because, 1st, When a man and woman enter into marriage without a written contract, their rights must be regulated by the law of the country where they were domiciled at the time of the marriage. The legal matrimonial contract is of force, 1st, *vi legis*; and, 2dly, by the implied consent of the parties, who must be held tacitly to agree to all those conditions and consequences which the law of the country has made to follow upon their consent to the marriage itself. If the law of the domicile, at the time of contracting the marriage, makes the communion of goods an implied part of this contract, then it takes place by tacit consent; and, on the other hand, if by the law under which they entered into marriage, there is no communion of goods, but certain other rights of a different nature are held to arise upon the marriage, then they tacitly agree that there shall be no communion of goods, and that those other rights shall take place.

By the law of Scotland, there arises, upon marriage betwixt parties domiciled there, a communion of goods, in virtue of which the husband, on the one hand, acquires right to the whole personal property of the wife *jure mariti*, and the wife, on her part, acquires such an interest in the goods in communion, that she or her executors have right, at the dissolution of the marriage, to a third or a half, according as there are children of the marriage or not.

By the law of England, there is no communion of goods, and the wife acquires no interest in the personal property of the husband; and, accordingly, neither she nor her nearest of kin, have a legal claim to any share of the husband's personal property upon the dissolution of the marriage. The *jus mariti* in England is also very different from what

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it is in Scotland, being more extensive in some respects, and narrower in others. Thus, debts upon bonds, contracts, and the like, are vested, by the law of England, so imperfectly in the husband, that unless he recovers payment of them in his own lifetime, they do not go to executors, but remain with the wife as her own property, whereas by the law of Scotland, they are vested absolutely in the husband by the marriage itself, and go to executors, whether he has recovered payment of them or not.

The rights of parties being thus settled by a legal, and also an implied voluntary contract, at the time of entering into the marriage, they cannot be altered by any change of domicile during the subsistence of the marriage, but the original written contract, under which the marriage was entered into, must be of force to regulate the patrimonial rights of parties in all times and places, in the same manner as a written contract would do. A change of domicile during the marriage cannot alter the patrimonial rights of the married parties for several obvious reasons. 1. The legal matrimonial contract arising from the law of the country where the parties are domiciled at the time of the marriage has already taken its effect in many particulars, and as it cannot be undone or altered *in toto*, so it cannot be altered at all, without manifest injustice. 2. By removing his domicile to England, while he keeps his wife's estate he has acquired under the law of Scotland, he might defeat the wife's claim under the same law. And, in like manner, a removal of the domicile from England to Scotland, as it ought not to have the effect of depriving the wife of outstanding debts originally due to her, which, by the law of England, remained with her notwithstanding the marriage, so neither ought it to give her a right to a third, or half of the husband's moveables, to which by the law of England she could have no title.

But the consideration of the tacit agreement of parties that their rights shall be regulated by the laws of the country where they are domiciled at the time of the marriage, leads to the same conclusion. Such an implied contract can no more be defeated by their afterwards changing their residence, than a written contract of marriage or any other contract, can be set aside, merely by the parties thereto changing their place of abode; and as the law of England, where both Mr. Hog and his wife were domiciled when they entered into the matrimonial contract, does exclude the communion of goods, and any claims by the representatives

of the wife, in the event of her predeceasing, it must operate to that effect, just as forcibly as a special covenant in a marriage contract would do; these principles, so manifestly just and conclusive, are established by the authority of Voet ad Pand. lib. 23, tit. 2, § 87, and Kames' Principles of Equity, b. 3, ch. 8, § 3, and other authorities. 3. The respondent has hitherto argued this question upon the supposition of a marriage having been made in England *without* a contract; but, in fact, not only was the marriage entered into by parties domiciled in England at the time, but marriage articles were also executed there betwixt the parties. This circumstance, in the respondent's apprehension, greatly strengthens his argument. Where parties marry in any country without a contract, as it must be presumed they wish their rights to be settled by the law of the country, so, where parties marry with a contract, it must be presumed they have the law of the country in view, both for explaining the terms of the contract and for ascertaining those rights not expressed in the contract. If the provisions settled in the contract by Mr. Hog or Mrs. Hog, did *de jure*, exclude her from the legal provisions due to a wife by the law of England, it must be presumed that this was the meaning of the parties. If the reverse be the law of England, it must be presumed that the reverse was also their intention. To say, therefore, that the rights of married parties are to change with their residence, is, in other words, to say that a change of residence breaks a marriage contract. If a change does take place, such contracts must be construed and explained by the judge of the country agreeably to the laws of the country where the contract was entered into.

1. The first question as to the *extent* of the *legitim*, respects the claim for 120 shares of the bank stock, which Mrs. Lashley contends were the property of the late Mr. Hog till his death. Of these 120 shares, 39 were transferred to the respondent a number of years before his father's death, and the 81 were transferred by the father to him a few months before he died. In the argument, the appellant has distinguished betwixt these two classes; and although they contend there was no transference of the 120 shares, yet they argue that their plea is much stronger with regard to the 39 shares than the 81 shares. But, concerning the 39 shares of stock nothing has been proved to shake the absolute transference of these; far less has it been proved, what was attempted, that this transference by the father to his eldest son Thomas, the respondent, was only in trust.

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Letters of diligence and exhibits were taken out. They endeavoured to recover back letters, or back bonds to establish this trust, winding up the evidence with the respondent's oath, which declared, " that about twenty years ago the " deponent's father purchased some shares in the Bank of " Scotland, and which were transferred to the deponent; and " sometime afterwards he gave a letter to his father, the ex- " act words of which he does not recollect, nor the number " of shares to which it related; but, in general, it imported " that these shares were to be considered as his father's." And further, on occasion of his election as a director, upon telling his father that, in consequence of said letter, he could not take the oath as a proprietor,—whereupon his father said " that he should have a complete right to the " said shares, and added that he would *cancel* the letter."— " In consequence of which he took the oath, and has been " elected as a director annually ever since." The trust, therefore, if it was ever constituted, has been effectually evacuated in the manner described by the cancellation of the letter, as to which there is not the smallest doubt of the fact. And it is a mere mistake to say that Mr. Hog, after this, continued to uplift the dividends on these shares. The stock was registered in his name, and, of course, the dividends could only be received upon written orders under his hand. With respect to the 81 shares transferred by his father to him a few months before his death, in the most absolute and unqualified manner, it is admitted that the arguments applicable to the 39 shares do not apply to them, so that these stand free from all such argument as has been maintained against the 39 shares. 2. In regard to the second branch of the interlocutor under appeal, regarding the price of the estate of Kingston in England, which was vested in the respondent, but afterwards sold by his father, and the price appropriated by him, and a bond on £1000, the respondent contends they are both of them debts due by the late Mr. Hog, and, of course, must be deducted in calculating the amount of his executry, and the claim of legitim can only attach upon the residue. Nor is it any answer to say, that if the transfer of the bank stock is to be held effectual in favour of the respondent, it ought at same time to operate as an extinction of the debts due to him, upon the principle *debitor non presumitur donare;* but the interlocutor has rightly found " that, in the circumstances " of this case," the presumption does not take place, because that presumption yields to other facts and circumstances

supporting a stronger contrary presumption. 3. Deduction ought also to be allowed for the expense of probate in England and confirmation in Scotland. 4. In like manner, deduction ought also to be given of the payments made to Mrs. Lashley to account of her provisions, as well as of the annual payments of £65, which was paid to Mrs. Lashley as the interest of the balance of her provision.

After hearing counsel, in June 1802, for five days,

The Lord Chancellor adjourned the further consideration of the case until the next session (1803). In session 1803, it was again adjourned until session 1804, when it was finally disposed of.

THE LORD CHANCELLOR (ELDON) said:—*

"MY LORDS,

"This is an appeal by Rebecca Hog, otherwise Lashley, and Thomas Lashley, Esq., her husband, against several interlocutors of the Court of Session, of the 2d of July 1793, the 5th of March and 25th of November 1794, the 16th of June and 7th of July 1795, the 13th of December 1791, the 23d of May, the 8th of June, the 26th of June, and the 11th of July 1798, the 12th of November 1799, and the 14th of May, and the 26th of July 1800. And also an application to your Lordships, on the part of Mr. Hog, in the nature of a cross appeal, against the interlocutors in the course of the same proceeding. That cross appeal comprehends questions which I shall presently state, because, before it can be taken into consideration, your Lordships will have to decide whether it was presented consistently with the rules of your Lordships' House, and that question, though it will not much affect the principal matter in the case, will certainly affect one part of it, that which relates to a claim with reference to the expenses of confirmation in Scotland, and probate of the testator's will in England.

"This cause comprehends a great variety of questions, including many points deserving of very great attention, which have been very eloquently argued at your Lordships' bar. My purpose, if that shall meet with the pleasure of your Lordships, is to go through the statement of the case, and to exhaust the consideration of some of the points now, meaning to conclude the consideration of the whole in the course of to-morrow.

"The case, with reference to the questions between these parties, has been long, upon some points or other, under discussion in your Lordships' House, so long, that I have had the honour frequently of appearing at your Lordships' bar, as counsel for one of the parties in this cause. It has been; therefore, certainly with great reluctance that my attention, in a judicial character, has been called so im-

* From Mr. Gurney's Short-hand notes.

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periously to the consideration of the questions between these parties. But the circumstance of the absence of one noble and learned Lord not now present, and the circumstance of the occasional absence of another noble and learned Lord, whom I am happy to see this day present in this House, have compelled me to execute that duty as well as I can; which I never feel any inclination, under such circumstances, to attempt to discharge when it is not necessary that I should take the discharge of it upon myself. Thus I address myself to the decision of this cause, rather from matter of necessity than matter of choice. In the opinion, however, which I have formed upon this subject, I have reason to think that I have the concurrence of those who have had occasion, in different periods, to attend to the subject matter of this cause, and who, whether present or absent, have in that degree attended to the consideration of this case, which enables me to collect (what is of very great value unquestionably,) the judicial opinion of those who may possibly be not here to express it;—and I shall have the satisfaction, in expressing my own opinion in the presence of a noble and learned Lord, who has frequently had occasion to give his attention to this subject, and who, if I fall into any mistake, will be able to set your Lordships right.

"It appears, that previous to the year 1737, a gentleman of the name of Roger Hog, who married in that year a lady of the name of Rachael Missing, and who were the father and mother of the appellant Mrs. Rebecca Lashley, and the respondent Mr. Hog, lived in that part of this island which is called England. Mr. Hog carried on his trade in the city of London. He was a native of Scotland, but he had unquestionably lost his Scotch domicile. He was to all intents and purposes a domiciled Englishman when he contracted, in 1737, in England a marriage with this lady. Upon that marriage, a settlement was made, and it is necessary to state particularly to your Lordships the substance of that settlement; because it has been considered as affecting the questions in this case, both in the Courts below, and the arguments here at the bar; and because it appears to me, upon the best consideration I can give the subject, that, attending to the legal effect of it, it does not in any degree affect the legal consideration of this case.

"Mr. Hog received with the lady a portion of £3500; and, receiving that portion, he entered into an engagement that he would, as soon as a purchase could reasonably be had, dispose of the sum of £2500, part of the £3500, in the purchase of a real estate in England, with an obligation to convey that estate to his own use for his life, and, after his death, to trustees, to preserve contingent remainders, with remainder to the use of his intended wife, for her life, and after the decease of himself and his wife, then, to the children of the marriage, in such manner as she, notwithstanding her coverture, by deed or will should direct and appoint, and, in default of such direction and appointment, to the use of the children of the marriage, to

be equally divided between them, share and share alike, and, in default of such issue, to the use of the lady in fee.

"In looking through this settlement, a copy of which is presented in the cause, I think I am authorized to state to your Lordships, that its effect is no more than this,—that this lady, being entitled to the sum of £3500,—£1000, part of the £3500, was advanced to the husband for his own use;—that with respect to the remaining £2500, it was to be laid out in land, which land was to be settled to the use of the husband for life, then to the use of the wife for life, with remainder to the children of the wife, whose money your Lordships observe purchased the estate, and therefore power was reserved to her to dispose of the same, in such manner as she should appoint;—that, in default of any appointment by her, the children were to take equally, and, if there were no children, the real estate so purchased with £2500 of her personal property, was to go to her in fee. But the settlement does not contain any declaration whatever that this was to be in lieu of her dower; and indeed it would have been singular if it had, for this was the purchase of her own estate, with her own money. What is more to the present purpose, it does not contain anything, by way of declaration, covenant, or otherwise, that this was to be accepted in satisfaction of any right of any kind which she could acquire by her marriage, or otherwise, in the personal estate of her husband. It is a pure dry settlement of that real estate, which was to be purchased with the sum of £2500; and it appears to me, if I am right in collecting and stating the effect of this settlement, that, in respect to any question as to what, under any circumstances, this lady would have in the personal estate of her husband, that question remains just as much open to discussion as if this settlement had never been made,—this settlement has no relation whatever to that question.

"It appears, that after this, Mr. Roger Hog purchased lands at Kingston, upon the terms of this covenant; and those lands were conveyed to the trustees mentioned in this deed, to the uses of the deed, and it should seem, that afterwards the lady made her appointment, by which she gave, subject to her husband's estate for life, as she had a power of doing, the right of the land to the present respondent, Mr. Thomas Hog. It appears, afterwards, that when he became of age, (at least it is so suggested, and seems to have been so taken for granted throughout the whole of the proceedings in the cause), this estate was sold, and the estate being sold, the father received the money, the price of the estate; and the father receiving the money, the price of the estate, of course he would be debtor to the son, whose estate it was, for the price of the estate, to be paid to the son at the time his right to the possession of the estate so sold should have commenced; and that the son would therefore be a creditor upon the assets of his father for that sum, calculated as a sum to be paid at that time, unless it can be shown, either that by virtue of

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some agreement which had been entered into between the parties, this relation of debtor and creditor so entered into was cancelled, or that, by some circumstances which had taken place between them, this debt was paid; or that, from the effect of some transaction which has taken place upon the death of Mr. Roger Hog, or otherwise, this demand has been satisfied.

"Mr. Hog continued to carry on trade for a considerable time, and, carrying on that trade, it appears that he purchased an estate at Newliston in Scotland in 1752, and, it is alleged on the part of the present appellants, the original appellants, that he had his residence in Scotland from about the year 1752. Mr. Hog, the son, on the other hand, contends, that he was after that time domiciled in England; and that question will be material for your Lordships' consideration, at what time he ceased to be, in the contemplation of law, domiciled in England, and at what time he began to be capable of being considered, and necessarily to be considered, as domiciled in Scotland, with reference more particularly to the period of February 1760; because, in February 1760 Mrs. Hog, formerly Miss Missing, died.

"The question, upon the place of domicile at that period, comes to be material, because, upon the fact, whether he was domiciled in Scotland or domiciled in England, at that time, arises a very material question between the parties in this cause; whether she is to be considered as the wife of a Scotchman, or whether she is to be considered the wife of an Englishman? it being contended, on the part of Mrs. Lashley, that her mother was to be considered in 1760, as the wife of a Scotchman, of a domiciled Scotchman. The consequence of that is, that if she was the wife of a domiciled Scotchman, she was entitled, predeceasing her husband, to what they call *jus relictæ*,* that the husband could not deprive her of, but that she had that claim, and transmitted it to her next of kin. The appellants in this case, say that she was associated with her husband, and entitled to a share under the communion of goods with him, because he was a domiciled Scotchman, because the law of Scotland creates such an interest in the case of a domiciled Scotchman, his wife predeceasing him, and therefore Mrs. Lashley, as one of the children, claims to be entitled, according to her interest in that which, according to the law at the dissolution of that connection, goes to the children of the deceased wife.

"On the other hand, it is said in the cross appeal, (if it can be considered as such), that there is no fact which bears them out in the

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* Strictly speaking, the "*jus relictæ*" is the claim arising to the surviving wife, on the predecease of her husband. The claim here was the share of the goods in communion falling to her on the dissolution of the marriage by her predecease, called dead's part, or wife's third, and claimed in right of the mother by her children. But the term *jus relictæ* was applied here in this case by the most eminent lawyers.

assertion, that Mr. Hog was domiciled in Scotland in 1760, and if they are not supported in the fact that he was domiciled in Scotland in 1760, that there is no occasion to inquire farther about the law.

"But they add, if he was domiciled in the year 1760 in Scotland, yet they contend, 1. That because the marriage was had in England, the Scotch law, which would obtain between Scotch persons domiciled at the death of the wife in Scotland, when the marriage has *de facto* taken place in Scotland, will not apply to persons, though they are proved to have been domiciled in Scotland at the dissolution of the marriage, when the *locus contractus matrimonii* was actually in England; and that by the law of Scotland you are not driven to inquire what the rights of a Scotch wife would be if she had been clothed with the character of a Scotch wife under the effect of a Scotch marriage contracted in Scotland; but if, upon the husband's death, he is to be considered as a domiciled Scotch husband, and she is to be considered as a domiciled Scotch wife,—or if, upon the wife's death, she is to be considered as a domiciled Scotch wife, and her husband as a domiciled Scotch husband, you are to apply, as between the estates of such a husband and wife, the law of England, if these parties were married in England.

"And beyond that, they contend that, in this particular case, if *that* is not the just view of the law, that a marriage settlement having been made in England, *that* is to be regarded as a conventional provision, which would shut out the right to any legal provision.

"It is necessary also to state to your Lordships, that the appellant, Mrs. Rebecca Hog, in the year 1776, married the other appellant, a gentleman of the name of Thomas Lashley, whose father was a physician in the island of Barbadoes, and that upon that occasion no contract of marriage was entered into between them. Mrs. Hog's father made a proposal, which did not take effect, and the appellant received from him the sum of £700, which was advanced to Mr. Lashley, upon his bond in 1767; another sum of £300 in 1779; and an annual sum of £65 from the year 1772, during the remainder of Mr. Hog's life. I state these circumstances to your Lordships because the interlocutors have relation to these facts.

"Mr. Hog's other children received from him certain provisions, which they are said severally to have accepted in full satisfaction of all they could ask or demand by and through his decease, or the decease of their mother, in the name of legitim, or otherwise; and when I advert to this fact in passing along, it seems to me not quite immaterial, that after Mr. Hog became unquestionably a person domiciled in Scotland, and was providing for his children as a person would do, who was attending to the law of the country in which he was domiciled, his men of business, whom he consulted at the time he made these provisions, certainly felt that it was matter of doubt whether the children had not a claim under their mother,

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considering the circumstances under which their mother had died; for the deed which he expressly required before he paid to them the portion which he intended for them, contained a renunciation not only of whatever they could claim through his decease, but also of whatever they could claim through the decease of their mother in name of legitim or otherwise.

"Upon the 19th of March 1789, Mr. Hog died at Newliston, leaving a real and personal estate of very considerable value, part of which was situated in Scotland, part in England, and a small part in France. And before his death he had executed certain deeds of settlement. There can be no doubt his intention was to vest, as amply as he could, his property in his eldest son, and of this he was unquestionably himself the proper judge. He was the father of all the children, and, as far as the law would allow, he had a right to decide for himself to which of his children he would give most, and to which he would give least. It was quite clear that he meant to give all that he could give to the present respondent, Mr. Thomas Hog.

"The deeds of settlement which Mr. Hog had executed, were lodged in the hands of Mr. John Robertson, writer in Edinburgh, his ordinary agent. One of these was a general disposition containing a nomination of executors, dated the 5th of February 1787, in favour of his eldest son, the respondent. It conveyed to him certain lands therein mentioned, together with all Mr. Hog's personal property, burdened with the payment of debts, legacies, and provisions to younger children; and it directed—and this is the part of the disposition to be attended to by your Lordships—'that the residue and growing interest should be employed in purchasing land, 'to be entailed on the series of heirs specified in the entail of Newliston.' And I state this to your Lordships to be material, in deciding on the circumstances of this case, (and your Lordships will recollect, that in a former stage of it, I represented it to be material), because if, in fact, this species of disposition was made by the settlement in 1787, that will deserve attention when your Lordships come to consider the effect of the evidence, as it bears upon the question in regard to certain shares of stock of the Bank of Scotland, to the number of eighty-one shares, which were to be disposed of, or were intended to be disposed of, which eighty-one shares, it is contended by the respondent, Mr. Hog, had been absolutely conveyed to, and vested in him.

"Two bonds were also entrusted to Mr. Robertson in favour of Mrs. Lashley, excluding her husband's *jus mariti*. One of these, for £1000* sterling, contained a declaration that the same 'shall be in 'full satisfaction to the said Rebecca Hog, my daughter, of all por-

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* The sum mentioned in the interlocutor, quoted at page 592, ought to be £2500 instead of £1500;—thus £700 and £300 paid to Dr. Lashley, and £1500 left Mrs. Lashley at her father's death.

'tion natural, legitim, bairns' part of gear, or other claim or demand 'from me, or from my heirs and executors, in and through my de- 'cease, or the death of Mrs. Rachael Missing, my spouse.' And here also, it may be material for your Lordships to attend to it, that these bonds, which were executed at a period very long subsequent to that at which her mother had died, contained a declaration that the same should be in satisfaction of all that she could claim through his decease, or the death of Mrs. Rachel Missing, his spouse. Those, therefore, who transacted this part of the testator's business, did not think it safe to make this proposition, as a proposition to a child, to accept this provision in lieu of legitim, as it could be claimed through the decease of the father, who was unquestionably then a domiciled Scotchman; but they thought it right also to propose it, at least as a satisfaction for what could be claimed through the mother's decease, who, as I before stated, died in the year 1760. These provisions, which had been so tendered to Mr. Lashley and his wife, they were not contented with, and they raised a suit in the Court of Session against the present Mr. Hog, as representative of his father (for he had acted as such in Scotland, and had taken probate also in England), to account for one half of his father's moveables or personal estate, in name of legitim, and for Mrs. Lashley's proportion of one-third of the goods in communion at the dissolution of the marriage, to which they alleged the children of the marriage were entitled, as the next of kin to their mother.

General view of the argument.

"There were several defences to this action, and these defences were met by replies. It will be within your Lordships' recollection that there have been several interlocutors in favour of Mr. Lashley and his wife, which have been affirmed by your Lordships, sitting in judgment here, more particularly an interlocutor of the 7th of June 1791, that 'the renunciation of the claim of legitim by the 'younger children of the deceased Mr. Hog, operated in favour of the 'pursuer (Mrs. Rebecca Hog), and has the same effect as the natural 'death of the renouncer would have had; and as she is the only 'younger child who did not renounce, find her entitled to the whole 'legitim, being one-half of the free personal estate belonging to her 'father at the time of his decease, whether situated in Scotland or 'elsewhere.'

Vide ante, vol. iii. p. 247 and 250.

"Another question which arose in that case, was with respect to some part of that personal property, (of what value does not signify as to the principle which was under discussion), Whether the *lex loci rei sitæ*, or the *lex domicilii* of the testator was to determine in what manner the same should be disposed of. This question, which long agitated the Court of Session, and afterwards agitated your Lordships by a discussion at your bar, and which was finally decided here was, taking Mr. Hog, as he was found to be domiciled in Scotland at the time of his death, whether the personality which he had in England and in France, particularly the per-

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sonality which he had in England, and attending to the nature of it, and the property in the funds, was personality, to be distributed according to the law of England, or to be distributed according to the law of Scotland?

"There were other points, and those were points with which the present case more particularly connects itself. It was first denied that Mrs. Lashley had any claim to her mother's right to a share of the personal estate of her father at the dissolution of the marriage. That question was remitted by the Court of Session to the Lord Ordinary for his reconsideration, before the last appeal, and I shall have occasion to state to your Lordships his judgments, and that of the Court upon it.

"Then there was another question, which becomes extremely material in this case, which is, as to the amount of that property which is to be considered as subject to the legitim; and that question chiefly respects several shares of the stock of the Bank of Scotland; and the true question upon that will be this, Whether the property in the stock of the Bank of Scotland was, at the death of Mr. Roger Hog, to be considered (for the purposes with reference to which his children can claim) as the property of Mr. Roger Hog, whoever might be in the apparent ownership of it? Or, Whether, on the other hand, it was to be considered as property, with reference to which he had, to all intents and purposes connected with the question of legitim, divested himself of all ownership, and had *bona fide*, out and out, given that property to his son Thomas Hog in his lifetime? It cannot be denied, in any way of stating the question, that the claim of legitim attaches only on that which is the moveable property of the father at his death, and therefore ceased to be the property of the father at his death. The children can claim only against that which was the property of the father at his death, subject always to the consideration of what acts can be said to have put an end to the property of the father previous to his death, regard being had to the principles of the law as these respect fraud upon fair claims, and attending to the nature of those claims.

"The first question, therefore, is, Whether, under the circumstances, Mrs. Lashley had any claim under her mother?

"The next question is, What is the amount of the property to which she has a claim? That depends also upon the question, What claim Mr. Thomas Hog has, and what right Mr. Thomas Hog has to call upon Mr. and Mrs. Lashley to bring into division, or into collation, those sums of money, and those provisions which have been advanced by the father to Mr. Lashley or to Mrs. Lashley, during the lifetime of the father. When these claims are settled, it will of course be ascertained what is the amount of that property upon which this claim of legitim attaches.

"With respect to the first of these questions, it certainly is an extremely important question, which it appears to me has been

hitherto unprejudiced by any direct decision ; but, as it seems to me, by no means unaffected by the establishment of principles which have application to it. It is this, Whether, when a person marries in one country, and on that marriage a contract is entered into, but which contract, in the terms of it, has no relation whatever to the personal property of the husband, such as it is at the time of the marriage—such as it shall be subsequent to the time of the marriage, or such as it may be at the death of the husband ; whether, because in fact the marriage took place in England, whatever may be the change of domicile of the husband subsequent to the marriage, and whatever shall be said to be in law the place of his domicile at the time of his death, the administration of his estate in that place where he dies domiciled is to be an administration, as far as it respects his wife, with reference not to the law of the place where he died domiciled, but to the law of the place where the marriage was had. And then stating that, whatever might have been the claims, if she had been married in the place where her husband died, let her husband die domiciled where he may, she neither has nor can have any other rights than those which she would have had if the husband had died domiciled in the place where the marriage was entered into.

Effect of change of domicile on the rights of the wife ; or whether the *locus contractus matrimonii* must govern.

" This question comes to be important, because, your Lordships will observe, that there is a great difference, particularly in this case, which is the case of a predeceasing wife, between the claims of her children, and what would be the claims of her children if the rights of the mother are to be determined on by the law of Scotland or by the law of England. Under the law of England, I need not state to your Lordships, that when the wife predeceases the husband, and there has been no convention or provision upon her marriage ; when she dies, instead of any body representing her having any claim as against the husband, her husband has a title to be her universal representative against any children she had, and all other persons in the world. The law of Scotland is not so, because that law recognizes what is called the communion of goods in the married state, and, by virtue of that law, the wife has certain interests ; if she predeceases the husband, she and her husband being considered as entitled to communion and society in the personal estate, and the society and communion expiring by the dissolution of the marriage in consequence of her death, the property comes to be severed, and her children, as her children, have a right to a part of the property of the husband, as representing her, against the husband himself. The proportion, in the case of the wife dying after her husband, seems to be pretty much the same as in the law of England ; if he predeceases her in England, dying intestate, leaving children, your Lordships know her share is one-third, and the children have the other two-thirds ; if there are no children, her proportion is a moiety ; and the next of kin, not standing in the condition of children, take the other moiety. So in the law of Scotland, her right is different

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in respect to the proportion or the extent of her claim, in respect of her husband's dying with children or without children. I think, if he dies with children, she is entitled to a third, and to a moiety if he dies without children.

"In order, therefore, to state this question to your Lordships, we must consider, 1. What would be the case, supposing the wife had died after the husband; and see how far the principles we shall establish to regulate that case will apply to the case of the wife predeceasing her husband. When it was stated at the bar here that the *locus contractus matrimonii* must govern, one's attention was naturally called to the consideration of all the difficulties that presented themselves as consequential upon that way of stating the proposition. I am ready to admit there are considerable difficulties upon any state of the proposition; and yet, to a mind informed as that of an English lawyer is, as he is informed by his habits, I own it appears to me one of the most extraordinary propositions I had ever heard, notwithstanding the passages that are found in text writers upon the subject, that it could be maintained, as an universal proposition at least, that the *locus contractus matrimonii* was to govern. It is, no doubt, one question, what is an universal proposition to be acted upon in England, Scotland, or any where else, as a principle of sound law, to be adopted every where? and another thing to say, what is to be considered as being the law of England upon the point? When one recollects what has been the universal practice in regard to the administration in this country of the effects of intestates, under all the circumstances which have obtained, under all the changes and mutations of instruments which parties make in their lifetimes, I believe it never occurred to any person who has sat in these Courts, in which they adminster the estates and effects of intestates, to think of the question, *where* was the party married? in order to decide *what* was the *share* a wife was to take of her husband's personality?

"This is very familiar to us in this country, because your Lordships know very well that the distribution of the personal estate of intestates is in different proportions in different parts of England. When a person's estate, for instance, is to be distributed as the personal estate of an individual living in that district in which the *custom* of the province of York obtains, the wife is there entitled to five-ninths, and if the *locus contractus matrimonii* is to determine upon her rights, where there is no domicile in the province, I believe I should state a doctrine that would extremely surprise all the inhabitants of London who have transplanted themselves from the parts to which I am now alluding, if I were to tell them, if they happened to die domiciled in the province of Canterbury, where the wife's share is one-third, that it was not the circumstance of being themselves domiciled within the province of Canterbury which was to regulate this, but that the circumstance that the marriage had

been had in that part of the kingdom, on which the custom of the province of York attaches, was to decide upon it, and that it was to decide upon it with no communication, and no agreement between the parties at the time of the marriage. Upon this doctrine, the result would be, that if a man, domiciled within the province of Canterbury, should, in taking a journey northward, marry a lady within the province of York, though they went immediately home and resided during the rest of their lives within the province of Canterbury, the wife would be entitled to five-ninths of the personal estate.

"Taking it the other way, we know there are persons who come from that part of the world to which the custom of the province of York extends; they happened, perhaps, not to think much about these things; in advanced life, they are likely to go home again, and they take their chance; they are husband and wife, in this respect, as in all others, for better or for worse; and I should conceive it to be quite clear law (though it seems to have puzzled some very learned persons in the statement of this case), that a man might come from a particular part of the north of England; and, supposing he had married in the north of England, where if he had died before he accomplished his purpose of taking his journey, his lady would unquestionably receive five-ninths of the personal estate, yet if he came up to London to better his fortune, (as we north country people are apt to do), and died in London, his wife would take her one-third according to the custom of the province of Canterbury, and if, in his old age, he had retired to the land of his nativity and died intestate, the lady then, who, in the first instance, would have been entitled to five-ninths, who had by the course of events lost that right, and became entitled in the second instance to only one-third; and when her husband returned again to the province of York, dying in the place in which he was born and married, she would be restored again to the five-ninths; her condition as a wife, and her right as wife, being altered from time to time, exactly as her person followed her husband's person, from one place of domicile into another place of domicile, till it was at last decided by his death, where he left his residence in this world. I take *that* to be quite clear law.

"I think it was as long ago as 1704, unless I mistake the import of the case, that, as amongst French people, the law of England had decided this; for, in the case of Foubert *v.* Turst, in Brown's Parliamentary Cases, 38, this case occurred: A French lady and gentleman married at Paris, and having married there, there was a written agreement, by which certain sums of money were disposed of, and with respect to the other property which the parties had or should acquire, *that* was, by this agreement, according to the construction put upon it in our courts, to go according to the custom of Paris. After the marriage was had, the lady and gentleman thought London was a better place to reside in than Paris, and came here. They lived here some years; at length the wife died; and the ques-

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tion arose, upon her death, how the property was to be distributed? It first came on in the Court of Chancery. The Lord Chancellor was of opinion that it was not the intent of that agreement to attach, under all the circumstances, the rule which the custom of Paris afforded as to the distribution of the property. He held, that the parties being domiciled in this country, the law of this country must decide the right to his share in his wife's property. That was afterwards reversed in this House. But upon what principle was it afterwards reversed in this House? Why, upon a principle which showed what the conception of this House was as to the law if there had been no rule for the application of that principle, for it is distinctly admitted, in the printed reasons by the counsel on both sides, but especially in the printed reasons by the gentleman who was a counsel for the husband, that though the parties married at Paris, the custom of Paris would not follow them; and the ground upon which the Lord Chancellor's decree was taken to be wrong was this, (and an extremely clear ground it is), that then the parties had, in Paris, come to a written agreement, the true construction of which written agreement was, that wherever the parties died, the custom of Paris should regulate the distribution, therefore said this House, it is not the regard which the law here administering property has to the custom of Paris, but the *rule* is founded in the *contract* which the parties themselves had entered into; and that contract which they there entered into will travel with them, though the custom will not follow them. The contract will attach upon the property after the death of the parties. The meaning of the parties was, that it should so attach upon the property after death, and there can be no reason in the world why the parties should not say by express contract, that the *locus contractus matrimonii* should decide. They may do so, if they please, in a written agreement, which shall describe what shall be the share of the wife in the property of her husband when he is dead.

" It seems to me also, that that case was recognized to be very good law, in a subsequent case of *Freemoult* v. *Dedire*, in Peere Williams' Reports, p. 429. The result of the case may be stated, to show this, that it was the opinion of the Court at that day, that where the marriage had been had in Holland, the distribution in this country, if the party died domiciled in this country, would be certainly according to the law of Holland, if you showed there were articles saying that the distribution should be according to the law of Holland. But they seem to have refused, in that case, to make the distribution according to the law of Holland, because it had not been proved as a fact in the cause, what was the law of Holland, which these articles had stipulated between the parties should furnish the rules of distribution.

P. Wm's. vol. i. p. 429.

" Your Lordships have already gone the length of deciding, in the former stages of this cause, that with respect to the children's shares, upon the death of their father, it is the *locus domicilii* at the death

of the father that must decide what they are to take. In this case, the marriage was had in England. Some of the children were, I believe, born in England, and Mr. Hog having altered his domicile, and dying domiciled in Scotland, your Lordships held, that because they were the children of a father domiciled in Scotland, notwithstanding that was not the *locus contractus matrimonii*, the law of Scotland must decide upon the rights of those children. I believe it would be next to impossible to say that there is any distinction to be made between the legitim of the children as taking by such succession, and the *jus relictæ* of the widow as taking by the same. It would be absolutely impossible, if the wife survived the husband, that you should say, that though the marriage was in England, the children of that marriage should take according to the law of Scotland, where the man was domiciled; but that the wife should take according to the law of England, where the man was married. Unless you could say, in the case of the wife surviving the husband, that her interest was to be decided by the law of England, where the marriage was had, although the right of the children, who in a sort derived their title under that marriage, depended on the law of Scotland; that is, that the surviving wife took according to the *locus contractus matrimonii*, and the children according to the *locus domicilii*, it would be difficult to distinguish between what the wife takes, in the character of wife, if she happens to die in the lifetime of her husband, and what she takes in the same character, and under the same title, if she happens to survive the husband. It seems to me, therefore, when a distinction is taken between the *legitim* and the *jus relictæ*, in the manner in which it has been taken in this case, that the distinction is not substantial enough to be acted upon.

" A vast number of ingenious difficulties have been stated upon this subject, which may deserve a great deal of consideration, but we may here lay out of consideration all those cases upon which it has been asked, What are to be the consequences if a man marries in one place and goes immediately to dwell in another? If any persons were to go into Scotland, get married at Gretna Green, or any where else, and come back to England, or if they came from Scotland and were married in England, in the one case, if the parties returned immediately, and became domiciled in England, or, in the other case, if the parties returned, and became domiciled in Scotland, in both these cases, the place of marriage is a mere incident in the form of the contract, and would not alter the law, which says that the place where the parties *bona fide* reside, and that I shall call the *bona fide* residence of the husband, will decide upon the rights both of the wife and of the children.

" But it is said, that if there be no express contract when the marriage is entered into, there must be an implied contract, and it is assumed that that implied contract is this:—that the distribution which the law would make of the property of the husband if he were

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to die *eo instanti* that the marriage was celebrated, is the distribution which must be made of the property of the husband dying intestate at any distance of time from the period when the marriage was contracted, and under all the circumstances of mutation and change which might have taken place.

" It appears to me, that those who say that there is such an implied contract beg the whole question, because the question is, whether the implied contract is not precisely the contrary? This being a contract attaching upon property, in consequence of its being personal estate, whether the true implied contract must not be taken to be, that the condition of the wife, in respect to her expectation, should change as the condition of the husband changes with reference to the law of the country in which they are resident.

" Cases of great hardship may be put with respect to Scotch and English ladies. They tell you, with reference to a marriage in England, the moment the husband contracts that marriage, all the debts due to the wife, and property in the wife, attach to him; but that in case of a marriage in Scotland, with respect to all debts due to the wife, the husband must take the trouble of taking his hat off to request the payment of that money from those from whom it is due her, before he vests a right to it in himself. But really this difference is not very considerable, because, although it be that the husband, if he happens to die, without having done any act to stamp the character of his own peculiar ownership upon the property of his wife, is taken to have chosen to let it go to the wife, because he chooses to forbear to take that which, previously to the connection, was hers. Yet, on the other hand, there is nothing more clear than that the law supposes he may receive it when he pleases; for a man cannot, without evidence, be supposed to forego that which he takes in right of the wife. He may assign it for valuable considerations, or he may make it his own to all intents and purposes, and the moment he chooses to make it his own, he may assign it to persons in trust for the wife, who may have in this country the special equity of claiming to have some provision made out of it for herself.

" But the true question is, whether it is not of necessity that the husband and wife, or the one of them, and if the one of them, which of them, is to determine, in what manner, and in what place, the husband is to struggle for the means of provision for himself and his family whilst he lives, and for all the means of provision for the family which he shall leave behind him after he is dead; and when you shall say that both in England and in Scotland (about which there can be no doubt), it is competent for the husband to spend every shilling of the property, to alien *bona fide* every shilling of the property, what does that amount to but this, That the husband, if he pleases, has it in his power to make it of as little consequence to both his wife and children, in what country they resided at his death, as if they were in no country at all.

"The true point seems to be this, whether there is anything irrational in saying, that as the husband, during the whole of his life, has the absolute disposition over the property, that, as to him, whom the policy of the law has given the direction of the family as to the place of its residence, that he who has therefore this species of command over his own actions, and over the actions and property which is his own, and which is to remain his own, or to become that of his family according to his will—why should it be thought an unreasonable thing, that, where there is no express contract, the implied contract shall be taken to be, that the wife is to look to the law of the country where the husband dies, for the right she is to enjoy, in case the husband thinks proper to die intestate?

"This has been the principle which it seems to me has been adopted, as far as we can collect what has been the principle adopted, in cases in those parts of the island with which we are best acquainted; and not being aware that there has been any decision which will countervail this; thinking that it squares infinitely better with those principles upon which your Lordships have already decided in this case, it does appear to me, attending to the different sentiments to be found in the text-writers upon the subject, that it is more consonant to our own laws, and more consonant to the general principle, to say, that the implied contract is, that the rights of the wife shall shift with the change of residence of the wife, *that* change of residence being accomplished by the will of the husband, whom, by the marriage contract in this instance, she is bound to obey.

"Is there any inconvenience in this? None in the world; because it is an equally acknowledged principle, that though the custom of the place may not follow the parties to this contract, which places them in relation of husband and wife, and children; yet it is undeniable law, that they may contract, under hand and seal, that the custom of the place shall follow them;—whether it will be convenient, in ninety-nine cases out of a hundred, that there should be such a convention, and such a contract, or whether it will not be mightily inconvenient to the affairs of families to form such a contract or convention, is a question as to which persons viewing it, may think very differently about; but if there be any inconvenience in the circumstance of such a convention not being formed upon the marriage, it is an inconvenience neither of a higher nor less nature than any other which attaches upon that relation which is to be left to the providence of parties when they enter into that relation; but which can be met by the providence of parties when they enter into that relation, and to which inconvenience they expose themselves, if they do not think proper at the time to provide against it.

"It may be said in this case, and truly may be said in ninty-nine cases out of a hundred of a similar sort, if they arise, that this is a surprise upon the parties. The true answer to that is, that I believe the parties never thought of it; when they entered into this mar-

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riage, they entered into no contract by which this lady was to take one penny of her husband's property, but they entered into a contract, by which she was to have somewhat more than two-thirds of her own property converted into land, with a power to her to give this to any of her children that deserved best of her: They could not have but considered that Mr. Hog must die somewhere, that he was likely to die in England; but there is no stipulation that she shall have one shilling left to her. She takes her chance, under the effect of the marriage, whether she shall or not receive anything, even upon the casualty of the husband dying intestate. If he had thought proper to lay out all his money upon land, and had taken the caution to lay it out in the name of a trustee, instead of in his own name, she would not have had what the Scotch called *terce* and we call *dower*. On the other hand, if Mr. Hog had, that which it appears he had for a great number of years, a very strong inclination, and a fixed purpose to reside in Scotland where he was born, and to die there; one should think, if he had thought proper to attend to this subject with caution, he would have asked what would be the state of his wife if he did die there? But the truth is, that parties do not think upon this subject when they enter into these contracts; they get a bit of a settlement made, and very important interests remain unattended to.

"But I think it appears that this claim could not be matter of much surprise, when your Lordships come to see how this matter was regarded by men of business in Scotland;—because, though this lady died in 1760, and though Mr. Hog unquestionably became afterwards a domiciled Scotchman, having realized property in land in that country, whenever provisions were tendered to the other children, or to the appellant herself, your Lordships observe the persons who drew those discharges thought there might be at least some colour of claim under their mother's decease, and that circumstance, that there might be that colour of claim, whilst it contains an intimation upon the point at law, that at least it was doubted by the lawyers in Scotland, whether this might not be supported, is also a material circumstance in another respect, that it contains a strong intimation as to what they believed to be the fact with respect to the domicile of the father at the decease of the mother.*

"Without entering, therefore, into a great variety of very nice cases which might be put, and which might be all reasoned down, in my apprehension, to the single question, which is the principle that you are to imply from the contract of marriage, whether it is to be considered that the rights of the wife must vary with the rights which attach upon her residence in different places, and that her right to succeed to her husband must depend upon the domicile which he had at the time of

* The discharges were drawn out in the common form of such discharges in Scotland.

her death, if she is dead, or the time of his death, if she survived him; or, on the other hand, that the *locus contractus matrimonii* is to regulate the distribution of the property, and through all the changes in future life, her right is to remain unaltered in a case in which there is no express contract at all. It does appear to me that the rule we have adopted in this country is the better rule, and, therefore, I shall presume, upon that part of the case, in the application of that principle, to submit to your Lordships the propriety of altering the interlocutor, so far as they deny Mrs. Hog's right to transmit to her next of kin, she predeceasing her husband, the usual shares in the goods of that husband.

"But this cannot be done without deciding a question of fact, because if it be true, that this gentleman was not domiciled in Scotland in 1760, then, for the same reason, it must follow that if he was at that time domiciled in England, she could not claim, because she must be bound by the law of the place of his then residence, and, as in the case I put before, of a change of residence from a place in the province of York, to a place where the law of the province of Canterbury applies, it might be that her rights might change twenty different times during her life. I have little doubt that, without any suspicion of it, there are many persons who have different places of residence, who are changing their residences repeatedly, (each of which they call their fixed place of residence), and whose property, if they happen to die without a written disposition of it by them, must be distributed according to the law in the province in which their decease takes place. So, in the case I put, I feel no difficulty in saying, that if I were to marry in London to-morrow, and afterwards to go and be domiciled in Scotland, and then I were to come up to London again, and afterwards to go to Scotland again, as it appears to me, the principle must apply, from time to time, according to the place of my residence, and not perhaps as I choose it should apply; but then it is entirely the consequence of my own act that it does so apply.

"The question, whether Mr. Hog had his domicile in Scotland in 1760, is, however, a question which your Lordships must decide before you can say, as I before stated, that there is any room for a decision in this case, founded upon the communion of goods. This point of the domicile is argued with another point under the cross appeal taken by Mr. Hog in this cause. I beg distinctly to state to your Lordships these two points, in order that the rule of this House, as to cross appeals, may be understood, not thinking, in my poor view of the case, that it is very important to the parties what the rule of the House is, as to this point of the domicile, but because there is another question in this case, which your Lordships may perhaps think deserves attention, with reference to whether you can alter the decision, and whether this cross appeal be rightly or wrongly presented to your Lordships' consideration?

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" The two points contained in that cross appeal, are the question as to the domicile at the death of Mr. Hog, which Thomas Hog contends, upon his cross appeal, ought to be held to be a domicile, not in Scotland but in England, and the other is, upon the expenses of the confirmation in Scotland, and the probate in England. It is insisted by Mr. Hog, that those expenses ought to be so thrown upon the personal estate, that some share of those expenses may fall upon those who are interested in the claim to the *jus relictæ* and legitim. The Court of Session seem to have thought otherwise. I will not take upon myself to say how it may be in the law of Scotland. That is a question your Lordships may decide, but, in this country, I take it, it would be quite clear that the expenses of confirming, or of clothing yourself with that character, which somebody must have, in order to deal and to transact with the personal estate, (whoever may have a claim beneficially to enjoy the personal estate,) would be a charge upon the whole fund. It would be in the nature of a debt upon the whole fund; and I should considerably doubt, and I beg my noble and learned friends' attention to this part of the case; I cannot help entertaining a doubt, whether that part of the case is rightly decided against Mr. Hog.

Doubts if the interlocutor right as to expenses of probate and confirmation.

" With respect to the question of domicile, it is of no importance whether this appeal was brought in time or not; because those who state to your Lordships that, under Mr. Hog, they were entitled to claim in respect of the communion of goods, must make out, on their part, that Mr. Hog was domiciled in Scotland at the time the wife died. The question, therefore, whether Mr. Hog was domiciled in Scotland at the time Mrs. Hog died, is a question just as open to your Lordships whether there is a cross appeal or not a cross appeal. That is the material question in this cause between the parties; and one should have had to lament that we could not get at a question of that kind, in some cases that might have occurred, because the cross appeal did not come in time. Certainly, in this case, the question, though great and important, does not administer occasion for that feeling, because it seems to me impossible that those who contend for this community of goods, can make out their title, without satisfying your Lordships what was the residence at the time; and when they undertake to satisfy your Lordships that such was the residence at the time, they let in an opportunity for those contending with them to say, that such was not the residence.

Cross appeal not necessary in order to discuss point of domicile.

" With reference to the question, whether Scotland was or was not the residence of Mr. Hog, at the time of Mrs. Hog's death, *that* depends upon a very minute attention to all the circumstances which are disclosed, as matter of evidence in this cause, with respect to the mind and intention of the party upon that part of the case. I shall not give your Lordships the trouble of going through an accurate statement of the whole of the evidence, because I have not perceived in your Lordships' House, from the beginning of this cause to the

Domicile itself.

end of it, any tendency to doubt in the mind of any one of your Lordships whether those interlocutors that have declared him to be domiciled in Scotland at the time of the death of his wife, were or were not well founded. It seems to me that the whole of the passages which are to be collected from the letters, and which have been relied upon at the bar, amount to no more than such as would entitle your Lordships to represent this matter thus: This gentleman had originally come from Scotland to make his fortune in England; he seems to have been a very sensible and a very industrious man. He had succeeded in trade to a great extent, but throughout his whole life he seems to have been influenced by a determination to spend as much of his life, and particularly the latter days of that life, as he could in his native country. He meant to take there his *summa rerum*, he meant that his establishment should be there, and he was acting upon that intention when he went there. It is always a very nice question, if you are called upon to decide it immediately after a change of residence, whether that change of residence has actually operated a change of the testator's domicile; but we have not such difficulty in the present case; it is admitted that Mr. Hog was domiciled in Scotland at the time of his own death. Upon the whole, I see no reason to doubt that he was domiciled in Scotland at the death of his wife.

"In regard to the other point taken under the cross appeal, the expenses of the confirmation in Scotland and of the probate in England, there are two questions which will occur. The first will be, Whether it has been decided upon a right principle, that is, whether the expense of confirmation in Scotland and probate in England, has been thrown upon the right fund; and, if it has not, whether, considering the time when the appeal was brought here, subject to a protest made at the bar, you can consider, with reference to the consequences of that protest, that the appeal has been brought at such time as that your Lordships can give relief upon that part of the case?

Amount of legitim.

"The rest of this case calls for your Lordships to apply your consideration to a very important branch of the law of Scotland; and the facts of the case which give rise to the consideration of that important question of law will require a very minute and accurate detail. It is the question, what is the amount of the legitim? In order to determine that question, your Lordships are to decide whose property the various shares in the bank stock, which at one time were undoubtedly the property of old Mr. Hog, were to be taken to be at his death; and there are minor questions, and questions with respect to the money arising from the sale of the Kingston estate, a question as to a debt of £1000, out of what fund that debt is to be paid,—and the question with respect to bringing into contribution what has been advanced to the children. These all fall under another distinct head; and as I am sure I shall not be able so accurate-

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ly to detail all the circumstances which relate to the state of facts upon which these questions are to be decided, as it seems expedient they should be detailed, or to bring before your Lordships' consideration the points of law which are to be applied to the decision of these questions, in such a way as I should wish to do, if I were to call for your Lordships' further attention upon that part of the case to-night, I should hope your Lordships will not think it improper if I were here to leave this statement of what I shall humbly propose to your Lordships, meaning to proceed with what remains of the case in the course of to-morrow afternoon.

Adjourned.

July 10*th*, 1804.

LORD CHANCELLOR.

"My Lords,

"I adjourned the consideration to the present day of the question as to the amount of the funds out of which the legitim is to be paid. That question subdivides itself into several points.

Several questions stated.

"The first and most important one is most extremely important, not merely with reference to the parties in this cause, but with reference to the general law of Scotland upon the subject. It is, whether certain shares of the stock of the Bank of Scotland, which are admitted to have stood in the name of the respondent Mr. Thomas Hog, were or were not the father's moveable property at the time of his death?

"Another question is, whether the respondent was a creditor on his father's funds for £2500, which your Lordships recollect was the value of the estate which, under an appointment made by the mother, was conveyed to the respondent Thomas Hog, and also the sum of £1000 which he received with his wife, and lent to his father, who granted him a bond for it.

"A third question is slightly touched upon, which is, whether the respondent was entitled to the deduction of the expenses incurred by him in obtaining confirmation in Scotland and probate in England, of his father's will?

"A fourth was, whether the sums paid by Roger Hog, in his lifetime, are to be considered as forming a part of Mrs. Lashley's share, in calculating what is due to her?

Legitim.

"With reference to this part of the case, I believe I shall be founded upon the authorities which are stated in the text writers on the law of Scotland, and the decisions of the courts of Scotland, if I represent to your Lordships that legitim can be claimed only out of the moveable property belonging to the father at his death, and that this claim of the children to the legitim is a claim which leaves the father an unlimited power of disposition during his life; for it seems that

though the claim of legitim cannot be defeated by any deed executed on deathbed, or by any deed of a testamentary kind, which is to take effect at the father's death, yet it does not interfere at all with the father's right of administration while he is living and in health. Thus he may disappoint his younger children in various ways;—he may disappoint them by converting moveable property into heritable property; he may contract debts if he thinks proper, which debts would be a charge upon it; he may spend his estate in the most improvident manner in which he chooses to spend it; and he may give it away if he thinks proper. Provided he makes the disposition in time, all these acts which he may do, are to be considered certainly with reference to the question of the amount of the legitim. Your Lordships are still to determine whether the claim of legitim is capable of being considered as a right of property, as a *jus crediti*, or only as that which the children are to obtain under the hope and expectation of what the father may think proper to leave at his death.

"The question therefore is, substantially, What was his fair moveable property at his death? and that question will fall to be determined, regard being had to the consideration, that if an heir or disponee has a mere nominal interest in the property, that is, if he is in the nature of a trustee for the father, it will be not less the property of the father, because it is ostensibly (if it be but ostensibly) the property of another.

This alludes to the Bank shares.

"My Lords, the law of England furnishes a class of cases that seems to have some, though perhaps not a perfectly strict and correct analogy to the nature of the claim, with reference to which I am now speaking, for it will be familiar to some of your Lordships that it is not an unusual thing for a parent, when he gives away his child in marriage, to enter into a covenant that he will leave that child a share of his property equal to that which any other child at his death shall derive from him. Your Lordships perceive, that when that sort of obligation is entered into by a parent, he leaves to himself as complete, and indeed a more complete power of administration than the father has under the general law of Scotland, because, in addition to those acts which the Scotch parent is capable of performing, and which I have enumerated to your Lordships, the English parent, having bound himself under that obligation, is at liberty not only to spend every shilling of his fortune, but he may give away every shilling of that property, provided he does give it away the day before his death.

Bank stock.

"I apprehend, however, that there can be no manner of doubt, that if an English parent having entered into such an obligation, were to transfer any part of that property to any one of his children, by an instrument upon the face of it, the most absolute and complete that could be conceived in terms; yet if it appeared that, subsequent to that gift, the parent himself, from time to time, enjoyed

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the interest, dividend, or produce of that property, as it might yield, according to its nature, interest, dividend, or produce, that the receipt of the income of it would be complete evidence that the gift was a trust for the father; and that if the father died under such circumstances, the child with whom he had entered into such a covenant, as I have stated, that he would leave to that child as much as any other child should derive from him at his death, would have a right to say, that that property was part of the father's property, and would have a right to claim, upon the footing of considering it as part of the father's property.

"I wish to mark, in this part of the case, very distinctly the doctrine which I have now presumed to state to your Lordships, for another purpose, which is this, that although, perhaps, secretly between the father and the son, there might be an intention that the son, in such a case, should only pay, during the life of the father, the interest and produce of that property which had been so transferred to him, and that the son himself should take the property at the death of the father, yet if that agreement was not capable of being evidenced by testimony, admissible for that purpose, if the inference of law was to be collected from the mere fact, that the father was permitted, during that time, to receive the interest, dividend, or produce of that property, the inference in law would not be, that the father was entitled to that interest or property for the limited term of his life; but there being no special agreement capable of being proved that that limitation was intended to be put upon his enjoyment, the evidence which proved that he ate of the fruit of the tree, would be testimony in our courts of justice that he was the absolute owner of the tree which produced that fruit, and we should not hear it said, in a question between his children, that the father meant, in such a transaction, where there was nothing to show his meaning but this enjoyment of the produce of the property, that it was meant between the father and the son, to whom the ostensible transfer had been made, that the father was to have only a limited interest in it; that the property was given away from the moment of time the gift was made, and that the son was to be in the nature of a reversioner. There must be an express contract, I apprehend, before our law would admit that such was the nature of the intention of the parties to that transaction.

"But I go a great deal farther than that, because it has, I conceive, been settled by repeated decisions in this country, that if a father, upon the marriage of his child, enters into a covenant, that he will leave that child as much as he gives to any other child descended from him—after he has entered into that engagement, the law allows him, if he thinks proper, to give away his property as improvidently as he pleases; but an interest of this sort would hardly be worth having, if the law did not impose, for the protection of that interest, this guard upon the parent, that he shall not enjoy his pro-

perty as beneficially himself, having given it away, or nearly as beneficially as he would enjoy it if he had not given it away; and it would be competent for him at any moment to defeat the obligation he meant to enter into, to make an equal distribution among his children, if he could before his death say, I will give the whole of my property to one child, and that child shall give me the whole produce of that property during my life, and he may contend, after my death, that because I had given it on a day antecedent to my death, that it was given in such way as to prevent the operation of my covenant with respect to that property. I take it to have been decided in our courts of justice repeatedly that *that* cannot be done. I have stated what I conceive to be the views of the law of England upon the subject, that due attention may be given at least to the principles which have governed our decisions in this part of the island, upon a subject which seems to me to come the nearest to the subject, of the right which falls under consideration, a question resulting out of the circumstances which I am now about to state.

" Mr. Hog, the father of Mr. Thomas Hog, appears to have been, in the course of his life, in the habit of purchasing, at different periods, I think, from the year 1772 to a very late period of his life, various shares in the Bank of Scotland; and it appears, that in point of fact, between the year 1772, and the time of his death, he had become the owner at least, of one hundred and forty-four shares of the stock of that bank. When I say he became the owner of 144 shares, I mean that he had purchased 144 shares, some of which stood in his own name, and some in the name of his son;—I do not presume to state to your Lordships, that if it can be contended they were a fair purchase in the name of his son, and nothing more, that then the son is a trustee for his father: for the inference of law would be, that it is *prima facie* a gift to his son, and therefore, in the question relative to these shares of bank stock, it must be admitted that Mr. Hog, the respondent, has a right to the benefit of the principle, which is, that *prima facie* what is bought in his name, is given to him. So it would be in our law. At the death of the father, having in the course of his life bought this number of shares, some standing in his own name, some standing in his son's name, some originally purchased in his son's name, some occasionally transferred into his son's name, some retransferred into his son's name, which had been transferred from his son's name into his own, it has been made a material question between these parties, how many of these shares of stock belonged to the father of the parties who are now contending at your Lordships' bar; Mr. Hog, the respondent, insisted that there were only 24 shares which belonged to the father at the time of his death, that 39 shares had been given to him some time before the period of his father's death, and that 81 shares had been given to him at a period very recent before Mr.

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Hog, the father's death; at a period so recent before Mr. Hog's death, that between the date of that transfer and the date of Mr. Hog's death, there had been no dividend payable on the 81 shares, so that no evidence could arise from the fact of the application of the dividends, what was the purpose of the transfer so made as to these 81 shares,—and therefore, if that transfer cannot be connected with any other circumstance, it should seem clear, that as this was a transfer made whilst the father was in *liege poustie*, and a transfer made of property which he had a clear right to give away, if he thought proper to give it away, if there were no other evidence attaching upon these 81 shares, with a view to show who the true owner was, it would be *prima facie* evidence of a gift out and out to the son, and to be considered as his property.

" It appears, that in the year 1787, Mr. Hog, the father, had made a testamentary disposition, and by that he had conveyed to the respondent his whole personal estate, for the purpose of being vested in landed property, which landed property he meant to be settled in the same manner, and according to the same course of entail as that which he had before purchased, viz. the Newliston estate; but from these he excepted 39 shares of stock of the Bank of Scotland, having by this disposition expressly given all shares or stock in the company of the Bank of Scotland, and all stock in the public funds, which should belong to him at the time of his decease, exclusive of 39 shares of stock of the Bank of Scotland, which were transferred, as he says, sometime ago to the said Thomas Hog, and which he professes it is not his meaning or intention should fall under this conveyance, but that those 39 shares should remain with his son as his own right and property, notwithstanding any obligation granted by him to his father concerning the same, of which obligation, or any other in regard of the said 39 shares, the son was thereby acquitted and discharged, so that the purpose of the father clearly was, at the time he made this testamentary disposition, to give to his son an interest which your Lordships have determined he could not give as against the other children, on account of this claim of legitim, by giving to his son these shares of bank stock, for the purpose of being laid out by his son in land, to be entailed in the same manner as the estate of Newliston; but either recollecting, or conceiving that, with respect to the 39 shares; or misconceiving that with respect to the 39 shares, his son had, at some period of his life, come under the obligation to him by which he had declared himself in effect to be but a trustee to his father, he excludes the terms of the trust so created by his testamentary disposition of 39 shares, and he attempts by this testamentary disposition in effect to cancel and discharge the obligation, rightly conceiving or misconceiving, in making that disposition, that by the obligation which his son had come under, he acknowledged himself to be trustee of the 39 shares for his father.

" It occurred to those who had in Scotland the duty of attending

to the interests of Mr. and Mrs. Lashley to contend, first, with respect to those 39 shares, that they would be entitled to legitim upon them, because, in the first place, this testamentary disposition could not take effect upon them; and, in the next place, because the obligation itself was never cancelled, nor meant to be cancelled; that there was, as they asserted, a sacred trust between the son and the father in respect to the 39 shares, and a sacred trust also as to the father, in a subsequent act, as to the 81 shares. Mr. Hog was himself called upon, according to the forms of the law of Scotland, to give an account of what he conceived his interest to be in the shares of stock, and particularly in those shares of stock with respect to which he had given any acknowledgment whatever to his father, and he represented, in his answer to the interrogatory addressed to him for that purpose, 'that about twenty years ago or upwards, (and as far as I recollect the time of his examination, it would bring that back to the year 1774), but the precise year he does not remember, the deponent's father purchased some shares in the stock of the Bank of Scotland, which were transferred to the deponent, and some time afterwards he gave a letter to his father, the exact words of which he does not recollect, nor the number of shares to which it related, but that, in general, it imported that these shares were to be considered as his father's, and an obligation on the deponent to transfer these shares to him or his order, when required so do to. That sometime after this, at an annual election of directors of the said bank, the deponent, who was at that election elected a director, stated to his father, that in consequence of his having granted him the above mentioned letter, he could not take the oath as a proprietor or director, as not holding the said shares free and independent, upon which the father told him he need not give himself any concern on that account, as he intended the deponent should have a complete right to the said shares, to serve as a fund for providing for his younger children; and added, that he would cancel the letter or declaration which the deponent had granted, and therefore that he was at perfect liberty to take the oath required. That upon this the deponent was satisfied, took the oaths of trust, and has continued to be elected annually, and to act as a director in his father's presence during his life, and ever since;—and the deponent is certain that at no subsequent period did he ever grant any letter or declaration to his father, relative to the above shares, or to any others which were afterwards acquired for him by his father, and that he never saw the above mentioned letter after he granted it to his father, and does not know or suspect where it is.'

"This declaration, your Lordships observe, refers to a period twenty years or upwards preceding the time at which the deposition was made, and it is but fair to observe, that upon a transaction which had so much of ambiguity about it, both as it respected the father

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and the son, the son in his deposition might, without blame, be somewhat inaccurate, and the father might, without being exposed, I think, to the imputation of being an extraordinary inaccurate man, be also in some degree inaccurate.

"It has been stated, I think, at your Lordships' bar, that it requires ten shares of stock to be a director of the Bank of Scotland; and, in order therefore to try the effect of this deposition, it becomes necessary to look very attentively to the number of shares which Mr. Hog had from time to time, throughout the period in which it appears that he was in the habit of making purchases of shares, either in his own name, or in his son's name; and unless I mistake the effect of the evidence in this case, it will be extremely difficult to say, that at any period of the twenty years or upwards, to which the deposition can be supposed to refer, it can be a very accurate account of the transaction, that it was the intent of the transaction, in which the letter was given, to qualify the son to be a director of the Bank of Scotland, and conscientiously to take the oath to enable him to act as such director. If he had less shares than ten that could not be the object—if he had a great many more shares than ten, that could not be the sole object. Yet still that might be one object among others, and it might be the intention of the father at once to qualify him for being a director of the Bank of Scotland, and also to give him a capacity of making that provision for his younger children which this deposition asserts was the fair intention which his father's mind had conceived, and had adopted this means of effecting at one and the same time.

"It may be misapprehension, but it will be worth while to examine the evidence upon that subject, whether it could be possible that the son can speak accurately. I do not mean to lay great stress upon the subject, if it be an inaccuracy in point of time, it is likely enough to be so without making any imputation upon the moral honesty of this gentleman. But unless I misapprehend the fact, it will be found extremely doubtful, whether any letters he could give at that period, could have reference to such a number of shares as could enable this gentleman to act as a director at that time.

"If this were a question merely between the father and the son, and if the purpose of the father was to give such a number of shares to the son as would enable the son to act as a director, whether taking any oath or not, but much more if it were to enable the son to take this oath, and act as a director, where the father must, if he had that interest alone, be holding out his son to those who had interests to be well and duly attended to and managed by a person properly qualified in respect of property, to be placed in that situation, in which he cannot be placed according to the law, unless he has so many shares as to render himself properly qualified, and upon principles much more sacred and much more important, if he placed in his son's name, a property informing that son that he might pledge him-

self to God and man by his oath, as the person really entitled to that property, in a question between the father and the son, to be determined immediately after that transaction took place, no court of justice would have suffered the father to have holden a language which imported that he had not effectively done, what he promised upon the outside of the thing to do. This is quite familiar in this country: your Lordships know there are a great many situations with reference to which qualifications are necessary. One is familiar with this, that a person cannot have a seat in parliament, in this country, unless he has a clear freehold estate of £300 a-year at least, at the time he takes his seat—that estate once given, it is supposed can be taken back, but it cannot be taken back as against the creditors of the man to whom it has been given; and whatever may be the question as between the party who gives, and the party who receives, public considerations having determined that he shall receive that estate before he can act in this character of a member of parliament, I conceive that there would be no manner of doubt, that every judgment which the receiver of that property had recorded against him in Westminster Hall, would follow that property, if it went back again, even by conveyance, into the hands of the man who granted it. For where the law requires that a man shall have a property, and when a third person intervenes to give him the qualification, in order that the law may be satisfied, the law will not permit either the one or the other to disappoint the purposes for which that law was made. I take it, therefore, to be quite clear, in this case, that it is impossible to touch these 39 shares, if they should be found, upon examination, to be the subject of transfer made with this intent, if the question is to be considered as a question merely between the father and the son.

"If, therefore, these 39 shares had been given, whether twenty years ago or ten years ago, or at any other period, and nothing further had occurred in the case than that there was that gift; if, for instance, the dividends and profits of the 39 shares had remained dead in the bank, and had been received by nobody; if there were no evidence to show that there was a re-transfer contracted for, or a trust *bona fide* afterwards had, it would be perfectly impossible to touch this property, unless you are to say, that whatever the rule may be between the man who makes the conveyance, and the man who receives the benefit of the conveyance, the rule shall not operate to the prejudice of third persons; and it has been argued at your Lordships' bar, and strongly argued at your Lordships' bar, that although you would not permit the father to say, as against the son, that that gift which he had made, in order to qualify him to act as a director, swearing to his qualification, should be looked at as anything short of a gift, perfectly absolute and perfectly consummate in its nature; yet if the purpose of that gift was really to defraud the other children of the marriage, you would, in such a case as that, say, that

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at this instance you would examine the real nature of the transaction, and, examining the real nature of the transaction, you would, as with respect to third persons, set it aside.

" Now, it appears to me, without saying more upon it, for it is not necessary, in my view of the case, to say more upon it, that it would be a difficult thing to maintain *that* proposition. In the case of a creditor in this country, unless he has carried forth his diligence to such an extent that he has got a lien upon a man's property, if he, upon whose property the lien is, conveys it to another to make a qualification, he fails in his purpose, inasmuch as it is not a qualification free from incumbrance ; but, supposing the subject unfettered by any incumbrance, and to be in truth conveyed from A to B, the creditors of A, who had no lien upon the property whilst it was in the hands of A, had no reason to complain ; it was their own fault that they had not acquired a lien. So when it comes into the hands of B, the rights of B's creditors immediately attach upon it, and it cannot be the property of both A and B, for the purpose of permitting the claim of both one and the other to attach upon it ; and it would be found extremely difficult to say, that if this matter of the 39 shares had been to have been decided immediately after the transaction took place, it would have been competent for the younger children to have raised that contest which the father himself could not possibly, upon the ground of the policy of the law, have been permitted to raise in a question directly between himself and his son, to whom he had made the transfer.

" But it is extremely possible that the thing may acquire a very different complexion by the subsequent transactions between the parties, with respect to the property ; and it is alleged in this case, that notwithstanding these thirty-nine shares, or notwithstanding any other shares, more or less in number, were originally placed in the name of the son, or were by transfer placed in name of the son, yet that, in point of fact, all the transactions of the father in his lifetime, with reference to all the shares, whether they stood in the name of the father or stood in the name of the son, were transactions which would have taken place precisely in the same manner as they did take place, if every one of those shares, to the whole amount of a hundred and forty-four, had from beginning of the time that any of those shares were purchased, to the end of it, stood in the name of the father, and the father only.

" It is said that the expense of these transfers was paid by the father, if further subscriptions were called for ; the sums paid in discharge of the further subscriptions were paid by the father ; and the dividends *de facto* accounted for in the manner I shall have occasion to take notice of. The dividends upon the whole were, in fact, carried to the account of the father, being received by the father's bankers, as they necessarily perhaps must be received. Some

of your Lordships will know more correctly whether I am right or not than I can say I know myself to be upon this point. But I presume, where shares stand in the name of any individual, they cannot be received but by the authority of that individual. But whether the authority was or not given by both father and son, the produce of these shares, standing both in the name of the father and son, were received under such authorities by bankers, who carried the whole to the account of the father. In short, they do allege that every act of ownership (independent of the circumstances of the apparent ownership created by the property standing in the name of the son), was exercised by the father during every period of his life, except as to what I have to observe with respect to the 81 shares, which were transferred shortly before his death. And they say that *that* is very strongly confirmed by the date of the general disposition of the father, in which, as your Lordships observe, he attempts at least, not only to give all the shares which were then purchased, either in his own name or the son's name, but attempts by that instrument to discharge even the 39 shares from the obligation which he supposed his son at that time to be under respecting them.

"In that view of the case, considering the proposition I have finally to make upon this subject, I think I should trespass too long upon your Lordships' time, if I were to go through all the detail of the circumstances in evidence of the cause; that view of the case creates the necessity of considering whether, if these shares were *bona fide* granted at any period to be ascertained to the son, the son must not be taken, in consequence of his subsequent transactions, to have become a trustee for his father; and when the question is so put, whether the son must, in consequence of his subsequent transactions, be taken to have become a trustee for his father, I state again, that which I apprehend would be clear in the law of England, that if you could show that there was the appearance of an absolute gift, but that, at a time subsequent, the son had permitted the father, and particularly for a long course of years, to act with respect to the principal or of the interest, as if he was the owner of the principal; then the mere circumstance of the property standing in the son's name would not determine that the property was not the property of the father.

"Here I wish again to make a distinction, which is extremely important, that although there may be a case, in which the father of any other *cestui que trust*, may, upon the first formation of that trust, reserve what in Scotland they call a liferent, and we in England should call a life interest, yet the trustee who undertakes to prove that the *cestui que* trust had a limited interest, fails in that proof, if the only evidence he can offer is, that the father of the *cestui que* trust was in the constant habit of receiving the dividends, for the habit of receiving the dividends which Mr. Hog the father has taken, is evidence of the absolute ownership in the property which

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produces the dividends, unless the person who so pays the dividends, shows that he pays the dividends in pursuance of a more limited obligation, founded on some contract, which contract had been entered into when that practice of paying the dividends commenced.

"I mention this the rather, because I observe that it has been stated in these cases, and very truly stated in these cases, that such has been supposed to be the power of the father, as to disappointing this claim of the legitim of the son, that in the case of Agnew *v.* Agnew, tried in the Court of Session in Scotland, where a gentleman, having several children, some months,—but a few months before his death,—made a disposition, not of all, but of a part of his property, to one of these children, was found to be effectual; at same time, I do not lay much stress upon the circumstance, that it was only a part of his property; for it was a considerable part of his property, and, in principle, I cannot think that it would make a material difference, whether that part had been more or less considerable; but, a very few months before his death, he conveyed all the property, which he detailed, and enumerated in that detail, as a gift, being in *liege poustie*, to one of his sons, and he reserved as against the son his liferent in all the subjects he had so disposed of; his purpose seems to have been, (if it was not avowed, it would be impossible to deny that it would be easily perceived, that his purpose was) to disappoint the legitim, that *that* was his express intention, and that it was to make this conveyance to one *favourite* child, taking care, however, that he should not himself suffer by the act, which he did, because he reserved to himself the liferent; and if a person has not the wish otherwise to dispose of the capital, having the liferent, he is in pretty near as good a situation as if he had the capital at his own disposal. In the Court of Session in Scotland, that question was debated. It underwent great consideration before the Judges of that Court, and, having undergone great consideration before men of great eminence, who then filled the Court, they seem to have been much divided in opinion upon it.

Agnew *v.* Agnew, Feb. 25, 1775. Wallace's Decisions, et Mor. p. 8210.

"I have no difficulty in the world in saying, that if the interest of the children in the legitim can be considered as at all analagous to the interest of a child in this country under his father's covenant to leave him an equal share, a different rule would have been followed in that country, Such a covenant obliges the father to do nothing, because, if I agree to leave this noble Lord an equal share with the noble Lord that sits next him,—if I leave this noble Lord nothing, I am under no obligation to leave the other noble Lord anything; and that leaves me at liberty, if I choose to do so improvident an act, to throw my whole substance into the sea.

"But we have construed such a covenant as that so as to make it an act which binds to some purpose, and we have said that a disposition of property, under the circumstances I have mentioned, by a person leaving himself just as comfortably situated with respect to

that property after such a covenant as if he had never entered into that covenant, shall be considered as in truth, though not in letter, a fraud upon the covenant; and this will not be capable of being considered, according to our law, as that species of gift in the lifetime which is to defeat the covenant to leave at the death.

"I refer to this case of Agnew *v.* Agnew for the purpose of saying, with great deference and great respect, that I should wish rather to reserve what would be my opinion upon such a case as that, if it found its way to this House, than to say at this moment, that I should accede to the doctrine. But if the doctrine of that case is the doctrine which ought to be abided by, it seems to me quite incapable of being applied to the present case, as to the thirty-nine shares, or the eighty-one shares; because there is a vast difference in point of fact between a case in which the person who receives the dividends with an express contract, capable of being produced, to show that he receives them by virtue of a limited interest, and a case in which he receives the dividends, exactly as the absolute owner would do, there being no contract produceable to show that it was intended between the parties that he should have but a limited interest.

"There can be no doubt, if I should lay out £20,000 in stock tomorrow, in name of one of your Lordships, though it might be a possible thing, and that you should pay me the dividends for my life, in consequence of an understanding between you and me that I should have the dividends during my life, and you the capital upon my death; yet I conceive, if I were to die, and there was no evidence produceable, but the single evidence that my money had been laid out, and that you, from time to time, had given me the produce of the purchase, that *that* would be quite sufficient evidence to satisfy a court of justice, that, as a trustee for me during my life, you remained a trustee for those who represented me after my death; and it is incumbent for those who have once acted as if they were not the owners of the property, to show under some contract of which they can give evidence, that the inference is to be different from the receipt of the dividends in the one case to what it would be from the receipt of the dividends in the other case. This is a case in which it must be made out satisfactorily, either that Mr. Hog, the father, had parted with all interest in the thirty-nine shares and the eighty one shares, or, on the other hand, in which the judgment of law will be either, that he had never parted with any interest in them, or, if he had ever parted with any interest in them, then the judgment of law will be from the receipt of the subsequent dividends during such a period as he shall appear to have acted with those subsequent dividends, that he had absolutely reacquired a subsequent interest in the property.

"There are some topics addressed to the consideration of your Lordships extremely well worthy of attention, as evidence upon the fact, whether Mr. Hog, the father, did or not receive those dividends,

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because it does not necessarily follow, that because the dividends come into my coffers, that therefore, in looking at the whole of the transactions which take place between you and me, I ought to be said in law to receive the dividends; and it has therefore been urged that Mr. Hog, when he received these dividends, in truth, in a shape paid them out again to the respondent, because they say that he had come to an understanding or agreement with the respondent that he would pay him an annuity of £500, and that having engaged to pay him such annuity of £500, it was natural enough that the father, when he made him a present of these thirty-nine shares, should say, you must take the produce of the thirty-nine shares as *pro tanto* payment of that annuity, from time to time, as the produce arises, and therefore if that produce was brought to the account of Mansfield, Ramsay, & Company in the name of the father, yet that the payments which were made out of that fund in discharge of that annuity carried back the dividends again to the son.

"That may be all very good argument, but it will require a great deal of consideration before you can say it will be convincing argument. The natural quality of such a transaction as that would be this:—If the thirty-nine shares were in the name of the son, and the son received an annuity from his father, the son, who would be permitted to receive the interest and dividends of the thirty-nine shares, would carry them forward as *pro tanto* in discharge of the annuity. But it seems possible, and perhaps rational to admit of a perfectly different consideration, if your Lordships perceive that these dividends are carried in a mass into the same drawers of the banker's house which contain that which is undeniably the property of the father; if they are placed in a *congeries*, in which the one is incapable of being distinguished from the other, there can be no doubt, in point of law, they would to many purposes be the property of the father, and till they became severed by actual payment out again of the annuity, all which were so carried into this mass would be the property of the father, liable to all that could act upon the property of the father. Therefore, these were certainly permitted, for a period at least, by the son, to be laid hold of by the bankers of the father, as the property of the father; and, when looking to see what is the true intent and meaning of all this, you must look at all the other circumstances in the case, and if you find the father advancing the expenses of the transfer—if you find the father advancing the subscriptions for those shares put into the name of the son; if you find the father estimating his property, and in that estimate of property, attributing to himself the ownership of this property; these are all circumstances which must be considered when you are determining whether the dividends on these shares were taken into the coffers of the father's banker, in consequence of any agreement or understanding between the father and the son, that they should be paid out again in discharge of this annuity.

"It is contended here, that it does not signify at all what had been entered in the father's book with respect to the estimate of his property; but that is perhaps a proposition much more easily laid down than assented to, when the allegation here is, not the mere question between the father, who was the truster, and the son the trustee,—a question to which all the rules of evidence about trusts will naturally apply—but whether the transaction between the father and the son were transactions which, in point of fact, were intended between the father and the son, to disappoint this claim of legitim; for a great many circumstances will, in such a case, be circumstances admissible as evidence, which circumstances would not be admissible as evidence if it were a dry question under the act 1696, whether there was or was not a trust as between the person alleged to be the truster, and the person contending that he was, in truth, the *cestui que* trust.

"Under all these circumstances, therefore, I conceive the true question with respect to the thirty-nine shares, will be this, How many of these thirty-nine shares (attending to the date which the circumstance gives with respect to the transaction relating to the directorship), how many of the thirty-nine shares will really fall under the effect of that transaction? and, with respect to those which would not fall under that transaction, as well as with respect to those which did fall under that transaction, whether the subsequent dealings between the father and the son do, or do not, amount to evidence, that in the subsequent life of the father and the son these shares were considered as the property of the father, at least to the extent and the purpose of the father's receiving, from time to time, and I mean for himself beneficially receiving, and receiving as his own property, the interest, dividends, and produce of those shares. If it should turn out, upon an accurate examination of the fact, that he did receive *eo modo et eo intuitu*, and the son permitted him to receive *eo modo et eo intuitu*, it will be to be determined what is the effect of that subsequent dealing with respect—first, to the shares which qualified him to act as a director, and with respect to which the oath was taken, and with respect to those shares which are not professed to have been transferred for that purpose.

"In some points of view in which I have taken the liberty of representing this case, as to the thirty-nine shares, this case does not appear to me to have been very fully examined into, and I am more anxious to state it in this way, because, in a subsequent case of Millie *v.* Millie, it seems to be admitted by the Court of Session, that though the father may ostensibly part with his property, and allow it to stand as the property of the son; yet if, in truth, after he has so parted with that property, he really and substantially remains the owner of it, *that* will not defeat the legitim; and I am the more anxious so to state it, because, comparing the note in the case of Millie *v.* Millie, containing the opinion of the Judges, to which

Mor. p. 8215. June 7, 1803. Affirmed on Appeal. Infra.

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we look on these occasions, I observe that the case of Agnew *v.* Agnew, to which I have before alluded, is a case not only extremely doubted of by every high authority in the Court of Session, but I presume there must be some inaccuracy; for in the case of Hog *v.* Lashley, the opinion seems to represent that if Agnew *v.* Agnew has established a doctrine which would govern the decision in this case, the very same authority, if these notes in Millie *v.* Millie are accurate, is made to state *that* to be a decision, with which the decision in Millie *v.* Millie would not agree; but whether Agnew *v.* Agnew is to stand or not, for the reasons I before mentioned, as it seems to me, it cannot govern, when, upon the examination of facts, there is nothing to prove a limited interest (the conveyance being absolute) but the mere circumstance of receiving dividends after that conveyance had been made.

" Having said this much as to the 39 shares, the 81 shares fall certainly under a different consideration, and the 81 shares cannot be affected by considerations suggested by any of the documents to which I have been alluding, unless as far as they can be barely affected in reason upon the question, whether they are mine or yours, without attending to the circumstances of dealing that took place as to the 39 shares, and that took place as to the 81 shares before the 81 shares were transferred, in the manner I am about to mention, by Hog the father to Hog the son.

" It appears clearly by the instrument, of the date to which I have before referred, that these shares were intended by the father to have been laid out in land; that Mr. Hog intended that these 81 shares should have been vested by trustees in the purchase of lands, to be subject to the same species of entail as the estate at Newliston.

" Between the date of that deed and his death, and so shortly before his death that no dividends were received between the date of the transfer and the death, he transferred them apparently absolutely to Mr. Hog the son. This must have been either to give them to Mr. Hog the son absolutely, or to give them to Mr. Hog the son under a confidence and an understanding that he, Hog the son, was to make the same disposition of them as the trustees were empowered and required to make of them, by the deed of disposition he had before made.

" I believe there can be no doubt that if the father intended absolutely to give them to the son whilst he was in *liege poustie*, that it was competent for him to do so; and if there were nothing more in this case than the mere circumstance of his having made the gift to the son so soon after having before intended to give so large a portion of his property to that very son, to be laid out in land to be settled upon that very son, however much your Lordships might suspect about that transaction, suspicion will not do as a ground of judgment, as it was competent for the father to alter his purpose,

and by that act he sufficiently proved that he had altered his purpose, that that which he had a power to give away he had effectually given away, and you would have had nothing for the mind to address itself to, in order to consider whether this was really and absolutely a gift or not, excepting this circumstance, that in times past, after that stock which had stood in the name of the son, had in truth been dealt with by the father as his own, though it did stand in the name of the son; and you would have to put the question to yourselves, whether you could safely in judgment conjecture that he meant to deal with the 81 shares as he had dealt with the other shares: that is, that though he placed them in the name of his son, he meant to deal with them as if they were his own property; and I humbly submit my opinion to your Lordships, that whatever you might suspect out of a court of justice, it would be much too strong to suspect in a court of justice, that *that* which was upon the face of it a gift, was not intended to be a gift, before you had seen any other transaction consequent upon it which authorized you to say so; that because the 39 shares were so dealt with, if they were so dealt with, therefore the 81 ought to be so dealt with, and therefore they ought to be considered as the father's. But, to explain myself upon this subject, and I wish to do this in the presence of my noble and learned friend who sits near me, I do conceive that in this country, after the transfer of these 81 shares, if they had been shares in the Bank of England, if a day had come in which the son had received a dividend for the father's use, that one single receipt of the dividend for the father's use would have been evidence, upon which you would have been authorized to say, that the receipts of the dividend for the father's use proved that the property which produced those dividends was the father's property, and that, in that case, it would not have been competent, and I wish to mark the circumstance again, that, in that case, it would not have been competent for the son to have said, provided he put it upon no other evidence than that this was a payment during the father's life, that it would not have been competent for the son to have said, because this was a payment in the lifetime of the father, therefore the interest of the father was, in the intendment of the law, in such circumstances, to be taken to be only an interest during the father's life. I conceive, on the contrary, that the receipt, in such circumstances, would prove property in the principal, because it proved property in the interest, and that limited sort of interest would not have been contended for on behalf of the son; but it happened in this case that the father died before any interest was received at all; and it will be for your Lordships to say, attending to the circumstances and transactions between these parties previously, whether there was anything more than a transfer by the father to the son; and if there was nothing more, in this case, it would be too bold to say so; but there is something more in this case, which has reference to this law of legitim, a consideration so important in the view I take of the case, I

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should have to lament that it had not been considered with reference to the fact I am now about to mention, considered in every place in which it could be fully and truly considered, what would be the effect of such a circumstance upon the law of legitim? and it seems to me to come distinctly to this, that if the deed of disposition which had devoted this property to be laid out, after the death of Mr. Hog the father, in the purchase of lands at Newliston could not take effect, the question then is, whether the transactions I am about to state would do so, provided the evidence proves that such was the nature of that transaction,—whether he who, by this disposition, had intended that these funds should be laid out in lands, could, by saying, I will not permit my disposition to take effect, but I will give this money in my lifetime to my son, nevertheless with an understanding, and with a confidence that he shall lay out the property in the purchase of lands at Newliston as I have directed money to be laid out in that neighbourhood, and whether a gift, connected with such an understanding and confidence as that, would or not be sufficient to deprive the younger children of their title under the legitim? If it would, it appears to me that the case of Millie *v.* Millie, which was afterwards decided, will deserve a great deal of consideration, because that is neither more nor less than saying this, that in one shape, after an ostensible transfer, you may hold over your property pretty nearly an absolute dominion; and that, in the other case, after such transfer, you cannot hold dominion over it but subject to the claim of legitim. In the case of Millie *v.* Millie, it was held, that the parent going out of partnership, but still leaving the firm to go on in name of the son; it being understood between the father and the son that the father had an interest, that this did not disappoint the legitim. It does appear to me, upon the principles of the case of Millie *v.* Millie, to deserve a great deal of consideration indeed, whether, if the gift of 81 shares to the son, was a gift for the purpose of being laid out in land, to be settled after his death by the son, to whom he had given it in his lifetime; and, if that was the purpose, whether it shows he meant to retain power over it? If it was his purpose to lay it out, after his death, it does not exclude the idea that he was to enjoy it, as he had heretofore enjoyed it, during his life; the question then will be, whether, by a gift under such an understanding as that, the legitim may be defeated?

"The proof of the facts upon this point of the case depends upon the evidence of Mr. Ramsay, the banker of old Mr. Hog; who seems to have been much in the knowledge of the intentions of this gentleman; and who, in that deposition, gives his account of this circumstance, with which I think it would be quite impossible, in this country, that any court of justice could be satisfied. I will read to your Lordships both parts of Mr. Ramsay's deposition. In the first instance, when he is examined as to the interrogatory which relates to this matter, 'Do you know that, shortly before his death, Mr.

'Roger Hog executed a transfer in favour of Mr. Thomas Hog, and what 'shares did he transfer? Do you know the terms upon which this 'transfer was made, or the cause of making it? he depones, that a 'short time before Mr. Hog's death he told the deponent that he 'had received some anonymous letters of a very scurrilous nature, 'and which he supposed to have come from the pursuer.' The pursuer is the party who is claiming in right of his wife this legitim; and there can be no doubt that if he had received a letter of a scurrilous nature, he was fully at liberty to disappoint that claim of legitim; but whatever was his purpose, he could not execute that purpose except in the way in which the law would allow him to execute that purpose.

"Then Mr. Ramsay goes on to say, that he had made a transfer of his bank stock to his son, in order to prevent the possibility of its being attached, as mentioned in those letters. That the deponent believes there were no conditions annexed to the above mentioned transfer, and that Mr. Hog took it for granted that his son would fulfil what he knew to be his intentions of vesting the money in land, and entailing it in the same manner with the rest of the estate. Depones, 'That Mr. Hog told the deponent that he had 'executed a trust disposition, vesting his funds in Lord Henderland, 'Mr. Robert Mackintosh, and the deponent, to be laid out in the 'purchase of land, which was to be entailed in the same manner as 'the rest of his estate, but that afterwards he had acquired more 'confidence in his son, and had contented himself with taking the pro-'mise of his son that he would fulfil his intentions, and would con-'sult with Lord Henderland, Mr. Mackintosh, and the deponent.' And then when Mr. Ramsay comes to the close of his other deposition, he states himself thus: 'That some time before Mr. Hog's death, 'he transferred a considerable number of shares of stock of the Bank 'of Scotland to his son, which the deponent believed to have become 'from that hour, as much, and to all intents and purposes, the sole 'property of the son as if the father had given him the value in cash 'out of his pocket; that he also believes this transfer, or the 'giving away in his own lifetime, and with his own hand, was in 'consequence of the anonymous letters, and of some new opinions 'which prevailed at that time with regard to moveable property; 'and the deponent believes the only reason Mr. Hog had for keep-'ing any shares in his own name, was merely to act as a director of 'the bank, in the event of his again being requested to accept of that 'office. Depones, That he has reason to think that if Mr. Hog 'had conceived that his English funds would not have been carried 'by the settlement he had made, he would also have transferred 'them to his son.'

Now, your Lordships will permit me to say, that I think it would have been utterly impossible for the Court of Chancery in this country, which is obliged either to content itself with certain depositions, or

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to take the means of making further inquiry, to have been contented with such depositions as these. I take them to be (I hope I am not mistaken in that circumstance,) I take them to be the depositions of the same gentleman; but I confess, those depositions surprised me very much, for, when Mr. Ramsay, in his last deposition, says, that he believes those to have become, to all intents and purposes, the sole property of the son, as if the father had given him cash out of his pocket; and that his only reason for keeping any shares in his own name was, to act as a director of the bank, in the event of his being again requested to accept of that office, and that, he has reason to think, that if Mr. Hog had conceived that his English funds would not have been carried by the settlement he had made, he would also have transferred them to his son, one cannot help referring back to the former deposition of Mr. Ramsay; and, with respect to the former deposition of Mr. Ramsay, your Lordships will recollect the English funds and the Scotch funds were given by the same settlement for the same purposes. Mr. Ramsay has expressly stated, that whatever might have been the opinion of the deceased, with respect to the pursuer's letter, and though that allegation had led him to place these funds in the name of his son, yet, he says, that Mr. Hog, the father, himself told him, that he contented himself with taking the promise of his son that he, the son, would fulfil his intention. That is not all; but the promise which he takes, is a promise, not only generally, that he would fulfil his intention; but it represents the son as promising his father that he would consult with others, as to fulfilling this intention; and with whom would he consult? Why, that he would consult with Lord Henderland, Mr. Mackintosh, and Mr. Ramsay himself.

"According to Mr. Ramsay's deposition, Mr. Hog had executed a trust-disposition, vesting the funds in Lord Henderland, Mr. Robert Mackintosh, and the deponent, to be laid out in the purchase of lands to be entailed, together with those English funds, which English funds, Mr. Hog had been advised could not be touched by the law of Scotland as to this legitim, as was contended for many years, till otherwise decided in this House. And then the question is, Whether the fair inference from the whole be not this—that this was a gift by the father to the son, not in the sense, that it was to become the property of the son absolutely, but a gift by the father to the son, for the purpose of the son laying out this property in the purchase of lands to be entailed in the same manner as his estate at Newliston; placing the property in lands in which it would be safe from the claim of legitim—as safe from the claim of legitim as those English funds were supposed to be. I state this, because it appears to me a question which deserves a great deal of consideration in this place, and would, I think, require great consideration elsewhere, whether it be possible that a father in Scotland, the moment before he dies, can hand over to his son apparently that pro-

perty, for the very purpose to which he could not devote it by a trust-disposition, either made whilst he was in *liege poustie* or made after he was not in *liege poustie*.

"My humble opinion upon that is, that it would be absolute destruction to the law of Scotland, as far as it relates to this claim of legitim, if that could be done. The course, therefore, I should propose to take, would be, to come to some declaration of the principle which we conceive to be the principle of law that should govern in this case of legitim, and then call upon the Court of Session to apply the facts, as they are proved before them, or make such examination as may be necessary, in order to enable them to ascertain the fund to which the principle is to be applied, and to apply that principle of law so to be laid down in your Lordships' judgment; and it does seem to me it should not fall short of this,—that the receipts of the profits during the life of the person is evidence of the ownership of that person in the subject matter which produces the profits. And it seems proper for me to state, that without prejudice to what ought to be the determination in such a case as Agnew *v.* Agnew, if such a case should ever arise again, your Lordships will, at least, go the length with me, (guarding it against any such case as that to which I have referred,) in stating, that if any number of shares were placed in the name of the son under an understanding that the son was to execute the purposes contained in that trust-deed, such a disposition as that would not be sufficient to defeat a claim of legitim. When it is said, in this case, that *that* was no more than a declaration of the father—it will be open to the Court of Session to consider what weight is due to this observation, where the question is, whether the father and the son are together acting a part, in order to defeat third persons, and Whether the declaration of each must not be evidence? I think it must be evidence as between third persons, and a father and son, who are both to be considered as an adverse party to those third persons. When I say, I think it would, I am only stating the opinion which I at this moment entertain, but it will be open to those who have to reconsider this case, to say whether I am right or wrong in the opinion I at this moment entertain upon this point. In this way of considering the question, your Lordships will, in point of fact, have settled some material points, both on the law of evidence and the law of legitim, as far as the law of legitim is affected by a transaction of this kind, being a material part of the law of Scotland.

"The other questions which arise here are of minor consideration. The other questions.

The first is, with respect to the respondent, Thomas Hog, being a creditor for the value of the estate which his father had purchased in this country, which became his by the appointment of his mother, which was afterwards sold, and the father received the money. It is very difficult to suppose that, in the course of so many years of the lives of both, spent after that transaction took place, that somehow or other it was not very well understood between them, that the father

Father debtor to the son for his mother's English estate.

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was not a debtor to the son for that sum of money; but we must not take that for granted, the transaction clearly constituted the son a creditor to the father; and unless it can be shown, far beyond what appears from mere conjecture or supposition, that *that* relation of creditor and debtor was made to cease and discontinue by some satisfaction or some agreement, we must act upon the fact as it originally was; for we are not authorized to say, that the nature of it was changed, unless that change be distinctly proved. It appears to me, therefore, that this appeal is groundless, so far as it quarrels with the Court of Session in considering Thomas Hog as a creditor for that sum of money.

Sums received by Mrs. Lashley and the annuity to be deducted, but only from the legitim.

"I am also of opinion, that regard must be had to the sums which were received as provisions for Mrs. Lashley, and the annuity paid to her; and it will be observed by your Lordships, that the effect of the decree is that they shall be brought into collation. This decree or interlocutor, supposes that more than one younger child might be entitled to the legitim; but if there be a well grounded apprehension, (as, from what has passed in this House, there may be, I say no more than that there may be), that only one child will be entitled to legitim, if your Lordships gather the words of the interlocutor aright, that collation is to be only with respect to the legitim. Whoever will finally receive the legitim will receive the benefit of that collation; if more than one receives the benefit of legitim, more than one will receive the benefit of the collation; if only one turns out finally to be entitled to the legitim, the collation cannot prejudice the estate of that child, because it would then be collation only to itself, for, as I read the books, the collation is between those who are entitled to the legitim.

Also of the debt of £700.

"There is another circumstance of a debt of £700, that, as a debt, will fall to be so dealt with. There will be no difficulty then, in providing for the differences in reference to these smaller considerations I have been now stating to your Lordships.

Expenses of confirmation and probate.

"I would beg your Lordships' particular attention to that part of the case (though it is not a matter of very considerable value) which relates to the claim with reference to the expenses of confirmation in Scotland and of the probate in England. I can have no manner of doubt in the world, that if a person die in England, as may happen in some parts of England to be the case, when a wife or a child have a claim against his property, as wife or child, or where a part of his property may be undisposed of by his will, and when the wife, therefore, as wife, will take a share in the undisposed part—and the child take a share in the undisposed part—yet, inasmuch as no part of this property can be touched, but either wrongfully or rightfully, and as it ought not to be touched wrongfully, but ought to be administered rightfully, as no part of his property can be touched, if he has made a will, but by his executor—or if he has made no will, but by his administrator, the expense of clothing

the individual who is to act as such with the character which is to enable him to act as such, is an expense for the benefit of the whole estate, however distributed; and, therefore, as it seems to me, *that* expense should fall proportionally on the whole estate; whether that which respects confirmation in Scotland falls under the same principle I perhaps am not so competent to judge, but I should conceive that it would. The question then is, Whether, in stating my own opinion to your Lordships, I should state that these interlocutors are right or wrong, and I do say that the inclination of my opinion as to both is, that they are wrong.

"Then this circumstance occurs, and your Lordships must deal with it, regard being had to the circumstance that the cross appeal in this cause, which raises two points, the one not necessary to be raised by the cross appeal, as I had occasion to observe yesterday, in the question about domicile, because that was necessarily included in the discussion and argument upon the other appeal; and the other, in respect of the expenses of the probate and confirmation which is raised by the cross appeal: but, unless your Lordships choose to relax your general rule, this matter is not properly before you. How far you may choose to relax your rule, is a matter of infinitely greater consequence to the House than a question of such a value as this can be to the parties now litigating at your Lordships' bar,—the difficulty will be where you are to stop; this, however, must be left to the sound judicial discretion of your Lordships; and, when the question comes to be put, Whether the interlocutor should be reversed? as to so much of that subject, your Lordships' opinion will be to be taken on this point.

"Your Lordships will observe, that this leads me finally to say, that I have nothing to propose but the change of interlocutor respecting the domicile of Mr. Hog. It will be for your Lordships to decide, whether it is fit to adopt that proposition, that there should be a change of the interlocutor, as far as it is founded upon the notion, that the marriage in England must decide the rights of the wife when she is transplanted to Scotland, and her husband's domicile is established there. But with respect to the domicile of the husband in the year 1760, it does not appear to me that there is any occasion to alter the interlocutor as to that part.

"With respect to the price of the Kingston estate—with respect to the sum of £1000 upon bond—with respect to the £700 —and with respect to the provisions which have been made for Mrs. Lashley, your Lordships will see, that if the interlocutors are to be altered at all, it will be an alteration rather in terms than in substance, an alteration which only clearly marks out how the collation is to operate, regard being had to whether it shall finally be one person or more than one who shall be entitled to legitim; and, with respect to the question upon the 39 shares and the 81 shares, that it is fit for your Lordships to declare as matter of law the principles of evidence, and

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the rules which should obtain as to what shall or what shall not be taken to be *inter vivos* a sufficient disposition of the property, to render the property no longer capable of being considered as the moveable property of the testator at the time of his death. Calling upon the Court of Session to act upon that part of the case, upon that declaration, and to determine whether they can or cannot, upon the whole of the case, say that this property was not in the perfect enjoyment of Mr. Hog, and that the purpose of the transfer was not under an understanding between the father and the son, that *that* property should be applied to the purchase of land to be settled by entail in the same way as the estate at Newliston, of course giving their distinct attention, as they have been before called upon to do, to the 39 and the 81 shares.

"I hope your Lordships will allow me to state, that I have thought it better to go through the case at great length, stating my opinion upon the different parts of it, than to draw out the judgment in form, before I knew whether your Lordships concurred with me in the opinion I have humbly stated; if it should be your Lordships' opinion so to do, it will not be difficult then to draw up the terms of such judgment as your Lordships may think proper to give upon the whole of the case. Therefore, for the present, I shall content myself with saying what I have done, expressing, however, a wish that the noble and learned Lord, who has given great attention to this case, will be pleased to say how far he does or does not concur with me, because it will be very satisfactory to my mind, recollecting how long he has been in the knowledge of the law of that part of the island as well as this,—if his Lordship should be of opinion that I have not mistaken the true view of this case; and, on the other hand, most thankfully shall I receive any information that may fall from the noble and learned Lord that may tend to set me right, if in any respect I am mistaken in the principles I have laid down."

LORD ROSSLYN.

"I have the satisfaction entirely and absolutely to concur with the noble Lord who has just sat down.

"I am sorry to observe, that, in the proceedings of the courts below, there have occurred, in my opinion, several mistakes in point of law, particularly in that interlocutor which finds that the circumstance of the marriage being celebrated in England can decide upon the rights of succession that will arise to the wife and children of that marriage according to that law, which by the future events of the life of the party may be the law of the land, to operate upon his property at the time of his death. I think there are many errors that have misled the judgment of the Court upon this point.

"In the first place, in this case there is no express contract; and I have no conception, in point of law, that a lawyer is to entertain a

metaphysical idea of an implied contract, arising from the situation in which the parties place themselves by a civil act. My general idea of law is, that in all cases where parties make an express contract, that excludes all consideration of an implied contract. An idea of an implied contract, in all cases where there is an express contract, is to me a solecism.

" But, supposing there had been no legal contract, and you were to determine upon the situation of the parties upon the mere fact of a marriage celebrated in a given place, they had no occasion to raise an implied contract. A man and a woman are united together; they take their chance of the future fortunes of each other, and particularly with regard to the wife, who can have no domicile separated from the domicile of her husband; she must follow the fortunes of her husband wherever they happen to be placed, and must take her chance at the time when his fortune falls under the disposition of a particular law. Therefore, in the general case, there is no foundation for that; and I am sure my noble and learned friend will see the application of this observation in almost every case where that occurs, that a metaphysical idea of an implied contract is a fallacious idea, substituting an imaginary idea, not applicable to the actual situation and relation of the parties.

" With respect to the claim of the appellant, in right of the mother, to that share of the estate which the law of Scotland gives, under the name, not very properly applied, of *jus relictæ*, I am of opinion, with the noble and learned Lord, that the interlocutor ought to be reversed.

" But upon that being reversed, there comes a matter of great consideration with regard to property,—the claim of legitim to the children. Now I take it that I have never learned, or that I have forgotten the law of Scotland, if I do not know that the father has a full power to dispose of his personal property in any manner he pleases. He may convert it all into land, and by that means the younger children will be defeated of their legitim, but then he must do the act himself. He must himself purchase the land, because the nature of the property that becomes the property, either of the right heir or partly of the younger children, must be judged of at the time of the death of the father. Therefore, according to my idea of the evidence in this case, but I do not mean to say it is not a matter open to inquiry—for I will not presume to know so much as some others may do on this subject—I should say that Mr. Hog's intention to have either his stock in the Scotch bank, or the funds in England, laid out in land after his death, by any stipulated alienation of them from him to his son for that purpose, is totally void in point of law, and can have no effect with regard to the disposition that he might make of it. He might do the act in person—he might give a provision to a child in his lifetime, without any consideration what might be the state of his moveable property at the time of his death, and that, when actually given, could not be

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recalled. He might advance one of his children to a certain situation in life—he might lay out his money expensively on his education—he could not be hindered from it—but he must actually give the money with which this would be done—he must divest himself of an interest in it, and he cannot retain that interest to the moment of his death, consistently with law. Therefore the case of Agnew *v.* Agnew, I think, is totally wrong in law, (I have no scruple to say so), and a bad decision. I should not be so moved by that decision as to send this case back to the Court of Session for reconsideration, but, when I am to pronounce upon a case, where there are a great many papers, and a good deal of evidence which I have not examined with attention, I do not wish to apply the law in this case, but, as far as I know the evidence, and can judge of it, I think it clear that, as between Hog the father and Hog the son, there was a disposition and an understanding to reduce the claim of legitim, with a view to prevent the wife of the appellant from having that claim, which she would otherwise consider herself to be entitled to.

"With regard to the debts contracted by the father, in consequence of the son's paying him the price of the estate he was entitled to by his mother, the son is fairly entitled, as a creditor, to stand upon the moveable estate of the father, and to receive the value of the estate at Kingston, and the bond of £1000, before any distribution of it can take place.

"I think there is a mistake in the interlocutors of the Court of Session, with regard to a trifling sum—the expense of the probate in England and confirmation in Scotland. They are both sums of money laid out, in order to acquire a legal title to that property which is to be distributed. Somebody must lay it out—and it is no matter whether the son or any body else had done it. But I think, my Lords, that the rules of your Lordships' House, in the case of appeals, ought to be strictly adhered to, and this may be still more trifling in the result, because it may happen that the share of that fund to be divided may come to be equal, which I think will very probably be the result of this case. But he certainly has a legal claim on the fund for those expenses."

It was declared by the Lords, &c.

That the contract of marriage between the late Mr. R. Hog and his wife, is not so conceived as to bar a claim to legal provisions; and that Mr. Hog is to be considered as having his domicile in Scotland at the time of his wife's death; and that the pursuer has therefore a claim, in right of her mother, the wife of the said Mr. Roger Hog, who, at the time of her death, had his domicile in Scotland, to a share of the moveable estate of her father at the time of her mother's death, and the

Lords do also declare that such shares of the stock of the Bank of Scotland, standing in the name of the respondent Thomas Hog, at the death of the said Roger Hog, as shall appear to have been transferred to the said Thomas Hog, under any agreement or understanding that he would invest the same in land, after the death of the said Roger Hog, and also such shares, the dividends whereof shall appear, notwithstanding the transfer of the same, to have been, after such transfer, ordinarily received for the account, and applied for the use of the said Roger Hog, ought to be considered as subject to the pursuer's claim of legitim; And it is therefore ordered and adjudged, That all such parts of the interlocutors complained of in the said appeal, as are inconsistent with these declarations, be, and the same are hereby reversed, and, in so far as they are agreeable thereto, the same be and are hereby affirmed: And it is further ordered, that the same be remitted back to the Court of Session in Scotland, to ascertain whether any, and which of the shares in the Bank of Scotland, agreeably to the declaration aforesaid, are subject to the pursuer's claim of legitim, and also to ascertain the interests of the pursuer in her father's estate, at her mother's death and at his death, regard being had to this declaration: And it is further ordered and adjudged, That it is unnecessary to consider so much of the matters complained of in the cross appeal as relates to the domicile of the said Roger Hog, touching which, such declaration hath been made as is herein before contained; and the said appeal also not having been presented in due time, it is further ordered and adjudged that the same be, and is hereby dismissed this House.

For Appellant, (Mrs. Lashley), *Wm. Alexander, John Clerk, Geo. Cranston.*

For Respondent, (Thomas Hog), *Edw. Law, Samuel Romilly, Henry Erskine, John Connell.*

NOTE.—This case is noticed in Mr. Robertson's excellent treatise on Personal Succession. The Lord Chancellor's speech is printed in the Appendix to that volume, but inaccurately. It is here given in a corrected form