APPENDIX.

PART I.

LEGITIM.

1777. *February* 6.

DAVID LAWSON, Baker in Fisherrow, *against* JOHN LAWSON in Connaty.

No. 1.
Legitim, and mother's executry, claimed by a child from the father's friends who had survived the mother's death for twenty years.
See No. 27. p. 8190.

IN 1762, Andrew Lawson, the father of the parties, made a settlement, by which he left his fourth son, John Lawson, the defender, all the effects that should belong to him at the time of his death. Andrew died in 1770, leaving considerable funds. David Lawson had, upon his marriage in 1739, received from his father 200 merks by marriage contract, and for which he granted the following discharge: "I hereby discharge him Andrew Lawson, his heirs, &c. "of the said 200 merks, part thereof, being 500 merks left amongst us (the "children) by our grandfather, and I hereby discharge him, &c. of all bonds "and bills, or sums of money, belonging to me, for ever." As this was the only provision David ever received from his father, and part of which must even be imputed to the legacy of his grandfather, he brought an action against his brother John, as universal intromitter with his father's effects, for payment of his legitim, and for his share of the effects belonging to his mother at her death.

In defence against this action, it was pleaded, that from the settlement made by the father in 1762, it is evident that he understood that all the children had been provided for by the provisions they had received at their respective marriages, and that when the 200 merks were paid to David, there could not be a doubt that they were paid instead of legitim, or any other claim whatever which he could have upon his father, which must all have been renounced in the usual style in the contract. So strong was the presumption of this being the case, that it could not be overcome but by the production of the contract itself, which should be in the hands of David. And besides, with regard to the mother's executry, it is now impossible to ascertain what was the amount of it twenty years ago, when the mother died; and David's having so long delayed making this demand, confirms, that this, with the legitim and all other claims, had been completely renounced by the marriage contract.

No. 1. Answered: As the claims of children for suitable provisions from their parents, are strongly founded in nature and in equity, the renunciation of any of these claims cannot be inferred by implication: Therefore the discharge granted by David to his father for the 200 merks, cannot have that effect. For it has even been found, that provisions to children are not imputed to their legitim, unless so expressed; Nisbet against Nisbet, 18th January 1726, No. 23. p. 8181. The writ founded on makes no mention whatever of legitim, nor from any expression in that discharge can it be presumed, that to discharge the legitim was ever the intention of parties. It solely discharges the marriage contract, which, as it seems to be lost, and is not produced, cannot be presumed to be more than a simple provision, without any renunciation of the legitim. There can be as little doubt with regard to the mother's executry, which was intromitted with by his father; For Lord Stair, B. 1. Tit. 5. § 12. mentions, that a father was even found liable to a son for annual rent of his mother's third of moveables remaining in the father's hands; 4th February 1665, Beg, No. 147. p. 16273. The delay in making this claim is easily accounted for; for it is believed, that no person, who had considerable expectations from his father at his death, would have insisted during his life upon such a claim.

The Court (2d February 1776) pronounced the following interlocutor:—"On report of the Lord Alva, and having advised the informations *hinc inde*, "the Lords repel the defence both with respect to the claim of legitim, and to "a share of the moveables belonging to the pursuer's mother at the time of her "death, and falling to him as one of her executors; remit to the Ordinary to "proceed accordingly, and further to do as he shall see just."

John Lawson, however, having recovered his father and mother's contract of marriage, by which 1000 merks, and the whole conquest to be acquired betwixt them during the marriage, had been provided to them, and to the longest liver of them two, in conjunct fee and liferent, and to the children of the marriage, contended in a petition, that these thousand merks, settled by this contract of marriage, were more than exhausted by the provisions already paid by Andrew, the father of the parties, to his different children upon their respective marriages; that by his surviving his wife, he was fiar of the conquest; that David had actually received a share of that provision; and that it had been established by many decisions, that the father has the power of dividing the conquest among the children, in such proportions as he should judge proper; —therefore David's claim must be effectually barred.

Answered for David: Supposing that all beyond the 1000 merks were to be deemed conquest, yet it could not be disputed that by the contract he was entitled to an equal share of the specific sum of 1000 merks, provided to the children of the marriage. This he contended he had not got, when his share of his grandfather's legacy with interest was deducted from the 200 merks

given him at marriage; so that as in fact he had received no part of the conquest whatever, he was entitled to an equal share of it even by that contract of marriage. If a father had the power of bestowing only a trifle upon one of his children, as an heir of provision, whilst upon others he bestowed an ample patrimony, the greatest injustice and partiality might be introduced, and the purpose of such provisions and marriage-contracts entirely defeated. No. 1.

With regard to the mother's executry, it is laid down by our lawyers, that by accepting of a conventional provision from her husband, she is not to be understood to have renounced the *jus relictæ*, or her legal interest in the moveables; consequently as one of her executors, he is entitled to his proportion at whatever distance of time.

The Lords adhered to their Interlocutor.

Act. *Clerk.* Alt. *Elphinston.*

D. C.

1800. *May* 14.

REBECCA HOG and Others, *against* THOMAS HOG.

No. 2.
The legitim may be disappointed by the gratuitous deeds of the father *inter vivos*.

In the process, No. 29. p. 8193. brought by Rebecca Hog, her husband Mr. Lashley for his interest, and the assignees of Alexander Hog, against their brother Thomas Hog, as their father Roger Hog's general disponee, to account for the legitim, the pursuers, *inter alia*, claimed to have included in Roger Hog's personal succession 120 shares of the stock of the Bank of Scotland, which he had transferred to the defender *inter vivos*, the greater part of it only a few months before his death, and in order to defeat the claim of legitim, which, he had become apprehensive, would be made against his general disponee.

The pursuers contended, That this had been done *in fraudem* of the claim of legitim; Ersk. B. 3. Tit. 9. § 16. and that the stock was held in trust for Roger Hog during his life.

The defender hardly disputed the object of the transference; but maintained, that it was absolute in his favour, and therefore sufficient to exclude the claim; 28th Febrnary 1775, Agnew against Agnew, No. 36. p. 8210.

To ascertain the fact, the defender, and others acquainted with Roger Hog's affairs, were examined as havers; the books of the Bank and of the deceased were inspected; and other written evidence was produced.

The Lord Ordinary found, "That the 120 shares of the stock of the Bank "of Scotland, transferred to and vested in the defender by the late Roger "Hog of Newliston, anterior to the death of the said Roger Hog, are not "subject to the pursuer's claim of legitim."