THE LORDS, therefore, "assoilzied John, James, and Margaret Hendersons from the claims of Elizabeth."——*See* PRESUMPTION. No 28.

Lord Ordinary, *Kennet.* For Elizabeth Henderson, *Maclaurin, Rolland.*
For the other Children, *Hay Campbell, G. Fergusson.* Clerk, *Colquhoun.*

S. *Fol. Dic. v.* 3. *p.* 384. *Fac. Col. No* 59. *p.* 94.

1791. *June* 7. REBECCA HOG *against* TAOMAS HOG.

No 29.
One or more of the children *in familia* having renounced the legitim, their shares fall to those who have not renounced.

THE father of Thomas and Rebecca Hog had six children, three sons, of whom Thomas was the eldest, and two daughters, beside Rebecca. On the younger sons and the daughters he made provisions; and from all of them, except Rebecca, having given the securities in his lifetime, he received discharges, and renunciations of their legitim. Rebecca had offended him by her marriage; and though he intended to make her portion equal to that of her sisters, who had married with his approbation, he did not chuse to advance it to her, or settle it irrevocably during his life; by which means she had not the occasion of renouncing her legitim, as all the rest had done.

On the death of the father, two of the other children being predeceased, it came to be a question between Rebecca, and Thomas his heir, who was also his general disponee, whether she, who alone had not renounced her legitim, and who now repudiated the provision destined for her by her father, was entitled, unquestionably contrary to his intention, to claim a full half of his moveables under that denomination, or only one third of such half, while the shares of the other two surviving children accresced by their renunciation to Thomas, in the room of his father. In an action at the instance of Rebecca, to enforce her claim to the half of the moveables, she

Pleaded, The present question relates to the effect of the renunciation of legitim by a part of the children entitled to it, whether the father is to be considered as having purchased their shares, so as proportionally to increase the *dead's part*, or to give him, as coming into their place by implied assignment, the absolute power of disposal of them; or if the portions of the renouncers, still remaining in the same situation as the rest of the legitim, will fall to the child or children who have not so renounced.

The legitim resembles a right of property. Though a husband, from his power of administration, may waste the goods in communion, in the same way as any other part of his fortune, and so impair or annihilate the subject of the legitim; yet he cannot, by a testamentary deed, or even by a deed *inter vivos*, if calculated for that end, disappoint his children of their shares, which they take, not as in right of succession, but *proprio jure*.

When a father, in giving portions to his children, obtains a renunciation of the legitim, it is plainly nothing but a transaction, by which they receive their shares, or what is held as equivalent, by anticipation, the fund for division as at

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the father's death being thus proportionally diminished. If, therefore, the father's disponee were then entitled to claim the shares of the children who had renounced, the consequence would be, that having been already advanced by the father, they would be doubly paid. For in such a case there could be no room for collation; the law not requiring collation by a disponee.

Nay, were the effect of this renunciation, or of a virtual assignation to the father, of the shares renounced, such as to separate the renouncers proportions from the rest of the legitim, they would still be comprehended among his moveables, and suffer the division belonging to that aggregate fund.

The effect of renunciation of legitim is therefore the same as that of the death of the renouncer; so that if the children renounce, the whole goods in communion become dead's part, or fall also under the *jus relictæ*; and if only some of the children be thus forisfamiliated, the whole legitim must be drawn by such as remain *in familia*. In the same manner, when a wife renounces her *jus relictæ*, this, instead of encreasing solely the powers of the husband, renders the subject of it liable to the legal division between father and children.

Accordingly, in the instructions framed in 1666, for the guidance of the Commissaries in the confirmation of testaments, the *dead's part* is always held as either *a half* or *a third of the free gear*, no idea, it is plain, being entertained of increasing the dead's part by transacting with the children; for then it would hardly have passed unnoticed by those dignitaries of the church, who were both the framers of the instructions, and the very persons to whom the *quot* was payable. It is also clearly there laid down, that in the case of all the children being forisfamiliated, the division should be bipartite; whereas, were the father to stand in their place, it would be rather tripartite, as he would be entitled to two thirds.

All the other authorities of our law equally coincide in establishing the same doctrine; and some, by implication or analogy, as Nisbet *contra* Nisbet, 18th January 1726, No 23. p. 8181.; Kilkerran, Falconer, 22d February 1749, Martin *contra* Agnew, No 8. p. 8167; Fac. Col. 7th January 1762, Jervey *contra* Watt, No 9. p. 8170.: And some of them more directly, as Stair, b. 3. tit. 8. § 46.; Bankton, b. 3. tit. 8. § 15.; Erskine, b. 3. tit. 9. § 23.; Stair, 17th February 1671, M'Gill *contra* Viscount of Oxenford, No 19. p. 8179.; June 1728, Henderson *contra* Henderson, No 24. p. 8187.; 29th July 1768, Sinclair *contra* Sinclair, No 26. p. 8188.

Answered, The legal division of a defunct's moveable estate may be properly denoted by saying, that the wife receives a half, if there be no claim for legitim, and the children a half when the *jus relictæ* is not claimed. When, therefore, a wife relinquishes her *jus relictæ*, or when the whole of the children renounce the legitim, the legal division is necessarily bipartite, the claim of *jus relictæ* in the one case, and of legitim in the other, being extinguished. But if the right of legitim has been renounced by only a part of the children, that claim still subsists, and by consequence produces a tripartite division. Those,

however, who have not renounced, can only have a title to their respective shares; and when these are obtained, they suffer no loss from the disposal of the shares of those who have renounced. No 29.

The case is the same as if a father, for value given by him, were to stipulate with one of his children, that he should apply in a certain manner his portion of the legitim, or that he should allow a nominee of the father's to draw it in his stead; a bargain, to which it is plain neither the relict nor the rest of the children could make any legal objection. It is, besides, obviously equitable, that a father who gives for his child's renunciation a value which is absolutely his own, so that he may employ it in any other way he chuses, should reap the benefit of his purchase, which indeed is also a casual benefit, dependent on the child's surviving.

The idea of a share's being thus twice drawn, as if collation were then excluded, is erroneous; because a disponee, as well as a child, would be bound to collate; and, at any rate, the hardship would be no greater than if the father had exerted his power in another way, by declaring, that notwithstanding the payment of a provision, the child should remain *in familia*.

With respect to the authorities quoted by the claimant, the cases of Nisbet and of Jervey respect the renunciation of the *jus relictæ*, which it is admitted does not convey the right to the husband.

In those of M'Gill, of Sinclair, and of Martin, the natural presumption was, that the father willed the shares of the renouncers to accresce to the rest of the children; and every case of this kind is a *quæstio voluntatis*. The case of Henderson, where a renouncer's share was found to accresce to the children not renouncing, contrary to the father's will, therefore is, and that alone, favourable to the claimant's plea,

The right of children to conquest is extremely similar to the legitim; and the idea, if a just one, of renunciation having the same effect as the death of the renouncer, should apply not less to conquest than to legitim. But in regard to the former, it has been repeatedly found, that a renouncer's share did not accresce to those who had not renounced, but became at the father's disposal; Allardice *contra* Smart, 1720, see Appendix; Sinclair *contra* Sinclair, 1768, No 26. p. 8188.; Dirleton, *voce* Executory.

The Lord Ordinary pronounced an interlocutor, in substance as follows.

"Finds, that when a father takes a discharge and renunciation of the legitim from one of his children, no *jus quæsitum* arises to the other children therefrom, the transaction being *res inter alios acta* as to them; so that the father has absolute power over such discharge and renunciation, and may cancel or burn it when he inclines: Finds, that the same power must be competent to his heir or universal disponee, who has right to it from him; or, without destroying the deed, he may wave the exception which it affords him against the renouncer, and admit him to the legitim, to which the other children have not a title to object, but only to insist for collation, if that has not been dis-

No 29. charged by the express or implied will of the father: Finds, that there is nothing in law or reason to disable the child from assigning, in the father's lifetime, his eventual right to the legitim, either to the father or to any other person; and that if any other person claims upon such assignation, he must collate what the child has received in the father's lifetime; but that if the father's heir or disponee claims upon such assignation, he will not be obliged to collate, because the father can discharge the obligation to collate; and such discharge is implied from his having taken the assignation to himself: Finds, that a discharge and renunciation granted by a child ought to have the same effect as if an express assignation had been granted; the meaning of the parties being clear, and the omission of the assignation being probably owing to its being deemed unnecessary, and to the seeming impropriety of granting an assignation to a man who can never himself use it in his lifetime: Finds, that it has been twice adjudged by this Court, and by the House of Lords, that such discharge and renunciation as to conquest will operate in favour of the father and his heir, and not in favour of the child or children not renouncing: And though it is admitted in one of these two cases, that the contrary would hold as to the legitim, finds, that no solid reason is assigned for making the distinction: On these grounds, finds, that the renunciation of the other children cannot avail the pursuer, but must operate in favour of their father, who obtained it, and his heir, the defender."

Afterwards the Lord Ordinary took the cause to report on memorials, and the Court pronounced the following judgment:

"Finds, that the renunciations of the claim of legitim by the other younger children of the deceased Mr Hog, operated in favour of the pursuer, Mrs Rebecca Hog, and have the same effect as the natural death of the renouncers would have had; and as she is the only younger child who did not renounce, find her entitled to the whole legitim, being one half of the free personal estate belonging to her father at the time of his decease."

The defender reclaimed; but the Court, on advising his petition, with answers, adhered to their interlocutor.

Reporter, *Lord Dreghorn.* Act. *Lord Advocate, Solicitor-General, Wight, J. Clerk.*
Alt. *Dean of Faculty, G. Fergusson, M. Ross.* Clerk, *Sinclair.*

S. *Fol. Dic. v.* 3. *p.* 384. *Fac. Col. No* 186. *p.* 381.

*** There has been much subsequent procedure in this case, of which a full account shall be given in the Appendix.