[Judgment, 6*th April*, 1843.]

MRS MARGARET FISHER, and DANIEL FISHER, her Husband, *Appellants.*

WILLIAM DIXON and Others, *Respondents.*

*Personal Succession.* — *Legitim.* — *Parent.* — Acceptance by a child, after the death of the father, of a provision given by the father in satisfaction of *legitim*, enures to the benefit of the father's general disponee, and not of the other children.

IN 1822, Dixon, the testator in the cause, died, leaving a widow and two sons, John and William, and four daughters, Mrs Mann, Mrs Fisher, Mrs Whitehead, and Miss Lilias Dixon.

The widow accepted the provisions given her by her husband instead of her *jus relictæ.*

The testator had, in the contract of marriage of his daughter, Mrs Whitehead, bound himself to pay her L.2000 within five years, "and that in full satisfaction to the said Janet Dixon and "her intended husband, of her patrimony, and of all that they, "or either of them, can or might ask or demand of the said "William Dixon, her father, or his representatives, through his "decease, in any other manner of way whatever, excepting what "he may hereafter think proper to bestow of his own good will "only."

In April, 1817, the testator executed a general disposition of his whole means and estate in favour of his two sons, under burden of payment of his debts, and such legacies as might be bequeathed by him. By this deed the testator directed his sons, whom he thereby constituted his sole executors, to pay to each of his daughters L.2000, to bear interest from the date of his death,

but not to be payable till two years thereafter; the L.2000 being payable to Mrs Whitehead in terms of her contract of marriage. This disposition contained a declaration that the L.2000 should be enjoyed by the daughters, free from the power of their husbands, in liferent, and their children in fee; and another in these terms: — "And I hereby declare, that the provisions above "mentioned shall be in full to each of my daughters, their "husbands, children, or assignees, of all that they could ask or "claim in or through my decease, legally or conventionally, or "any other manner of way."

In March, 1820, the testator executed another deed, giving an additional sum of L.2000 to each of his daughters on the same terms as the first.

Mrs Fisher refused in the meanwhile to accept the provisions given her by her father, and, with the view of ascertaining whether she should betake herself to these, or to her right to *legitim*, she, in May, 1823, raised an action of multiplepoinding, in the names of her brothers John and William, against herself and the other members of the family; and in 1826, she likewise brought an action of count and reckoning and payment.

The sons accepted of the general disposition in their favour, and entered into possession of the estates left by the testator, which consisted of property, both real and personal, without any collation of the real estate being made by John, who was the testator's heir-at-law.

Subsequently, in 1827, after having carried on the business of their father as an iron master and coal miner, William purchased from John his whole interest in the testator's estate at the price of L.35,000.

Mrs Mann and Miss Dixon agreed to accept the L.4000 given them by their father's settlements, and to receive from the brothers, "in addition to the provisions made by the deed of "settlement," a sum of L.1000.

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In 1830, with the view of confirming the sale by John to William, and relieving John of his liability to pay these sums, after having parted with the estate to William, Mrs Whitehead and Miss Dixon joined the widow in executing a deed, which, after reciting the different provisions made by the testator in their favour, and that they had ratified his said settlement, "of which "provisions we accordingly accepted, and declared ourselves "satisfied therewith," they released and discharged John Dixon "of and from all claims and demands of every description com- "petent to us, or any of us, under the said disposition and "settlement, reserving to us our claims against the said William "Dixon for the said provisions in our favour, which shall in no "way be hurt by the granting of these presents."

In 1831, Mrs Mann and her children executed a deed, whereby, upon the recital that the provision given them by the testator had been paid, and settled upon trust for their behoof, they discharged John and William Dixon, as disponees and executors of the testator, of the provision, and declared, that they accepted it "in full of all claims competent to us, or any of us, of "*legitim*, portion natural, bairns' part of gear, or other claim, "legal or conventional, by, and in consequence of, the decease "of" the testator.

In 1835, Mrs Fisher declared her intention to reject her testamentary provision, and claim her *legitim*.

In 1836, William Dixon lodged in the multiplepoinding, (which up to this time had been in dependence, but had been little proceeded in,) claims in the name of Mrs Whitehead, Mrs Mann, Miss Dixon, and himself, for their respective shares of *legitim*.

In the course of the proceedings which followed upon these claims, William Dixon produced deeds executed by Mrs Mann and Miss Dixon in 1837, which set out, that the deeds executed by Mrs Whitehead and Miss Dixon in 1830, and by Mrs Mann

and her children in 1831, and what occurred previously to the execution of these deeds, was merely the carrying out of an arrangement between them and him as to payment of their *legitim*, in regard to which they retained their right, but accepted him as their debtor, and renounced all claim against their brother John, his co-disponee. Upon this recital the deed confirmed the testator's settlement, so far as it conveyed the granters' shares of the *legitim* fund to the general disponees, and conveyed to William the whole sums claimable by the granters on the death of their father, in name of *legitim*, portion natural, bairns' part of gear, or otherwise.

For the purpose for which the case is reported, however, it may be assumed, as, indeed, was not much disputed at the hearing of the appeal, and as the House appeared to hold, that Mrs Mann, Mrs Whitehead, and Miss Dixon did, after their father's death, accept the provisions given them by his several deeds, as in satisfaction of their claim for *legitim*.

In this state of matters, Mrs Fisher insisted that she alone was entitled to the whole *legitim* fund, 1st, Because John did not propose to collate the heritage, and made no claim; 2d, Because William held a general conveyance to a share of the heritage and moveables, and refused to collate that share; 3d, Because Mrs Whitehead had, by her marriage contract, accepted from the testator a sum in full of her *legitim*; 4th, Because Mrs Mann and Miss Dixon had accepted of the provisions given them by the testator, in full of their *legitim*.

On the other hand, William Dixon insisted that the provisions accepted by Mrs Whitehead, Mrs Mann, and Miss Dixon, in full of their legal provisions, fell to be held as paid out of the *legitim* fund; that in accounting for that fund with Mrs Fisher, he was entitled to deduct the amount of these provisions to the extent to which the share of each of the parties in the *legitim* would amount; or, at all events, that Mrs Fisher was entitled

only to one-fourth part of the *legitim* fund, and that the remaining three-fourths belonged of right to him, two-fourths as in right of Mrs Mann and Miss Dixon, and one-fourth as in his own right.

The Lord Ordinary (*Moncrieff*) ordered cases by the parties, which he reported to the Court. The Court, after hearing counsel, ordered additional cases on the following questions: — "A father having died leaving a disposition and settlement in "favour of a general disponee, burdened with certain provisions "to his other children, declared to be in satisfaction of *legitim*, what "is the effect of a child accepting such voluntary provision after "the father's death? Does it operate to increase the share of "another child who repudiates the settlement, and betakes him-"self to his legal right of *legitim*, or does it operate in favour of "the general disponee?" and ordered the cases to be laid before the other Judges for their opinion.

On the 16th of June, 1840, the Court, in conformity with the opinion of a majority (of five to four) of the consulted Judges, which will be found in 2 *D. B.* and *M.* 1121, pronounced the following interlocutor: — "In respect of these opinions, "find, with reference to the question put to the consulted "Judges, that the acceptance by a younger child after the "father's death, of a voluntary provision made by the father "in favour of such child, as in satisfaction of the claim of "*legitim*, operates in favour of the general disponee, and not so "as to increase the share of another child who repudiates the "settlement, and betakes himself to his legal right of *legitim*."

The appeal was taken against this interlocutor.

*Mr Pemberton Leigh, and Mr Sandford, for the appellants.* — The judgment of the Court below is rested upon a distinction taken between acceptance of provisions in the life of the father,

and such acceptance after his death, and is in principle based on the assumption, that the general disponee of the father is debtor to the children for their shares of the *legitim*. The children are not creditors but proprietors. During the life of the father they are members of the partnership of marriage; and though he has the right of administration, their right of property is not the less existent, as is shewn by the effect of his becoming ill of the disease of which he dies, which is to deprive him of the right of administration; and even before that event happens, the father cannot, by testament or revocable deed, dispose of the *legitim*, *Ersk.* III. 9, 16. The general disponee of the father, therefore, is merely a trustee for division of the *legitim* among the children entitled to it. He cannot derive any title of property to himself from the father, as the father has no power to give it, or affect the fund in any way.

The right of the children is not as individuals, but as a class, and is to the whole as an *unum quod*. If any of the class have discharged or renounced their right to a share in the division among the class, by any agreement with the father, the right of such child is extinguished, and the fund remains, unaffected by any such agreement, for division among those who have retained their right. Martin *v.* Agnew, *Mor.* 8168.

This is admitted in regard to any agreement with the father in his lifetime, but is denied if the agreement be after the father's death. There is no trace in the institutional writers, however, of any such distinction. The decision in Hog *v.* Lashley, *Mor.* 8193, is opposed to any such notion; and the decision in M'Gill *v.* Oxenfoord, *Mor.* 8179, is a direct authority, that acceptance after the death of the father, of provisions given by him, does not make the share of *legitim* of the child so accepting, go to the father's general disponee; for the acceptance in that case was not in the lifetime of the father, as supposed by the Court below, but after his death, as was shewn to the Court by documents pro-

duced after its judgment had been pronounced, and as indeed appears from a proper reading of *Lord Stair's* report of the case. Henderson *v.* Henderson, *Mor.* 8199, in some degree counte-nances the claim of the respondent, but the report of that case is very imperfect, and has never been recognized as law; on the contrary, it was expressly overruled in the case of Andrews *v.* Sawers, 14 *S.* and *D.* 593. As to Robertson *v.* M'Vean, decided 16th January, 1813, but not reported, it is no authority for the present case, as the question there raised and decided was, whether an only younger child being residuary legatee, had a right to *legitim*, or whether the whole went to the eldest child, and heir-at-law.

*Mr Solicitor-General and Mr Gordon for the respondents.* — Both the *legitim* and the *jus relictæ* remain part of the father's estate after his death, and may, in certain circumstances, be effectually conveyed away by him, Collier *v.* Collier, 11 *S.* and *D.* 912. No doubt, the widow and children may follow their shares of the estate into the hands of the disponee, but in the case of children, if there be only one, and he accept provisions from the father in discharge of the *legitim*, the whole fund would go to the disponee, as would also be the case if there were more than one child, and they all accepted provisions. But it is said, if one out of several children do not accept the provisions, the case is different, and this child takes the whole *legitim* against the disponee. Though this may be true where the acceptance is in the life of the father, it is not so where the acceptance is after his death. On the father's death the child's right vests; and it is competent for him to bind it in any way he chooses, in favour of the disponee or otherwise. The law, under the custom of the cities of London and York, is the same in regard to this matter as the law of Scotland; and in Morris *v.* Burrows, 2 *Atk.* 627, this very point was decided. The Scotch authorities are to

the same effect. In Henderson *v.* Henderson, *Mor.* 8189, two out of three daughters had accepted provisions from their father: one of them after the father's death renounced her *legitim*, and it was held, that "by her ratification and renunciation, she "had communicated her share of the *legitim* to her brother," who was the father's general disponee. In Robertson *v.* M'Vean, 16th January, 1813, an unreported case, *vide post.* p. 87, it was held that the whole *legitim* fund did not go to one of two children who repudiated a provision by the father — the other accepting the provision. No doubt, in Andrews *v.* Sawer, 2d March, 1836, it was held, that acceptance by a widow of her *jus relictæ*, after the death of the husband, would create a bipartite division of the husband's estate, and so increase the *legitim* fund; but that case, if authority as to the effect of the acceptance of *legitim*, is directly opposed in principle to Henderson *v.* Henderson, and Robertson *v.* M'Vean. In Hogg *v.* Lashley, the point now in question never was decided. The final judgment there merely was, that the assignees of Alexander Hogg had discharged his right to *legitim*, but the effect of this, as between Mrs Lashley and Thomas Hogg, the executor, never was raised, so far as appears, and the decision of that question could alone be authority in the present case. In regard to M'Gill *v.* Oxenfoord, it is not clear, by any means, that the acceptance by or for Mrs M'Gill was not made in the life of her father, but it is evident from the terms of the report of the case by *Lord Stair*, then on the bench, that the Court dealt with the case as if the acceptance *had* been in the life of the father; and *Lord Stair*, in his Institute, I. 5. 6. in the editions of 1681 and 1693, corrected by himself, so treats the case, by quoting it as authority for the position, that a father granting bond "delivered in *liege poustie*" to a child in satisfaction of its *legitim*, has the effect of giving the child's share of the *legitim* to the other children.

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LORD COTTENHAM. — My Lords, it will, I think, be well to consider first, how this question would stand independently of authority; and secondly, how far the cases which have occurred operate upon it.

The case put to the consulted Judges, very properly represents the facts. The provisions for the other children are declared to be burdens upon the general disponee, and such provisions are declared to be in satisfaction of *legitim.*

Upon the father's death, the title of the children to *legitim* was complete, each to a proportion of the whole, according to the number of children; and so was the title of the disponee to the general estate complete, but subject to the choice tendered to the other children, of accepting the provision declared for them. If they elected to receive their legitim, the general disponee would retain the whole of the property included in the settlement, subject to payment of the *legitim.* If the children should elect to take under the settlement, their provisions would necessarily come out of the property comprised in the settlement; and the question is, whether in that case the share of the *legitim* which each of such children is compelled to give up, is to be added to the shares of children who elect to take the *legitim*, or to go to the general disponee in lieu of it, in substitution for the provision paid to each child?

Independently of authority, I cannot conceive that this would be doubtful. It has been said, that this is not a *questio voluntatis*, and in one sense that is true, because the father had no power to deprive any child of its share of *legitim;* but consistently with that right in the child, the father might well render to each child a price for its share, and provide for the application of the share given up. If the father had provided that upon any child's accepting the provision tendered by the settlement, that child's share of *legitim* should be given up to the general disponee, the child could not have claimed the provision without performing

the condition which it clearly had the power to do, and if such had been the right of the parties, it could not be contended that they might be defeated by the form in which the transaction was conducted. The father has not so expressed himself in terms, but there can be no doubt of his intention.

He has declared, that the provision for the daughter shall be in full of all that she could ask or claim, in or through his decease in any manner of way. Out of what fund, and from whom had she any right to ask any thing? Out of the funds in the hands of the disponee, and from him. If he be liable to pay the share of *legitim* to which that child would be entitled, and also the provision for that child under the settlement, how can the latter be in full of the former? Is it not clear, that the disponce was not intended to pay both, and yet, according to the contest of the appellant, if any child elected to take its share of *legitim*, that amount alone would be payable, but if it elected to take the provision, then both would be payable.

The situation of the child and the disponee has been aptly assimilated to the position of a creditor and debtor, and acceptance of the provision to satisfaction of the debt. It may also be compared to an offer to the child to sell its share of *legitim*. The father makes the offer, and if the child consents, compels the disponee to pay the purchase money, that is, the provision. Can it be supposed that the father intended, that if the purchase should be effected, the thing purchased, that is, the child's share of *legitim*, should not go to the person whom he compels to pay the purchase-money, but to others who are strangers to the transaction, and whose interests are not in any manner affected by it? The election is tendered to the child, who, by accepting the provision, takes it out of the fund in the hands of the disponee, and it seems to be as consistent with good sense, as it is conformable to the rule of equity, in this country at least, that the property rejected in the election should go to the disappointed

party, that is, to the party from whom the property elected is taken.

The justice of this view of the case is so apparent, that I should much regret to find the Scotch authorities at variance with it. But before I advert to those, I must make some few observations upon what appears to have created the greatest difficulty below, and that is, the supposed similarity between the case of a provision for a child, and a renunciation of the title to *legitim* in the lifetime of the father, and the case of such a renunciation after his death; and, indeed, a clear understanding of this part of the question will, as it appears to me, dispose of by far the greater part of the cases relied upon by the appellant.

It appears to me, that the rule which has been applied to renunciation by children in the lifetime of the father, has no application to renunciation after his death. In the first case, it is held that the effect is the same as if the child had died at the time of the renunciation, and therefore, of course, as if at the time of the father's death the child were not in existence, from which it necessarily follows that the whole *legitim* would be divisible among the other children. Now, apply this principle to a renunciation after the father's death. Upon that event happening, and before the renunciation, the full title to the child's share of *legitim* vested in such child, and consequently was his property at the time of the renunciation, whereas, in the case of the renunciation in the father's lifetime, the child had no such title. Up to the time of the father's death, the right of the children to *legitim*, though spoken of as existing for some purposes, is at most future and subsequent, depending not only upon the amount, if any, of the property, but upon the number of children entitled to partake of it at the father's death. But upon that event happening, all contingency ceases, and the right becomes present and vested; so that if the child die before it receives its share, the representatives are entitled to it, and it is

quite immaterial whether the shares be set apart and allotted, or whether the interest of the child dying be a right to a certain share of an unascertained fund.

So, if the claim of the child to *legitim* be considered as a debt, it can only be so considered after the father's death; for, till that event, nothing is due; and if the renunciation of *legitim*, in consideration of another provision, be considered as a purchase during the lifetime of the father, it is merely a dealing with his property, which can only affect the children's title to *legitim* as it increases or diminishes the fund out of which, to the amount of one-third, or one-half, the *legitim* is to come. But, after the father's death, the disponee who pays the price must be considered as the purchaser. If the rule of law were to add the share of *legitim* so rejected to the shares of the other children, it is obvious that the disponee, and the child accepting the provision, might prevent its operation, and defeat the title of the other children, by the child taking its share of *legitim*, and then exchanging it with the disponee for the provision; and this, though not in form, is the substance of an election to take the provision. The disponee has the property subject to the claim of *legitim*; the other children, in the first instance at least, can only claim their shares according to the number of children; one child, for whom provision is made, remains, and instead of claiming the remaining share of *legitim* from the disponee, demands the provision. Is not that a transaction between such child and the disponee, with which the other children have no concern?

It appears to me, that, upon all analogy and principle, the rejected share of *legitim* belongs to the disponee, and that in every essential particular, the case of a renunciation after the father's death, differs from a renunciation in his lifetime. If this be correct, all the arguments in favour of the appellant fail, and nearly all his authorities fail him. It is necessary, however, to examine them.

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The case of Allardice *v.* Smart, in *Robertson's Reports*, page 199, though not directly applicable as to its facts, is important, as shewing, that an election has been considered as having the same effect as it has in England, that is, as giving the rejected property to the person from whom the accepted property is derived.

Passing over those cases in which the renunciation was in the lifetime of the father, the first case in which the question, as to the effect of a renunciation after the father's death, occurred, is that of Robertson *v.* M'Vean, in the year 1813, not reported, but stated at length in the appendix to the respondent's case, and in that case, the title of the disponee to the rejected share of *legitim* was established by the unanimous opinion of the Court.

That the same right was established in Henderson *v.* Henderson, in 1828, reported in *Morrison*, 8199, is admitted. But this principle, it is said, is inconsistent with the subsequent case of Andrews *v.* Sawers, in 1836. That may be so, but I do not think it necessary to express any opinion upon that case beyond this, that assuming it to be inconsistent with the two former cases, I do not hesitate to prefer the principle of those cases.

It appears to me, therefore, that the interlocutor appealed from is supported by the greater authority as well as by the clearest principle.

The claim of William Dixon to a share of *legitim*, as such, was, I think, properly disposed of.

The interest which has arisen in this case, from the very equal division of opinion amongst the Judges of the Court of Session, has appeared to me to call for a distinct declaration of opinion upon the general merits of the case; and as the opinion which I have formed is consistent with the title of the disponee arising from the peculiar form of the renunciation, or rather, of the assignment of the share of *legitim* to the disponee by Mrs Fisher, it is unnecessary to consider what would have been the effect of

that transaction had the title of the disponee upon the general question been considered as invalid.

It appears to me, therefore, that the interlocutors appealed from ought to be affirmed.

*Lord Brougham.* — My Lords, I so entirely agree with the view which has been taken of this case by my noble and learned friend, that it is quite unnecessary for me to occupy your Lordships with any argument in addition to the very luminous and distinct account which he has given of the reasons upon which it appears that this judgment undoubtedly ought to be affirmed. A difficulty was said to have arisen upon one part of the case, by the conflict between the present decision and the decision in Andrews *v.* Sawers. I have no doubt whatever, that the present decision of the Court below is correct.

*Lord Campbell.* — I will trouble your Lordships with a very few observations, the subject having been so fully and ably discussed, and in my opinion so satisfactorily, by my noble and learned friend, who has moved the judgment in this case. If the law upon the subject had been clearly settled by the authority of uniform decisions in Scotland, I should not at all have considered myself at liberty to form an opinion, either of the justice or expediency of the rule. But as it is, at all events, considered a doubtful question, I think I am at liberty to look at what is the justice and what is the expediency of the rule.

Now it seems to me, that justice and expediency require, that a distinction should be drawn between a child accepting a provision in the lifetime of the father, and accepting a provision after the death of the father. If the child accepts a provision in the lifetime of the father, that provision is made out of the general funds of the father, and thereby the fund is lessened, out of which the *legitim* is to be paid to the children upon the father's

death. It is therefore, under these circumstances, perfectly fair, that the children who are not provided for in the father's lifetime, should take the whole of the third of the property, which he leaves at his death. But where the provision is not made till after the death of the father, then it is not made from the general fund. It is made from the dead's part — from that third over which the father had a control; and thereby the fund out of which the *legitim* comes is not in any degree diminished. It comes from the dead's part, which goes to the disponee. Then if the provision comes from that, it seems to me a perfectly fair arrangement, that the *legitim*, which is the substitute, should go to that fund from which the provision is taken. During the life of the father the children have not a vested right in any particular amount of their father's personal property. While in *liege poustie*, he may dispose of the whole, but at his death they have a vested interest in an *aliquot* part of one-third or one-half of his personal property. The rights of the children are at the moment of his death defined and ascertained. There is obviously, upon principle, the broadest distinction between a provision that is made and accepted in the lifetime of the father, and that which is accepted after his death.

Then with regard to expediency, I addressed a question to the very learned counsel, who argued this case at the bar, — if upon the death of a father leaving three children, one of them demands and receives his *legitim*, and gives a discharge to the executor, and afterwards another child accepts the provision that is made for him by the father's will in place of *legitim*, how is the settlement to be made with the third, and does a new demand rise up to the first, notwithstanding his release to the executor? The learned counsel said, that the only answer which he could give, was, that he supposed that there would be no distribution of *legitim*, until the whole estate was wound up, and it was seen whether the different children would accept or

would repudiate the provision intended for them. But where there are infants, or married women, or children abroad, it may be a long while before it can be ascertained, whether a child shall accept the provision made or insist upon the *legitim*; and in the meantime, the children who are of age, who are under no disability, and are upon the spot, will be entitled to claim their *legitim*, that is, their proportionate part of one-third of the personal estate of the father. It seems to me, therefore, that both expediency and justice require the distinction to be made, which a majority of the Judges, certainly a very small majority of the Judges in Scotland, have supported.

Now, with respect to authority, I cannot find that any of the institutional writers have laid down, that if a provision be made by the will of the father, and accepted after the father's death, the children who take the *legitim* shall derive any benefit from the renunciation of the others; I do not find that laid down by *Erskine* or by *Stair*, or any of the institutional writers referred to. All that they lay down is perfectly satisfied by the doctrine which I think is indisputable, and which was established in Hog *v.* Lashley, that if a provision is made and accepted in the lifetime of the father, the consequence is the same as if the child had died, and the remaining children are entitled to share between them the whole third of the property of the father.

Then, with regard to the decisions, the case of M'Gill was most strongly relied upon. Looking to the facts as they appear upon the report, they certainly do not at all lead to the inference that it was considered that the provision had been accepted after the death of the father. That must be regarded as a very uncertain and unsatisfactory decision.

Now we have Henderson's case, which is allowed to be expressly in point in favour of the opinion of the majority of the Judges; but that is supposed to be overruled in Andrews *v.* Sawers. I entirely agree with what has been said by my noble

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and learned friends who have preceded me, with regard to Andrews *v.* Sawers. Although that case was respecting the *jus relictæ*, and we are not bound to give any opinion expressly, whether it was well decided or ill decided, I have no difficulty in saying, that if it is supposed to be inconsistent with Henderson's case, I abide by Henderson's case, and that Henderson's case, as far as the *legitim* is concerned, must now be considered as the law of Scotland.

I have not been influenced by English decisions upon the subject, in the slightest degree. But it is a great satisfaction to know, that the law of Scotland and the law of England, upon this subject, are precisely the same. Because, upon investigating the matter, it turns out, that it is clearly settled by the law of England, with regard to orphanage by the custom of the city of London, that if a provision is made for any of the chileren in the father's lifetime, exactly as in Hog *v.* Lashley, the children not provided for, after the death of the father, take the whole of the children's third. But if the provision be by the will of the father, and accepted after his death, then a division takes place as if that child had died after the death of the father, exactly according to the law of Scotland, as it is now settled by the majority of the Judges, and as it is now declared by this House. I therefore entirely concur in the motion of my noble and learned friend, that these interlocutors should be affirmed.

*Lord Brougham.* — My Lords, I did not enter into the two cases to which my noble and learned friend has very justly referred, because I considered that what fell from us in the course of the argument, and what had been stated by my noble and learned friend who moved the judgment, entirely superseded the necessity for it. But I entirely agree with my noble and learned friend who spoke last, that Henderson's case, if in conflict with Sawers' case, must be taken to be, *quoad legitim*, the law of the land. If we were called upon to decide upon the very

point which occurred in Sawers' case which was not *legitim*, but *jus relictæ*, it would be another question. At the same time, I have no hesitation in saying, that I feel very great difficulty in going along with Sawers' case, even as to the question of *jus relictæ*. As far as the two cases are cognate, as far as the same principle applies to both, (which it appears to me very difficult to refuse assent to, and to say you can draw a line as to the one which shall exclude the other, as far as it goes,) I adhere to Henderson's case, considering that to be the law of Scotland, and if that case be in conflict with the other, perhaps strictly speaking it is not — in terms clearly it is not — the one being *jus relictæ*, and the other being *legitim* — but if the two cases were in conflict, I certainly would, with my noble and learned friend, abide by Henderson's case.

There are peculiar circumstances in this case, which I think should prevent the rule as to the costs from being applied. If so, it must be taken to be owing to the very peculiar circumstances of the case.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

SPOTTISWOODE and ROBERTSON — GRAHAM, MONCRIEFF, and WEMYSS, Agents.