

[The following is the case referred to at page 70.]

JAMES ROBERTSON, son of GEORGE ROBERTSON deceased, — *Appellant*.

ELIZABETH ROBERTSON, otherwise M'VEAN, — *Respondent*.

GEORGE ROBERTSON, the father of the parties, had, by a first marriage, three sons, Andrew, James, and Thomas, and, by a second marriage, a son and daughter, George and Elizabeth. In 1801, he executed a trust-deed and settlement, whereby he disposed to trustees, (his son James being one of them,) his whole effects, upon trusts which were expressed in these terms: — “Declaring hereby, that these presents are granted by me in
 “ trust, for use and behoof of Thomas Robertson, my second son, George Robertson, my
 “ youngest son, and Elizabeth Robertson, my daughter, equally and proportionally, (and
 “ failing any of the said George and Elizabeth Robertsons by death, before marriage or
 “ majority, the share of the deceasing party to fall and accresce to the survivor of the
 “ said George and Elizabeth, and failing of both of them by death, before marriage or
 “ majority, their share to fall to my two eldest sons equally, and to the survivor of them,)
 “ which deed of trust above written, and subjects thereby conveyed, I hereby burden
 “ with the payment of the sum of L.100 sterling to the said James Robertson, my eldest
 “ son, and that within three months from the time of my decease, with interest thereafter
 “ during the not-payment; and which sum of L.100 sterling, with the estate in Jamaica,
 “ to which I succeeded in right of James Robertson, deceased, my brother, and which I
 “ have conveyed over to the said James Robertson, my son, and with the farther sum of
 “ L.600 pound sterling, contained in an heritable bond, granted to me by John Cranston
 “ therein designed, in Eckford, portioner of Smailholm, of date the 8th day of June, 1797,
 “ to which the said James Robertson, my son, will succeed as my heir-at-law, (the said
 “ heritable bond, and sums therein contained, not being conveyed to my said trustee in
 “ the general conveyance above written,) I consider as the said James Robertson's share
 “ of my means and effects; and I farther burden the said trust-deed, and subjects thereby
 “ conveyed, with the payment of L.40 sterling to the said George and Elizabeth Robert-
 “ sons, equally, upon their respectively arriving at majority or marriage, with interest
 “ from my decease; which L.40 was money left by the late Agnes Mather, my wife,
 “ their mother, and which I consider as their property, and also with the payment of all
 “ my lawful debts, death-bed and funeral charges; declaring the above provisions in
 “ favour of my children, to be in full contentation and satisfaction to them of all executry,
 “ legitim, portion-natural, bairns' part of gear, or others whatsoever, they or any of them
 “ can ask, claim, or demand of me, by and through my decease.”

In 1805, George Robertson, the father, died, leaving only his son James, and his daughter Elizabeth, surviving him, his second wife having also predeceased him.

In these circumstances, James brought an action of count and reckoning against the trustees of the settlement, and his sister Elizabeth, now Mrs M'Vean, in which, repudiating the settlement, he claimed the whole *legitim* fund.

In support of his claim James insisted that his father's moveable estate was subject to a bipartite division of *legitim* and dead's part. That as Mrs M'Vean claimed under the

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settlement, she, by the terms of that deed, renounced her right to *legitim*, and, by necessary consequence, the effect of that renunciation was to leave the *legitim* fund undiminished. That he, as the only other child, was entitled to the whole *legitim* fund, agreeably to the authority of *Hog v. Hog*, 7th June, 1791. That he was so entitled without the necessity of collating the heritage, as collation only took place where there was another claimant on the *legitim* than the party required to collate, whereas here there was none other.

Mrs M'Vean answered, that if James pleaded her renunciation, he could not challenge fulfilment of the testamentary provision, which was the very condition with which the renunciation was qualified. But moreover, on principle, immediately on the death of the father, consideration of the *legitim*, as a gross fund, was at an end. The share of each child then vested *ipso facto* in him, and was descendible to his executors. The child might enforce or abandon the claim to his share. If he abandoned, that, without more—without a conveyance—would not give the right abandoned to the other children; all that it could do would be to leave the fund of the claim undisposed of, and as such, to go to the general disponent, or executor. In the present case, the obligation to renounce the legal claim being attached as a condition to the acceptance of the testamentary provision, the renunciation took effect only from the time of the acceptance, which was after the father's death; and as she was the father's general disponent, by the predecease of Thomas and George, she was entitled, as such, to the share of *legitim*, which, as a child, she would have taken, but for her acceptance of the testamentary provision. So that in any way, James could only be entitled to his own share of the *legitim*, or a fourth of their father's moveables, and that only upon condition of collating the heritage.

James also claimed the whole of the deads' part, as having been virtually renounced by Mrs M'Vean; but as the Court did not decide this branch of the case finally, it is not necessary to notice the arguments in support of this claim.

The Court, on the 16th January, 1813, pronounced the following interlocutor:—
 “ Upon the report of Lord Balgray, and having advised the informations for the parties,
 “ the Lords repel the claim of James Robertson to the entire fund of *legitim*; as also
 “ repel, in *hoc statu*, his claim to any share or portion of the said fund; but reserve to
 “ him, if he shall see cause, to offer collation of the heritable estate, and other provisions
 “ received from his father, and to be heard before the Lord Ordinary on any claim he may
 “ have to one moiety of the fund of *legitim*, under provision of his collating as aforesaid :
 “ Find, that on the death of George Robertson, junior, the share of his father's means
 “ and effects, appointed for him by his father's trust-deed and settlement, did accrue and
 “ devolve to his sister, Elizabeth Robertson, and decern in the preference in the process
 “ of multiplepounding accordingly: But with respect to the share of the said means and
 “ effects, appointed by the said settlement for the deceased Thomas Robertson, remit to
 “ the Lord Ordinary to hear parties farther on their respective claims to the same, and to
 “ do therein, and in the remaining points in the cause, as he shall see just.”