settled since the case of *Brander* v. *Brander*, 4 Ves. 800, where Lord Loughborough laid down the rule, though evidently feeling that it rested on not very solid grounds. This decision was followed by Lord Eldon in *Paris* v. *Paris*, 10 Ves. 189, and by Lord Erskine in *Witts* v. *Steere*, 13 Ves. 368. And the rule in Scotland is the same, as was settled by this House upon an appeal in *Irving* v. *Houston*, 4 Paton Ap. 521. Indeed, in *Paris* v. *Paris*, Lord Eldon refers to the Scotch case as having been settled after great inquiry as to analogous cases in England. But that Scotch case was the case of a liferenter, and does not, in my opinion, govern the case now before the House, where the person entitled is not a liferenter but an absolute fiar. It is true, that during his minority, which is the period now in question, the income is given not to him, but to trustees for his behoof. But this makes no difference in principle. The gift was evidently made to the trustees instead of to George himself, only on account of his personal incapacity by reason of his minority. There was no intention to alter the character or quality of his interest in the fund. He was no more a liferenter during his minority than he was after he had attained his age of 21 years. After attaining that age he became entitled in his own right. Before that age others were entitled, as trustees for him. If there had been no minority he would at once have been fiar, and so entitled to the bonuses as well as to the ordinary profits. The minority makes no difference, except that the persons entitled are the trustees? but they are entitled with all the same incidents as would have attached to George himself if he had been of age. Therefore I think both appeals must be dismissed, and dismissed with costs.

Sir R. Bethell.—There are cross appeals, my Lord.

LORD CHANCELLOR.—I propose to dismiss them with costs. If the parties like that they should be dismissed without costs, as they are cross appeals, that will save the necessity of taxation.

Sir R. Bethell.—I think, probably, the simplest way would be to dismiss them both without costs.

Lord Advocate.—I think it would.

LORD CHANCELLOR.—Very well. I do not think I should be justified in making the fund liable.

Sir R. Bethell.—No, my Lord, we do not ask it. The parties ought to bear their own costs.

Interlocutors in both appeals affirmed, and both appeals dismissed.

Appellant's Agents.—G. and G. Dunlop, W.S.—*Respondent's Agents*, J. W. and J. Mackenzie.

JULY 18, 1856.

ROBERT HUTCHISON and Others, *Appellants*, *v.* JAMES SKELTON and Others, *Respondents.*

Legacy—Provisions to Children—Vesting—Fee and Liferent—Trust—Personal Bar—Discharge—*A father, subsequent to the death of his daughter M., executed a trust settlement, directing his trustees to set apart for each of his daughters, (including M.,) and their children respectively, in fee, the sum of £1500, and declaring that such sums as had been or might be paid by him to any of them, and were vouched by receipt, or entered to their debit in his books, should be held in* pro tanto *of provision. Previous to the date of his settlement, the truster had disponed to M. heritable subjects valued at £1000, and that sum he entered to her debit in his books, as "to account of patrimony." On the truster's death:*

HELD (reversing judgment), *That this £1000 was to be deducted from the provision to M.'s children, as the will obviously intended, that equal legacies should be given to all the daughters.*[1]

The late John Hutchison, on 16th December 1840, executed a trust disposition and settlement, by which he conveyed to his wife and his sons, as trustees, his whole property, heritable and moveable. The trust purposes were—*1st.* For payment of debts. *2d.* That the trustees should "secure to Mrs. Elizabeth Morrison, my spouse, in liferent, for her liferent use only, the dwelling house of Cairngall, with the garden;" and also deliver over to her, as her own absolute property, the whole household furniture, &c., with a free liferent annuity of £150, by equal portions, at Whitsunday and Martinmas, beginning the first half year's payment at the first of these terms which shall happen six months after my death, for the half year succeeding, and so to continue during her life. "*Tertio*, That they shall set apart and secure to each of my daughters, Mary, Elizabeth, Katharine, Ann and Jean Hutchison in liferent, and their children respectively in fee,

[1] See previous report 15 D. 570; 25 Sc. Jur. 340. S. C. 2 Macq. Ap. 492; 28 Sc. Jur. 670.

the sum of £1500 sterling, to bear interest from the first Whitsunday or Martinmas six months after my decease, but always with and under this special condition, viz., that as these provisions are intended for the particular or personal benefit of my daughters and their children, so the same are to be nowise subject to the *jus mariti* of their husbands, or to the debts or deeds of any or either of them, or the diligence of their creditors; and the receipts of my daughters themselves, and of their children according to their several rights of liferent and fee, shall be sufficient exoneration to my trustees, without the necessity of any consent or acquittance by their several husbands. And *lastly*, That they shall pay and divide the free remainder and residue of my estate, real and personal, hereby disponed, amongst my sons, the said Robert, James, Alexander, William, George and John Hutchison, equally between them, share and share alike; it being understood, and hereby specially provided and declared, that whatever sum or sums have already been paid, or may in my lifetime hereafter be paid, to any or either of my said children, whether sons or daughters, and vouched by receipt or other written document, or entered to their debit in my ledger or other account book, shall be held and accounted (without reckoning interest thereon) as so much of the provision falling to such child or children under this deed of settlement; and declaring further, that the said provisions both to wife and children shall be in full satisfaction to them respectively of every provision, legal or conventional, that they could ask or demand by and through my decease any manner of way."

The truster died in March 1843. He was predeceased by his daughter Mary, wife of George Arbuthnot, who died in 1837, leaving five children.

In October 1823, the truster had executed a disposition, by which, on occasion of her marriage with Mr. Arbuthnot, he conveyed to his daughter Mary, and her heirs and assignees, a house and grounds in Peterhead, which he had purchased for £800, (to which he added a piece of garden ground,) and on which house he afterwards expended some money in improvements. Of same date with the disposition, Mrs. Hutchison granted an acknowledgment to her father, by which she declared that the conveyance had been made to her "in consideration of the value of the sum of £1000 to account, or in part of patrimony." The truster also made, in his own hand writing, an entry in a book titled, "Account of money advanced my children at different times as patrimony, as per their receipts," under an account titled, "Mary Hutchison, my eldest daughter," in the following terms:—"1823, Oct. 29. To her receipt for house and ground as described in the receipt, value to account of patrimony, £1000."

The present was an action of multiplepoinding and exoneration at the instance of Hutchison's Trustees, the competing claimants being Robert Hutchison and others, the sons of the truster, and the children of Mary Hutchison.

The truster's sons claimed the residue of the estate after payment to each of the daughters, or their representatives, of £1500, under deduction from Mary Hutchison's share, of £1000 paid to her on her marriage. And they pleaded, that, at any rate, three of her children who had granted discharges to the trustees on payment of £100 each, and Sibilla Arbuthnot, who had for two years accepted of interest on £100 as the amount of their provisions, were thereby barred from insisting for further payment.

On the other hand, Mrs. Hutchison's four surviving children, and the trustees of the late Mrs. Elizabeth Arbuthnot or Anderson, her fifth child, claimed payment of £300 each in full of their provisions,—those who had granted discharges and accepted of interest, maintaining that, having done so in ignorance of their legal rights, the same formed no bar to their claim.

The Court of Session held that the payment of £1000 was not to be deducted from Mary Hutchison's share.

The pursuers appealed against the judgment of the Court of Session on the following grounds:—

By the sound construction of the settlement, the children and grandchild of Mrs. Mary Hutchison or Arbuthnot are only entitled to claim a balance of £500, inasmuch as it was the intention of the testator, that the conveyance of the house and grounds to his daughter in 1823, on the occasion of her marriage, should be held equivalent to a payment of £1000 of the legacy of £1500 bequeathed to his daughter and her children.

Sinclair v. *Sinclair*, 15 D. 212; Bankt. Inst. i. 6, 5; *Robertson* v. *Macintosh*, M. 9619; *Innes* v. *Jameson*, Mor. 11,464; *Burnet* v. *Maitland*, Mor. 11,467; *Smith* v. *The Common Agent of Auchenblane*, 3 D. 1109; *Grant* v. *Anderson*, 3 D. 89; *Trimmer* v. *Bayne*, 7 Ves. 508; *Carver* v. *Bowles*, 2 R. & My. 301; *Monck* v. *Monck*, 1 B. & Beatt. 298; *Ewan* v. *Watt*, 6 S. 1125.

The respondents supported the judgment on the following grounds:—1. According to the sound construction of the deed of settlement, the special declaration, that any sum advanced to any child or children in the testator's lifetime should be held and accounted as so much of the provision falling to that child, had reference exclusively to the provision of liferent settled upon the testator's children, and not to the separate and independent provision of the fee of the sum so liferented, which was secured in favour of the testator's grandchildren. 2. There are therefore no grounds for imputing the advance or payment of £1000 made to the mother of the respondents

in the lifetime of the testator, in extinction or satisfaction of the fee of £1500, which was specially secured to the respondents by the deed of settlement.

Solicitor-General (Bethell), and *Rolt* Q.C., for the appellant.—This is a question of construction, and comes simply to this:—When a provision was made to Mary in liferent, and her children in fee, was that a provision to Mary? In England it is held, that a provision to a child and her children is a provision to that child, and therefore the one may be deducted from the other. It is not common sense to say, that you can deduct £1000 from the liferent of £1500; you can only deduct it from the capital sum of £1500. There can be no doubt of the intention of the testator, that the sum of £1000 was meant to be deducted from the capital of £1500, for he seems to have treated all his children equally; and if the Court below was right, Mary would receive nearly double the provision of the others. The intention of the testator is everything.—*Sinclair* v. *Sinclair*, 15 D. 212. It is not enough to say, that the provisions in the two cases were different, and conferred different kinds of benefit.—*Booker* v. *Allan*, 2 R. & My. 270; *Kirk* v. *Eddowes*, 3 Hare, 509; *Wharton* v. *Lord Durham*, 5 Sim. 297; 3 Cl. & F. 146; *Dixon* v. *Fisher*, 6 W. S. 431.

Sir F. Kelly Q.C., and *Monro*, for respondent.—The provision of a fee and the provision of a liferent are totally distinct legacies, and the one cannot be imputed as part payment of the other. This appears clearly from *Dixon* v. *Fisher*, 6 W. S. 431. If the testator had intended the £1000 given to Mary to be deducted from the provision to the children, he would have expressly stated this, as was done in reference to Jane, another of the daughters.

LORD CHANCELLOR CRANWORTH.—I have no hesitation in at once moving your Lordships, in this case, to come to a decision different from that at which the Court in Scotland has arrived. This case appears to me, I confess, with all deference to the learned Judges of the Court below, to be a case scarcely admitting of any reasonable doubt. It turns entirely upon the construction of a particular instrument. It has been likened, at great length, in the printed argument, to cases with which I think it has little or nothing in common. In the first place, we were pressed with the case decided in this House, of *Dixon* v. *Fisher*, in which it was held, and held upon very intelligible principles, that where a widow or a daughter, or any person claiming anything against a will, such as the payment of legitim, and also claiming to take something by virtue of the disposition of the will, is put to an election—if that which is given by the will or trust disposition is a liferent only, and, after the death, the fee is given to the children—if the election is made to take against that instrument—to take for instance the legitim, or to take under the will, it does not affect the interest of those who take after her, if she has chosen to take under the instrument in question—upon very intelligible principles it has been so settled, and it is unnecessary to discuss the grounds upon which that determination was come to.

Then, during the argument, the case was likened, and so it is in the printed papers before me, to cases of ademption of legacies. I cannot say that I think that those cases bear much analogy to the present case. They somewhat resemble it, but still they do not at all afford an authority on which a Court of justice could act. Those cases proceed upon this ground—that if a testator makes a will, and gives that which is in the nature of a portion to his daughter, say £5000 to his daughter, for her separate use; or he gives it simply to the daughter, and afterwards, in his lifetime, the daughter marries, and he gives to that daughter £1000, even though he does not give that to her as he had given it by the will *simpliciter*, but settles it upon herself for her life, and afterwards it is to go to her children, still that must be intended to be taken in satisfaction of what has been given by the will. That affords no analogy to the present case, because the Courts, in this country at least, to which those authorities refer, have not considered that the circumstance of a limited interest, such as an interest for life being given to the daughter, and, after the death of the daughter, an absolute interest being given to the children of that daughter, makes any substantial difference; but they have treated that as a provision for the daughter. I do not think, however, that those cases bear any close analogy to the present, which turns entirely upon the construction of this will.

Now, the will is in these terms:—After directing the payment of debts, and making certain other provisions, "*Tertio*, the trustees are to set apart and secure to each of my daughters," there being five of them, "in liferent, and their children respectively, in fee, the sum of £1500 sterling, to bear interest," and so on. Then it says no *jus mariti* is to accrue; "and, lastly, that they shall pay and divide the free remainder and residue of my estate, real and personal, hereby disponed, amongst my sons, equally between them, share and share alike." Then comes this clause—"it being understood, and hereby specially provided and declared, that whatever sum or sums have already been paid, or may in lifetime hereafter be paid to any or either of my said children, whether sons or daughters, and vouched by receipt or other written document, or entered to their debit in my ledger or other account book, shall be held and accounted (without reckoning interest thereon) as so much of the provision falling to such child or children under this deed of settlement."

Now, in the case of Mary Hutchison, afterwards Mary Arbuthnot, who died in the testator's

lifetime, two or three years before the date of his will, he had advanced upon her marriage £1000. Is that to be taken in deduction of the £1500, or is it not? The Court below decided that it was not, because they said that that is to be deducted from her life interest and not from the interest of the children. She was herself dead, so that in her case there would be no deduction. But the same principle would apply to the other daughters; they are not dead, at least we have not heard of their death, and I presume they are still living.

What is contended for by the respondents is, that the sum which the testator directs to be deducted from the provision falling to the children under the will, shall be deducted from the life interest, because that which would otherwise be deducted, if not from the life interest, would have to be deducted, not from the provision for the child, but from the provision for the child of the child. Now, in the first place, it is perfectly obvious, that the intention of this will was to give equal legacies to all the daughters, and equal shares of the residue to all the sons. But the intention of giving equal legacies to the daughters would be totally defeated by the construction which has been adopted by the Court below, because, if there had been any daughter who had had £1500 advanced in her lifetime, the consequence would be, that eventually that daughter's family would take £3000, whereas the daughter who had had nothing advanced to her would take only £1500. It is very improbable that the testator should have contemplated such a state of things as that arising.

But further, how is the gross sum which has been advanced in the lifetime to be apportioned and set apart against the life interest of the legacy given by the will? Supposing a sum of £1500 to be advanced in the lifetime, the testator dies, the interest that had accrued due up to the death of the testator is expressed not to be taken into account. Then, take interest at any rate you please,—5 per cent.,—is that to go on, and the daughter to remain unprovided for for 20 years, till the interest for that number of years shall amount to £1500, and then to be let into the enjoyment of the whole? The whole arrangement is so preposterous and inconvenient, that, if there be any possible construction that will not militate against the language used by the testator, I think it is the duty of the Court to arrive at such a construction. Now, is there any such possible construction? I think that which is suggested by the learned counsel for the appellants is a perfectly rational construction. The testator calls it the "provision falling to such child or children." If a man by his will gives £1500 for his child, to have the benefit of it during her life, and afterwards to go to her children, she being a married woman with a family, is not that legitimately described as "provision falling to children"? It appears to me clear that it is so. The same expression, "portions for children," has been so construed in England; and I can see no difficulty whatsoever in adopting the same construction upon the language used in this instrument.

Then it is contended, that the codicil raises a difficulty here, because by the codicil in respect of one daughter, namely, Mrs. Hutchison, who had married first a gentleman of the name of Mackay, and afterwards a gentleman of the name of Hutchison, the testator makes a provision that what he has advanced or agreed to advance to her, shall be taken as a portion of the money that is given by the settlement. Then it is said *expressio unius est exclusio alterius.* But the codicil, when looked at, has clearly no such object. The object of that codicil, I think, was to exclude the notion that the £1000, for which he had given a bond, and which he had not paid for, did not come within the description of sums already paid or advanced in his lifetime. It was a memorandum that he would advance it at a future time.

Mrs. Hutchison, or those claiming in right of her share, might well have argued upon the construction of this will, and, I think, perhaps successfully argued, if he had not made such a codicil—you must construe this strictly, this is not a sum of money which has been paid or advanced to me in my lifetime, and consequently the provision for deduction does not apply. It is not necessary to argue, whether that could not have been successfully contended; certainly it might have been very plausibly contended, and therefore it was a prudent thing for the testator to exclude all doubt upon that subject, by making the codicil which he made.

Upon the whole, although one is anxious to hear the matter fully out, in deference to the opinions of the learned Judges of the Court below, I cannot say that I feel any reasonable doubt upon the subject. Therefore, I think that, they having come to a wrong conclusion, I must move your Lordships that the interlocutors be reversed.

Solicitor-General.—I would suggest that the order should be drawn up in this form:—"Reverse the interlocutors appealed against; direct expenses to be repaid; repel the pleas and claim of the respondents to the whole sum of £1500; find expenses in the Court below due to appellants; and find that the residuary legatees are entitled to have the previous advance of £1000 made by the testator to his daughter Mary in her lifetime, deducted from the provision of £1500 settled on the children of Mary." The Court below gave costs against us, and we have these to pay. That ought to be altered.

LORD CHANCELLOR.—That is, the property paid the costs?

Solicitor-General.—The daughters received interest upon the sums now found due to them for

a period of seven or eight years, and after seven or eight years they now come forward and raise this litigation.

LORD CHANCELLOR.—I think there should be no costs.

Interlocutor reversed with a declaration, and cause remitted.

Appellants' Agents, Jollie, Strong, and Henry, W.S.—*Respondents' Agents*, J. B. Douglas, W.S.

JULY 29, 1856.

WILLIAM DIXON and WILLIAM JOHNSTON, *Appellants*, *v.* GEORGE HINTON BOVILL (Trustee for Messrs. Balls), *Respondent.*

Obligation—Writ *in re Mercatoriâ*—Act 1696, c. 25—Iron Scrip—Assignation—Retention—Stamp—*D. a trader granted the following document to S. and Son, in London:—"Glasgow, 10th July 1849.—I will deliver 1000 tons No. 1 pig iron free on board here when required, after the 10th day of September next, to the party lodging this document with me. (B. 151.)" (Signed) "For* WILLIAM DIXON, JOHN CAMPBELL." *S. and Son sold to B. and Co., and received the price. S. and Son became insolvent after the period for delivery of the iron had elapsed, but before it actually was delivered, and their bills in payment of the price were dishonoured.*

HELD (affirming judgment), *That though the document was invalid, yet D., the original seller, had no claim of retention against the holder after the period specified for the delivery in the document had elapsed, because by a new engagement he had accepted B. and Co. as the party at whose order the iron would be delivered.*

Iron scrip is not, like a bill of exchange, a negotiable instrument.[1]

The defenders appealed, pleading, that, 1. The original vendor of a subject was not bound to deliver it to a sub-vendee where the price had not been paid by the original vendee. 2. The document being blank in the name of the party to whom it was originally granted, was null, in virtue of the Statute 1696, c. 25. 3. Even if the document were valid in favour of the party to whom it was originally granted, it was not a negotiable document, and any right which might be held to be constituted under it could not pass to a third party by mere delivery, but required to be transferred by a conveyance in his favour. 4. The original vendee not having paid the price to the appellant, but having merely granted a bill for it, the appellant was entitled to retain the subject on the original vendee becoming insolvent, notwithstanding that the bill which had been granted for the price was not then due. Ross's Leading Cases in Commercial Law, ii. 658, 591, 648, and 662; *Leslie* v. *Robertson*, M. 1397, *et seq.*; *Brand* v. *Anderson*, M. 1679; Ross's Leading Cases in Commercial Law, ii. 646.

The respondents maintained, that, 1. The cause having been remitted by the Court of Session to be tried by a jury, and having been withdrawn from the jury, and submitted for the decision of the Court, the interlocutors pronounced by the Court of Session cannot be made the subject of appeal to your Lordships' Most Honourable House. 2. The undertaking granted by the appellant being by its terms transmissible from hand to hand, so as to entitle the holder to delivery of the iron mentioned free from all claims at the instance of Dixon against the parties to whom he originally delivered it, the respondents, as the holders of the scrip for value, were entitled, on lodging the same, to demand and receive delivery of the iron from Mr. Dixon. 3. The undertaking having been, in point of fact, granted by Dixon and received by Smith and Son, on the distinct understanding that the right to demand delivery of the iron should pass to any person to whom the undertaking might be given, the appellant was barred from objecting to make delivery, and must be held to have undertaken, that delivery of the iron should be given to the party who lodged the undertaking with him, irrespective of his (Mr. Dixon's) claims against Smith and Son; and the respondents, as representing Balls and Son, who lodged the undertaking with Dixon, were therefore entitled to enforce delivery from him. 4. By the letter of 4th September 1849 Dixon entered into a new engagement with Balls and Son personally to ship the iron on their lodging the undertaking, and they having sent the undertaking, Dixon was bound to deliver the iron under such new engagement. 5. In any view, Balls and Son having intimated their right to the scrip, and lodged it with the appellant, and demanded delivery—before the date of payment of any debt due to him by Smith and Son, or before any claim of retention was competent to him against Smith and Son in respect of their insolvency—the

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[1] See previous report 13 D. 1029; 26 Sc. Jur. 284. S. C. 3 Macq. Ap. 1; 28 Sc. Jur. 684.

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