might result either to buildings erected upon the surface, or to the surface itself, devoted to other purposes, by subsidence, I think it is impossible to deny effect to that clause; and I cannot see how effect can be given to that clause without rejecting the pleas of the respondent.

I see that it is said in the Lord Ordinary's judgment that it would be absurd (I think that is the expression) to suppose that it could have been in the contemplation of the parties that there was to be an obligation to rebuild, and an obligation to maintain houses—the feu being taken for the purpose of building—if it was to be in the power of the mineral owner to do that which would destroy the buildings. He says that there may have been some other injuries ("destroy" is the word used there) for which the mineral owner would not be liable, and against which he has protected himself. But his Lordship does not illustrate this, and I do not think that a greater or smaller amount of injury to the buildings would affect the principle of the case.

The ground upon which the majority of the Court below proceeded was a very broad one, namely, that the workings were not proper workings, and that they could not be proper workings, because they produced the result that is complained of. I venture to think that that is a mode of reasoning in a circle. If the fact that they produced the injury is enough to determine the character of the workings as to whether they are proper workings or not, there is no effect given to this clause at all, and there is no occasion for going further into any examination of the contract. But I think that those words—"proper working," have reference, in the first place, mainly to the mineral owner. I think they are inserted principally for his sake, as between him and his tenant. But, also, I can conceive that there may be some very irregular proceedings which would be unnecessary for taking out the coal, and which would go further than merely taking out the coal, and cause injury of another kind, for which there would be no excuse under a reservation of the right to get the coal. But I do not see that there is any allegation here that the modern mode of working by stoop and room has not been pursued with all propriety by these tenants as far as the mode of working is concerned.

It is said, further, that it is impossible to suppose that the feuar would have taken the feu if the landlord or the mineral owner was to have the power to do what he purposes doing here. Now, we do not know all the circumstances under which the feu was granted. We do not know what was in the contemplation of Mr Porteous. Mr Porteous was probably not a good engineer, and he may have been under the belief that no working at that depth would affect the surface above; or, he may have been of opinion that it would not be carried to an extent which would affect the surface. At all events, he did not protect himself; but, on the contrary, the landlord protected himself against any consequences resulting from the working of the whole of the coal. If Mr Porteous was under any misapprehension of that kind, or, if he thought that the risk was so small that it was worth his while, for a feu-duty of £5 a-year, to have a house there until some unfortunate result should come at some distant period of time, I can easily comprehend it. He soon got rid of the matter, and then came his successor. Mr Porteous only had it for a short space of time. At all events, we cannot go into this question. We cannot tell the motives which influenced the parties—they had their own views of their interests, and they bargained freely.

I cannot concur in the view of one learned Judge in the Court below, that because the superior has protected himself against the claim for damages for working, therefore it is the more necessary to grant an interdict against his doing so. It does not appear to me that that is the right view of the case. I think the very stipulation of not being liable for damages contemplates the power of working so as to occasion injury, otherwise there was no use in making such a stipulation. Upon the whole, although I see that there is a strong ground for holding in a case where the stipulation is not so clear as it is here, that the feu being made for the purpose of building, with an obligation to maintain buildings upon the property feued, the working must be consistent with that purpose. I do not see in a case like this, where the stipulation is express, that it is possible to get over it. I may say as to the obligation to rebuild, which seems to have been in the view of both parties, that I am not disposed to express any opinion upon the point. I am not quite prepared to say that the obligation to rebuild in a contract of this kind could be enforceable. That is not a question which it is necessary for us to decide, and I give no opinion upon it.

I therefore concur in the judgment.

Ordered—That the appellants be assoilzied from the conclusions of the action, with expenses in the Court of Session and the Sheriff-court; and that the expenses ordered to be paid by the Court below be repaid to them.

Counsel for the Appellants—Lord Advocate and Sir George Jessell and Mr Trayner. Agents—Messrs Dewar & Deas, W.S., and Messrs Grahames & Wardlaw, Westminster.

Counsel for Respondent—Sir R. Baggalley, Q.C., and Mr Cotton, Q.C. Agents—Messrs J. & R. D. Ross, W.S., and Mr W. Robertson, Westminster.

COURT OF SESSION.

Tuesday, March 11.

SECOND DIVISION.

[Lord Mure, Ordinary.

TREVELYAN *v.* SIMCOE OR TREVELYAN.

Marriage-Contract—Legitim—Collation—Domicile.

A, who was a domiciled Scotchman at the time of his death, and who had been twice married, left one son, B, the issue of the first marriage, and made no provision for him in his will. *Held* (1) that B was not barred from claiming legitim by the terms of the ante-nuptial contract entered into between his father and mother, in the English Style, and in England. (2) That in a question with the second wife, B was not bound to collate or impute in satisfaction of his legitim the provisions contained in his mother's marriage-contract in his favour, or certain outlays made in his behalf, notwithstanding that the will of A contained a clause to the effect that the son had been amply provided for by the provisions in his mother's contract of marriage, and by the value of his commission in Her Majesty's army.

The summons in this suit, at the instance of Colonel Harrington Ashley Trevelyan, against Mrs E. L. Simcoe or Trevelyan, widow of the late Lieutenant General Willoughby Trevelyan, and sole executrix appointed under the will of the said Lieutenant General Trevelyan, dated 9th January 1871, and registered on 10th February 1872, concluded that the defender, "as executrix foresaid, ought and should be decerned and ordained, by decree of the Lords of our Council and Session, to exhibit and produce before our said Lords a full and particular state and account, duly vouched and authenticated, of the whole moveable goods, gear, and effects which the said deceased Lieutenant-General Willoughby Trevelyan was possessed of, or had right to at the time of his death, and of the intromissions of the defender therewith, so that the free balance thereof remaining due after all legal deductions therefrom have been paid or satisfied, may appear and be ascertained; and the defender, as executrix foresaid, ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £5000 sterling, or of such other sum as shall appear and be ascertained by our said Lords to be due by the defender to the pursuer as the amount of the pursuer's legitim, bairns part of gear, or legal share of the moveable estate which belonged to the said deceased Lieutenant-General Willoughby Trevelyan, together with interest thereon at the rate of 5 per cent. per annum from the 3d day of July 1871, and until payment, or in the event of the defender failing to produce an account as aforesaid, she, as executrix foresaid, should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £5000 sterling, which shall in that event be held to be the amount of the pursuer's legitim, together with interest thereon at the rate and for the period foresaid.

The pursuer stated that the deceased Lieutenant-General Willoughby Trevelyan, the pursuer's father, died on the 3d day of July 1871. He was the proprietor of the lands and estate of Newfargie, situated in the counties of Fife and Perth, and resided at the mansion-house which he had erected on the said estate. He was a domiciled Scotsman at the time of his death. He was twice married—firstly, to the pursuer's mother, Anne Mary Astley, and secondly, to the defender, Mrs Elizabeth Lethbridge Simcoe or Trevelyan, who survived him. The pursuer, who was born on the 10th day of March 1835, is his only child. Lieutenant-General Trevelyan left a will or deed of settlement, dated the 9th day of January 1871, whereby he conveyed his whole estates, heritable and moveable, in liferent to his wife, the said Mrs Elizabeth Lethbridge Simcoe or Trevelyan, but only on the conditions, and for the ends, uses, and purposes therein mentioned, and nominated and appointed her his sole executrix during her life. The said will or deed of settlement provided for the distribution of the testator's estate, real and personal, but it does not contain any provision in favour of the pursuer. The defender accepted of the office of executrix conferred on her by the said will or deed of settlement, and has intromitted with, and taken possesion of, the estate of the said deceased Lieutenant-General Willoughby Trevelyan. The said deceased Lieutenant-General Willoughby Trevelyan having been survived by his wife, and the pursuer being his only child, the amount of his claim of legitim is one-third part of the free moveable estate of which his father died possessed, in the event of the defender not having renounced or accepted a sum in full of her claim for *jus relictæ*, or, in such event, one-half of the said moveable estate.

In answer, the defender stated that General Trevelyan was born in England. His domicile was English at the time of his marriage with the pursuer's mother in 1830, and with the defender in 1859, and it was not till 1861 that he came to reside in Scotland. He was not at the date of either marriage possessed of any Scotch estate, nor did he become possessed of any such until the year 1861, long after the pursuer had been forisfamiliated and provided for. That by antenuptial contract or indenture of marriage in the English style, entered into in England on 24th December 1830 between the pursuer's father and mother, the former conveyed the sum of £5000, and the latter the sum of £6167, 3s. consols, to certain persons therein designated, in trust for behoof of the children of their marriage, on the death of the survivor of them. Of this marriage the pursuer is the only child, and at the death of his father on 3d July 1871, the funds settled as aforesaid became payable to and have been received by him. At the time of their marriage the father and mother of the pursuer both had their domicile in England. By indenture of marriage, entered into in England on 10th September 1859, between the pursuer's father and the defender and various other parties, the pursuer's father conveyed to trustees various sums invested in Russian bonds and English railway shares and debentures, amounting in all to £5264, with a direction to pay the annual proceeds thereof to the extent of £100 yearly to the defender from the time of her father's death till his own death, and the balance to himself; and if there was no issue of the marriage, to pay the whole annual proceeds on his death to the defender; and after her death, to hold it for behoof of his executors, administrators, and assigns. There has been no issue of the marriage. The defender's father died many years ago; but the defender has not received any part of the yearly allowance settled upon her, it having been paid to General Trevelyan. The defender has survived her husband; and under his settlement, of date 9th January 1871, having been appointed sole executrix during her life, has accepted of the office, and entered upon the administration of the funds. The above mentioned indenture of marriage was prepared and executed in English form; and all the parties to it were domiciled in England. By will or deed of settlement, dated 9th January 1871, and registered in the Books of Council and Session on 10th January 1872, General Trevelyan conveyed to the defender his whole means and estate, heritable and moveable, for her liferent use allenarly. The said deed contains certain directions in regard to General Trevelyan's burial, payments of expenses and debts, management of the property, &c.; bequeaths to the defender the sum of £200, and the money investments settled on her in liferent in her marriage-contract, and appoints her sole executrix during her life. The said deed nominates certain parties as trustees after the defender's death, who are directed to hold the balance of the trust-estate, in so far as not disposed of in the defender's favour, for behoof ultimately of certain heirs in the order therein specified, and failing them, for behoof of the Scottish Episcopal Church. The only reference made by the said deed to the pursuer is as follows: "And

I desire to note that my son, Colonel Harrington Astley Trevelyan, has been already amply provided for by the marriage-settlement with his late mother and by the value of his commissions in Her Majesty's Hussars."

In statement second on the record the defender, with reference to the law of England, averred that according to the law of England the provisions made in the foresaid marriage-contract or indenture in favour of the issue of the marriage, operated as a full discharge of all legal or other claims which the issue so provided for could prefer against the succession of their parents, or in respect of the death of either of them. The pursuer has accepted of these provisions, and by so doing has discharged all other claims against the estate or succession of his deceased father.

The pleas in law for the pursuer were:—"The pursuer being the only child of the deceased Lieutenant-General Willoughby Trevelyan, he is entitled to legitim from and out of the moveable estate of his said father. The claim of legitim, being a debt due from the estate of the deceased Lieutenant-General Willoughby Trevelyan, the defender, as his executrix, is liable therefor. In the circumstances above set forth, the pursuer is entitled to decree of count, reckoning, and payment against the defender as concluded for."

The pleas in law for the defender were:—"The whole of General Trevelyan's moveable estate has been validly conveyed and apportioned by his deed of settlement in 1871, and that to the exclusion of the pursuer. The pursuer's claim to succeed to part of the moveable estate of his father falls to be determined by English law, and according to the just construction of the marriage indenture of 1830, and his whole claims in the action being thereby excluded, the defender is entitled to absolvitor. The pursuer's claim of legitim is excluded, in respect of the marriage indenture of his parents, and of his father's deed of settlement in 1871, and of his having been forisfamiliated and provided for in lieu of legitim before his father had acquired a Scotch domicile, or on one or more of these grounds. *Esto*, the pursuer is entitled to legitim, his claim is satisfied to the extent of the outlay and advances on his behalf by General Trevelyan, and his claim of interest is excessive."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 18th July* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions: 1st, finds it admitted that the pursuer's father, the late General Trevelyan, was a domiciled Scotsman at the time of his death, and that, by the will or deed of settlement executed by him in January 1871, he did not make any provision in favour of the pursuer: 2d, finds in these circumstances in point of law, (1.) That the pursuer, as the only child of his father, is entitled to legitim out of the free moveable estate of which his father died possessed; (2.) That the pursuer is not barred from claiming legitim by the terms of the contract of marriage entered into between his father and mother in 1830; and (3.) That in a question with the defender the pursuer is not bound to collate, or impute in satisfaction of his legitim the provisions in his favour contained in that marriage-contract, or any outlay or advances made to him by his father, of the nature set forth in the defender's statement of facts. Therefore to that extent repels the defences, and appoints the case to be put to the roll, that an account may be taken of the amount of the free moveable estate of General Trevelyan at the time of his death, and reserves in the meantime all questions of expenses.

"*Note.*—As the late General Trevelyan was a domiciled Scotsman at the period of his death, the main questions here raised must, it is thought, be disposed of according to the law of Scotland, in compliance with the well-established rule, that all questions of succession to moveable estate are regulated by the law of the domicile of the party whose succession is in question.

"Now it is not alleged that there has been in the present case any express written discharge of his legitim by the pursuer; and the Lord Ordinary did not understand it to be contended, on the part of the defender, that if the question of the pursuer's right to legitim had turned upon the terms of the will executed by General Trevelyan in 1871, there would have been any good grounds in law for resisting the pursuer's claim. Neither did the Lord Ordinary understand it to be contended, and he does not think that there are any grounds for holding that there has been, in the circumstances of this case, any such forisfamiliation of the pursuer—in the sense in which the term is used in the law of Scotland—as was calculated to operate a discharge of the pursuer's right to legitim. Ersk., iii., 9, 23. But it was maintained—(1) that the claim now made was excluded, in respect of the provisions of the marriage-contract entered into between the pursuer's father and mother in 1830, which ought, it was said, to be construed by the law of England; and (2) that, assuming the pursuer to be entitled to legitim, the claim has been satisfied, and is excluded to the extent of the advances alleged to have been made by his father on his behalf, in the purchase of commissions in the army, and towards payment of his debts.

"1*st.* The marriage-contract or indenture on which the first of these pleas is rested was not in process when the case was debated. It has, however, since then been produced; but after examining its provisions the Lord Ordinary has been unable to find any of them which can be held to import a discharge of the pursuer's claim, or of any other legal rights which might accrue to him, as one of the children of the marriage. The case must therefore, it is thought, be ruled by the decisions in the cases of *Lord Chandos*, 16th August 1836 (2 S. and M'L., p. 377), and *Keith's Trustees*, 17th July 1857; the latter of which seems to be more specially in point. Because, while the deed was an English contract, executed between parties resident in England, where it was alleged that Lord Keith was domiciled at the time, the Court do not seem to have considered it necessary to direct any inquiry as to the domicile—thereby implying that in such a case they did not consider the ascertainment of the question of domicile at the date of the execution of the contract to be essential for the disposal of the case.

"2*nd.* With reference, again, to the sums sought to be charged against the pursuer in name of outlay or advances for commissions and to pay debts, it appears to the Lord Ordinary to have been settled in the case of *Nisbet's Trustees*, March 10, 1868, following that of *M'Dougall*, January 31, 1804, (M. App. "Bankrupt," No. 21), that such advances cannot be claimed as debts except where an obligation for payment has been taken at the time, and the advances have thus been constituted and kept

up as debts, which is not here alleged to have been done. While, therefore, claims of that description were allowed as against the eldest son in *Nisbet's* case, they were allowed not as sums claimable in name of debts, but on the footing that they were advances, which, in a question *inter liberos*, required to be collated in settling the legitim. The doctrine of collation among children, however, has no application here; as the question is raised not with children, but with a widow under a general settlement; with whom it appears to be settled that a child cannot be called on to collate. Stair, iii, 8, 46; Ersk. Principles, iii, 9, 10; *Keith's Trustees, ut supra.*

"In the view which the Lord Ordinary thus takes of the law applicable to the case, he has seen no sufficient reason for allowing the defender a proof as to the meaning and effect of the marriage-contract of 1830 according to the law of England; because it is not alleged that the marriage-contract contains words of technical import in the law or practice of England which can only be construed by those who are conversant with English law. It is for this Court therefore to put its own construction on the deed, as was done in the case of *Thomson's Trustees*, 18th December 1851, as well as in the cases of *Lord Chandos* and *Keith's Trustees*. And as the advances made to the pursuer by his father are not of a description which can, in the opinion of the Lord Ordinary, be imputed in satisfaction of the pursuer's claim, he has not deemed it necessary to allow the defender a proof as to the amount of those advances before disposing of the case."

The defender reclaimed.

Authorities cited—Stair, iii, 3, 45; *Fisher*, 7 D. 129; *Keith's Trustees*, 19 D. 1040; *Lord Chandos*, 2 S. and M'L., 377; *Nisbet's Trustees*, March 10, 1868; *Phillimore*, J. L., 4, 311: *Hogg* v. *Lashley*, 3 Paton's App. 247.

At advising—

Lord Justice-Clerk—The two questions which have been raised in this case are,—first, whether the marriage settlement executed between General Trevelyan and his first wife excludes the claim of the pursuer for legitim; and secondly, whether the advances set out in the condescendence are to be taken as deductions, or payment to account of the claim.

As to the first point, there can be no doubt that the right to legitim, although in a certain sense a debt, is so far a right of succession that it is to be determined by the domicile of the defunct. That was not disputed by the defender; but it is maintained that this right has been surrendered or discharged by virtue of the English contract of marriage between General Trevelyan and his first wife; and in the second article of the statement of facts the effect of this instrument is stated as matter of English law.

According to the law of Scotland, it is now well settled that legitim can only be excluded by express discharge; and, certainly, as far as the contract in question is set out by the defender, nothing to that effect appears to be contained in it. All that is alleged is, that by the indenture in question a sum of £5000 is conveyed by the husband, and a sum of £6167, 3s. by the wife, to trustees, in trust for the spouses for their lives, and for the children of the marriage. That such a provision would not by our law exclude the right to legitim seems not to be doubtful; and the cases of *Breadalbane* and *Keith*, referred to by the Lord Ordinary, are decisions which appear conclusive on this point.

It is, however, contended that the law of England, and not the law of Scotland, must regulate this matter; and that any discharge which would by the English law exclude such a claim, must be accepted by the Courts of Scotland as sufficient to extinguish it.

This point was not raised in either of the cases referred to, although it was involved in the circumstances in which they respectively arose. There can be little question, as was laid down by Lord Eldon in the second branch of the case of *Hog* v. *Lashley*, that when persons domiciled in England settle the incidents of the marriage by an English contract, its stipulations, and the effect to be given to them, will follow them to any domicile to which they may afterwards resort; an illustration of the general rule that contracts must be construed according to the law of the place where they are made, and where they are originally intended to be fulfilled. Whether it be a sound corollary from this principle that a right like legitim, arising from the customary law of the domicile, can be discharged otherwise than according to the law of the domicile, might be attended with doubt; and certainly the cases of *Breadalbane* and *Keith* seem to have proceeded on an opposite assumption. If we had to decide on that proposition, I should have had difficulty in excluding the law of the alleged contract.

In the present case, however, I have a very clear opinion that the allegation in regard to the law of England is not relevant as it stands. It is as follows:—"According to the law of England, the provisions made in the foresaid marriage-contract or indenture in favour of the issue of the marriage, operated as a full discharge of all legal or other claims which the issue so provided for could prefer against the succession of their parents, or in respect of the death of either of them. The pursuer has accepted of these provisions, and by so doing has discharged all other claims against the estate or succession of his deceased father."

Now, before we inquire into the law of England, we must have a clear understanding of what it is alleged to be. I own I gather no definite meaning from this allegation. It is not said that there are any claims which by the law of England would have been competent to the pursuer, and from which the contract would exclude him. It is not said whether the claims said to be discharged are claims arising on intestacy, or claims which would arise notwithstanding a settlement by will. It is not said that this marriage indenture was equivalent to a mutual contract of release between the father and child, nor what demands would by the law of England be held to be thereby released. We could not frame a case for the Courts in England which would be intelligible on this statement. We know, as matter of general jurisprudence, that the right of legitim has no place in the law of England; although in London and in York some analogous customs until recently prevailed. I doubt if the allegation is meant to imply that the indenture would exclude the son's right *ab intestato;* and if it do not mean that, I am at a loss to gather its import. As to referring the international question to the English Courts, and asking them how they would decide this case, I presume no such suggestion is made.

I am therefore prepared to hold the allegation irrelevant, and to repel the plea founded on it.

On the second point, I concur in the opinion of the Lord Ordinary, and have nothing to add to what he has said.

LORD COWAN—Having regard to the legal questions raised in the record, and the argument under the reclaiming note, I am of opinion that no sufficient ground has been stated which should lead us to disturb the interlocutor of the Lord Ordinary.

The legitim claimed by the pursuer is by the law of Scotland undoubtedly due to him, as the only child of the marriage of his parents. At the date of his death his father was a domiciled Scotchman, and he had no power to test upon his whole moveable estate to the detriment of that right of succession which by law the pursuer has in his father's executry, unless the same has been satisfied or discharged. Accordingly, this is what the defender, the second wife of General Trevelyan, as his general disponee under his settlement of 1871, maintains to be the actual state of matters. No express or special discharge of the legitim is alleged ever to have been executed. No provision in express satisfaction of his legal right is alleged to have been settled on the pursuer by his father. Yet, by the law of Scotland such special discharge, except in very peculiar circumstances, which do not here exist, is indispensto exclude the claim of legitim.

The defender, however, maintains, in the first place, that by antenuptial contract entered into in England between the pursuer's father and mother, when the parties were both of them domiciled in England—a certain provision was made for the children of the intended marriage, and that this provision, according to the law of England, "operated as a full discharge of all legal or other claims which the issue so provided for could prefer against the succession of their parents." From the statement in the first article of facts set forth by the defender it does not appear that any general settlement of the father's estate, either at the date of the marriage or at his death, was made by the contract. All that is alleged is that a sum of £5000 by the father and the sum of £6167, 3s. consols by the father, were given over to trustees for behoof of the issue on the death of the surviving parent. This being the nature of the provision to which the defender refers, the first matter for consideration is, whether it is necessary to make inquiry as to the law of England? That this course has been followed in some cases may be true, and I observe in the case of *Hog* v. *Lashly* the opinion of English Counsel was taken by this Court as to the effect by the law of England of certain provisions contained in an English contract which had been entered into before the marriage as regards the *jus relictæ*. I do not think, however, that this course should be adopted in the present case.

(1) The provision in the contract is stated to have consisted of a sum of money, set apart, subject to the liferent of the spouses, as a separate fund for the children, not by their father alone, but by the mother also; and this fund they could claim as theirs, and if not actually given over to the trustees, was a debt claimable rateably out of the general estates of both parents. In such a question as the present there is no difficulty in dealing with such a provision without having recourse to the law of England, there being no technical words or phraseology employed requiring to be interpreted by that law.

And (2) it is for the law of Scotland to judge of the effect of such a provision upon the right to legitim, asserted by the pursuer, inasmuch as it is not alleged that by the law of England any interest in or share of the moveable estate of the father is capable of being vindicated by his children upon his death domiciled in England. In this respect there is a distinction between the claim of the children for legitim and the interest of the wife to share in the goods in communion. By the law of England there is a corresponding right of dower in the wife, the implied discharge of which by an English contract may, when alleged to have been discharged, be matter for inquiry. It is different as regards the legitim, there being no right whatever in the children similar to that by the English law, capable of being impliedly discharged.

Accordingly, in the case of *Hog* v. *Lashley*, the Court there, in the question as regards the legitim, judged of the effect of a provision in an antenuptial contract, very similar to the present, without having recourse to English Counsel to ascertain the effect of the English contract (*Hog* v. *Lashley*, April and May 1792, 3 Paton's Ap.), but at once proceeded to judge of it exclusively by our own law. But where the question of the alleged implied discharge of the *jus relictæ* by the English contract came before the Court (*Hog* v. *Lashley*, March and November 1804, 4 Paton's Ap., 586), recourse was had to English lawyers as to the effect of the contract in extinguishing the wife's right of dower, and how far thereby her *jus relictæ* might be affected, becoming exigible by our law on the change of domicile to Scotland. We have here to deal only with legitim, which, as there stated, is truly a right of succession, and is an interest which the law gives to children on the father's death, and thus differing in its character from the wife's share in the goods in communion, which may, when she predeceases, be made effectual during the husband's life.

On the second branch of the case we have to consider only the effect of the fifth plea for the defender, which exclusively relates to outlay for, and advances made to the pursuer by his father; and as to this point the decisions referred to by the Lord Ordinary in his note support his interlocutor. No plea is stated, and no argument was maintained, with regard to the right of the pursuer to claim the whole legitim without bringing into computation the marriage-contract provision, in so far as it was provided out of the father's estate. No question of that kind, therefore, requires to be considered.

LORD BENHOLME and LORD NEAVES concurred.

Counsel for Pursuer — Solicitor-General and Kinnear. Agents—Mackenzie & Kermack, W.S.

Counsel for Defender — Watson and Gloag. Agents—Gillespie & Paterson, W.S.

Friday, March 14.

SECOND DIVISION.

[Sheriff of Lanarkshire, Glasgow.

DUBS AND COMPANY *v.* W. THOMSON.

Patent—Interdict—Onus of Proof.

In an action by the holder of letters-patent