penter work of the buildings to the final decision of Mr Ramsay and Mr Smith." Now, these words are general, and it seems to me that what the parties intended to include in "all matters in dispute" must be determined by whatever the parties were disputing about, and this is clear from the letters which passed between the parties before the reference was made.

This was a building contract for a lump sum, but in the course of the work certain parts were dispensed with, and a reduction of the price was therefore necessary in respect of these; and, on the other hand, there was extra work to be performed by the contractor on the order of the employer, for which additional payments were to be made. Now, on both of these points the parties were disputing in their correspondence, and therefore the matters on which they were at issue were, what reductions of the price were to be made, and what was extra work, and to be paid for as such? And these matters were embraced in the terms of the reference.

But it is still clearer from portions of the evidence that the arbiters' powers included these points. Mr Ramsay says—"With regard to the provision in the specification as to written orders being given by the proprietor in regard to any jobbings, Mr Munro was always insisting upon having written orders from Mr Thomson for items that he objected to. Mr Thomson invariably refused to give written orders, but the items were always referred to us, and we, as a rule, insisted upon Munro doing the work, and we would deal with it at the end. So far as I know, Mr Thomson gave no written orders for such jobbing work. (Q) Did he ever to your personal knowledge order any part of that extra work for which you gave him this sum of £470, 12s. 3d.?—(A) He insisted upon all that work being done. Mr Munro refused to do it as being extra, and we ordered the work to be done, assuring both parties that in so doing we were preserving to ourselves the right to decide whether it was extra or not; we invariably made that plain to both parties." Mr Smith says—"(Q) While the contract was going on, or in the proceedings for settling the price of the contract work, did Mr Thomson ever intimate to you that he considered you had no right to deal with the question of extra work?—(A) No; on the contrary, he intimated that he expected we were dealing with the whole questions—the whole claims." And Thomson says—"Before we had a meeting with the arbiters there was a preliminary meeting at my office. It was arranged at that meeting in what way the arbiters should proceed. I furnished a list of my objections, and they were to look into these. It was arranged that they, as inspectors, should visit the building from time to time during its progress when necessary. It was contemplated that there might be other difficulties between Mr Munro and myself besides those which were then brought forward. (Q) Were the differences that had already arisen at the time of your first meeting differences as to deductions claimed by you on the one hand for work short of the contract, and extras claimed by Mr Munro for work additional to what was in the contract?—(A) Yes. It was my desire that the arbiters should visit the building for the purpose of satisfying themselves what was or what was not extra work." Now, after that it is hopeless for Thomson to contend that what was extra work, and what was paid for as extra work, was not submitted to the arbiters, and therefore that the arbiters exceeded their powers in dealing with these matters.

As to the other objections regarding the conduct and manner in which they dealt with the affair in the way of hearing parties and witnesses, I am of opinion that they cannot be stated except in a reduction, and therefore I am not prepared to give any decerniture which would prevent Mr Thomson from reducing the award if he thinks fit to attempt this. My reason for doing so is, that he has been prevented from stating his grounds for this in these conjoined processes. The Lord Ordinary has held that he could not lead evidence on this matter, and it is only fair to give him a chance of doing so if he wishes, and therefore I would propose to supersede consideration of this case till we see what becomes of the process of reduction. I need hardly say that this will keep the process in our hands, and in the meantime I propose to adhere to the interlocutor in so far as it contains findings for and deals with expenses, but supersede consideration of the reclaiming-note *quoad ultra.*

Lord Deas, Lord Mure, and Lord Shand concurred.

Counsel for Pursuer—J. C. Smith—Darling. Agent—W. Elliot Armstrong, S.S.C.

Counsel for Defender—Mackay—Begg. Agent—Andrew Clark, S.S.C.

Wednesday, June 28.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

MONTEITH *v.* MONTEITH'S TRUSTEES.

Succession — Legitim — Collatio bonorum inter liberos.

A testator who was survived by one son and four married daughters, by trust-disposition directed his trustees to set apart from his estate a sum of £5000, and to pay the interest thereof to his son during his lifetime, and on his death to divide it equally among his issue. This provision was declared strictly alimentary. He directed the residue of his estate to be paid over to the marriage-contract trustees of his daughters (including those of a fifth daughter who had predeceased him leaving issue) in certain proportions. Each daughter had been provided at her marriage with a tocher settled on herself in liferent and her issue in fee. The son repudiated the provision in his father's will, and raised an action of accounting against his father's trustees and against his sisters and their respective marriage-contract trustees, in which he claimed legitim to the extent of one-fifth of a half of the free residue of his father's moveable estate, and called on his sisters to collate their marriage-contract provisions. *Held* (*rev.* Lord Ordinary, *diss.* Lord Craighill) that the sums provided as tochers in the respective marriage-contracts of the daughters were not to be reckoned in ascertaining the amount of the fund from which legitim was payable, on the

grounds (1) that the doctrine of *collatio bonorum inter liberos* applies only when more than one child claims legitim; (2) that the renunciation by the daughters of their rights to legitim did not operate as an assignation of these rights in favour of the general disponee to the effect of making the claim of that general disponee thereby a claim for legitim, and therefore laying on him (in this case the marriage-contract trustees) an obligation to collate; and (3) that there was no evidence of such an intention on the part of the father that his children should take equal shares of his estate as to require collation.

Heritable and Moveable—Succession—Foreign—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 101), *secs.* 3 *and* 117.

The above succession comprised two sums secured by mortgage and deed of charge respectively over landed property in Wales. *Held* (*diss.* Lord Young) that the provisions of the above Act as to heritable securities in relation to legitim did not apply to such securities in a foreign country, which were to be regarded as heritable or moveable according to the law of the country in which the security subject lay, and that the above sums, being personal estate by the law of England, were therefore to be taken into account in computing the legitim.

Mr Duncan Monteith, of Belleville Lodge, Blacket Place, Edinburgh, died domiciled in Scotland in November 1879. His wife had predeceased him. He was survived by one son James Duncan Monteith, the pursuer, and four daughters, who were all married during his lifetime. A fifth daughter, also married, had predeceased him, leaving issue. An antenuptial marriage-contract trust had been created in the case of each marriage, under which each daughter had been provided with a marriage portion, settled on herself in liferent and her issue in fee. Mr Monteith left a trust settlement dated 16th May 1878, and codicil dated 23d November 1879, by which he made a universal disposition of his estate, heritable and moveable, to certain persons therein named as trustees for certain purposes. By the second purpose of his trust-settlement he directed that his trustees should hold and invest in their own names, or set apart from his general estate, a capital sum of £5000, the interest or annual produce of which they should from time to time, as the same should arise and be drawn by them, pay over to his son, the pursuer, during all the days and years of his life from and after the testator's death in the event of his surviving, declaring that in the event of the pursuer dying either before or after the testator without leaving lawful issue the said capital sum of £5000 should revert to and form part of the residue of the trust-estate; but if he should leave lawful issue, the said trustees should, at the terms of payment, and subject to the declarations therein mentioned, pay over to such issue, equally among them, the foresaid sum of £5000, with any interest or income thereof accrued thereon. This provision was declared strictly alimentary and in full of all claims of legitim or other legal claims on the part of the pursuer against his father's estate. It was also declared that in the event of the pursuer failing to accept the provision in full satisfaction of all claims it should become void. After making various minor provisions and legacies, he provided by the sixth purpose that the trustees should divide and pay over the free residue to the marriage-contract trustees of his five daughters, 'on the same terms and under the same conditions as the marriage portion provided by me to each of my said daughters,' in the following proportions, viz., three-tenth parts or shares to the trustees of Mrs Ferguson, two-tenth parts or shares to the trustees of Mrs Walls (the deceased daughter), two-tenth parts or shares to the trustees of Mrs Stanford, two-tenth parts or shares to the trustees of Mrs Hossack, and one-tenth part or share to the trustees of Lady Reid. The codicil directed that only one-tenth part or share should be paid to the trustees of Mrs Walls, the other tenth part or share to be paid to the trustees of Lady Reid.

The persons appointed trustees accepted office and gave up an inventory of the deceased's estate, showing the amount of the personal estate in England and Scotland to be £79,595, 12s. 8d. He was possessed also of considerable property, real and personal, in India. The inventory included two sums of £6000 and £4000, lent by the deceased on mortgage and deed of charge respectively over property in Wales. The pursuer in the circumstances raised the present action of count and reckoning against his father's trustees, calling also for their interest his surviving sisters and their respective husbands and marriage-contract trustees. He repudiated the provisions in his favour in his father's will, and claimed legitim to the extent of one-fifth of a half of the free moveable estate *in bonis* of the deceased at the time of his death, in which, he claimed, were embraced the above mentioned sums of £6000 and £4000, and which therefore fell to be taken into account in computing the legitim. He further maintained that there fell to be added to the legitim fund the whole sums (amounting to £10,000 in all) which formed the marriage portions of his four surviving sisters, with interest from the respective dates of advance, along with certain other sums, unspecified as to amount, said to have been advanced to them at the same respective times. He offered on his own side to collate a monthly allowance of 100 rupees which his father had made him for about two years during his lifetime.

Defences were lodged for the whole defenders. The testamentary trustees did not dispute the pursuer's claim for legitim, on which they had already paid £1000 to account, and had offered to make further payment of £3000—afterwards confirmed unopposed by an interim interlocutor of the Lord Ordinary. They had also already paid £50,000 to account of residue to the trustees under the several marriage-contracts of the pursuer's sisters.

The pursuer pleaded the obligation of his father's trustees to account to him for their intromissions with the latter's estate, or failing their accounting, for payment of £10,000 in name of legitim.

The defenders pleaded, *inter alia*—"(3) The pursuer's claim of legitim ought to be refused in so far as it extends (1st) to the houses and mortgages mentioned in the condescendence; (2d) to the sums settled by the truster in the marriage-contracts of his daughters. (4) The pursuer is bound to collate the whole sums advanced to him by the truster."

The Lord Ordinary found that in ascertaining the amount of the legitim fund the two sums of £6000 and £4000 were to be included in the moveable estate of the deceased, and also that the pursuer's surviving sisters were bound to collate their marriage provisions, and that the sum to be collated in each case was the actuarial value, estimated at the date of the marriage-contract, of the life interest of each daughter in the sum advanced by her father; and granted leave to reclaim, adding the following opinion:—"The testamentary estate of Mr Duncan Monteith is the subject of judicial distribution in an action of accounting instituted by Mr James Monteith, the testator's son, who has claimed his legitim. The amount of the legitim fund has not yet been ascertained, and with a view to its ascertainment two questions of law were argued before me. (1) The first question is, whether legitim is exigible from the sums of £6000 and £4000 lent by the testator on mortgage and deed of charge respectively over property in Wales? The question obviously depends on the legal character of such investments, whether moveable or immoveable, according to the law of England. The parties were agreed that there was no question on which it was necessary to refer to English counsel for assistance, and I was referred to the statement of the law of England on this subject by Mr Justice Williams, in his Law of Executors, 8th edition, p. 693, with the authorities there quoted, as equivalent to a legal opinion for the purposes of the case. I willingly acceded to this suggestion, there being no dispute as to what is the law of England on this subject. According to the authorities referred to, money lent on mortgage on the security of property in England or Wales is assets or personal estate; and even where, from the form of the security, the heir is entitled to enter into possession, he is considered a trustee for the executor or residuary legatee of the personal estate. In the present case the securities are of the nature of mortgages over property in Wales; and although one of the deeds is called a mortgage and the other a deed of charge, there does not appear to be much difference in the form of the deeds of security. From the preceding explanations it follows that the sums thus secured are executry estate. They are therefore subject to legitim according to the law of Scotland, which in this case was the testator's domicile. I do not think that this question is in any way affected by the provisions of the Titles to Land Consolidation Act 1868 in relation to heritable securities. These provisions have reference to heritable securities over lands and heritages in Scotland. The present question must be disposed of as it would have been if that Act had not passed, money lent on mortgage being personal estate by the common law of England, and therefore subject to the operation of the law of the testator's domicile in all questions of succession.

"(2) The other question, on which I heard a full and interesting argument, had reference to the application of the doctrine of *collatio bonorum inter liberos*.

"The testator Mr Monteith had four daughters, all married in his lifetime, and in the marriage-contract of each daughter he settled a sum of money in favour of the lady in liferent and her children in fee, with the usual trusts applicable to the event of failure of issue of the marriage. Mr Monteith's son claims that the sums settled under the deeds referred to should be collated or brought into the legitim fund. The daughters dispute their liability to collate on two grounds—(1) Because they are not claiming legitim, and collation, they say, has place only amongst the members of the family who participate in the legitim fund. (2) Because the sums paid by their father to account of the several marriage trusts are not to be regarded as dowry or tocher, but rather as donations for the benefit of the daughters and their families.

"On the first point I have given to the argument for the daughters that consideration which the importance of the question demands; but I have come to the conclusion that their argument is not well founded, because it is based on the erroneous assumption that the defenders are not participants in the division of the legitim fund. It is quite settled by the case of *Fisher* v. *Dixon* that a share of legitim vests in each child on the father's death, and that the acceptance of a conventional provision does not operate as a discharge of legitim in favour of the other children, but is equivalent to an assignation of the share in favour of the general or residuary legatee. If Mr Monteith's daughters had discharged their legitim, the son would have claimed the legitim fund in its entirety. But they have not discharged their legitim, and accordingly their shares have merged in the general residue, and the pursuer's claim is limited to one-fifth of the legitim fund. The defenders, Mr Monteith's daughters, are in effect taking benefit from the legitim fund through the medium of the trust, and in a question with their brother I think they are bound to bring their marriage portions into the legitim fund, just as if they had claimed legitim in their own right.

"To the second answer on the question of collation I propose to give effect to the extent of holding that the measure of the benefit taken by each of the daughters under their respective contracts is the actuarial value of her life interest at the date of the contract.

"A further question arises, whether interest should be added to these values for the purpose of increasing the sums to be collated? On this question the authorities are conflicting. In the case of *Skinner*, M. 8172, the decision was that the sums advanced by the father in his lifetime, without interest, should be brought into the legitim fund. In *Johnstone* v. *Cochrane*, 7 Sh. 226, interest was allowed to be added to the advances, to the effect of increasing the collation and reducing the sum to be paid to the claimant. But in the more recent and important case of *Nisbet* v. *Mathieson*, 6 Macph. 567, the Court reserved the question of interest, and apparently the point was not further pressed, as there is no trace in the reports of any further proceedings in the cause. Lord Neaves was evidently unfavourable to the claim of interest in such cases, and in this opinion he is supported by Voet (37, 6, 24), who holds that the father derives benefit from the advance equal to the interest of his money, in being relieved of the cost of his daughter's maintenance at home. This is also the rule of the Roman-Dutch law, 4 Burge 687.

"My own opinion is that the advances fall to be collated without the addition of interest to principal, not only for the reason given by Voet, but

on the more general ground, that interest ought not to be charged in account under any circumstances if the debtor in the account has received the money upon an agreement not to pay interest. The marriage provisions in the case were not loans, but advances, as I have held, to account of the daughters' succession. It was not intended that the income or annual return from the sums so settled should be paid to the father as interest. It was intended that the income should be consumed, that is, applied for the benefit of the daughters and their families as it accrued. This being so, it would, in my opinion, be contrary to equity to allow a claim of interest upon these advances to be reared up after the father's death. In the present case the stating of interest on the daughters' portions would have the effect of increasing the sum payable to the son, who alone claims legitim *eo nomine*. If the son were the person who had received the advances, the allowance of interest would of course have the opposite effect; but the decision of the question cannot, I think, be influenced by the consideration whether in the particular case the father's testamentary intentions would be aided or frustrated by allowing interest on advances. It must depend on the question whether the father when he made the advance intended that interest should run on it.

"The result is, that I hold that the sum to be collated is not the present value, but the actuarial value at the date of the contract, of the daughter's life interest in each of the sums advanced."

The defenders accordingly reclaimed, and argued—Collation depends on the presumed intention of the father—Ersk. iii. 9, 25. This intention may be reached in various ways. It may be declared at the time the advances are made, or it may be evidenced from facts and circumstances, or expressed or implied in the will. The father may at the time have meant the advance to be imputed to legitim, and afterwards change his mind and turn it into a free gift. And this he may do in a *mortis causa* settlement, under the old law, even on deathbed. The intention is ambulatory to the last moment of his life —*Allan* v. *Allan*, 1736, 5 Brown's Supp. 897; *Grant* v. *Gunn's Trustees*, February 28, 1833, 11 S. 484. The intention here was that the daughters were to hand over their legal rights to the testator, and were not to collate. We must assume all the intention necessary to carry out the scheme of the settlement. In the case of *Douglas* the point of intention shown from the will was not raised. There is no case in which a liferent interest has ever been collated. If any collation is to take place here, it can only be that of the liferent interest at the time of the father's death —*Fisher* v. *Dixon*, June 16, 1840, 2 D. 1121; 2 Bell's App. 63. As to the English securities—It cannot be disputed that these were moveable before 1868 by a series of cases—*Newlands* v. *Chalmer's Trustees*, November 22, 1832, 11 S. 65; *Downie* v. *Downie's Trustees*, July 14, 1866, 4 Macph. 1067. The Act of 1868 was meant to affect the law of succession in Scotland only, but was not confined to heritable securities there, but applied to them wherever situated. The expression "heritable securities" in the Act is quite general in its terms. The intention of the Act was to regulate the succession to the estate of a domiciled Scotchman wherever situated—Ersk. i. 1, 56; M'Laren on Trusts, i. 22.

The pursuer replied—Advances to children are in general to be imputed to legitim, and collated in a question between children, unless the father shall have shown his intention expressly or by implication that such advances are a *præcipuum* over and above legitim—*Douglas* v. *Douglas*, November 8, 1876, 4 R. 105; *Nisbet's Trustees* v. *Nisbet*, March 10, 1868, 6 Macph. 567; *Fisher* v. *Dixon*, July 6, 1841, 3 D. 1181; *Fraser*, H. and W. 1039; *M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1048; *Young* v. *Morison's Trustees*, December 3, 1880, 8 R. 205. This is illustrated from the history of the doctrine, from its origin in the Roman law, where it was originally applied only to intestate succession, but was afterwards extended to bring in the *dos* and the *donatio proper nuptias*, and ultimately to testate succession—Vinius De Collationibus, c. vii. secs. 4 and 7—cc. xvi. and xvii.; Just. Nov. xviii. 6; Donat, ii. 4, 3, 6 (Strahan's Translation, i. 692). The doctrine of presumed intention has been used to show intention of equality among children, but never, as attempted here, to show favour for one child over another. The daughters here are, in a question with the pursuer, virtually claiming legitim, since what they do claim diminishes his share. In a question between children claiming legitim the father's will is as if it did not exist, so no one taking under the will can plead it against children claiming legitim. The pursuer does not ask the collation of the marriage-contract trust-funds from the marriage-contract trustees, but collation of the advances from testamentary trustees, who are his proper contradictors here. The advances must be held as payment by the father to the daughters, who re-settled it on themselves. Their marriage-contract trustees are their assignees, and can have no higher rights than their cedents. *Fisher* v. *Dixon* is a decision of the principle of this contention. It is not the fund of legitim, but the right to legitim, which the defenders claim, and this carries with it the duty of collating, unless this is expressly excluded by the will. The pursuer is entitled to the capital sum, since it was truly a tocher, the form in which it was settled being no matter. There is no principle for stopping at the father's death in estimating the actuarial value. As to the English securities, the law of England is to be looked at merely to fix the quality of the estate, and no further, and by it they are moveable. The Act of 1868 deals, and was meant to deal, only with heritable securities over lands in Scotland. It had no object to assimilate the two laws. It was not intended to increase the sources of legitim. It says distinctly "heritable securities in Scotland"—*Henderson*, 1728, M. 8187; Papers for Kames' Dict., 1728, No. 55.

The Lords made avizandum of the cause. Before it was advised the pursuer died in England, survived by a widow and children. He left a will, which was proved there by his widow, whom it appointed sole executrix. She was then sisted to the present action as executrix in room of the pursuer.

At advising their Lordships read the following opinions—

The Lord Justice-Clerk read this opinion—In this important case I think it may be useful to preface the expression of my opinion on the legal questions involved by a

summary of the facts out of which they arise—not that these facts are in any degree doubtful or disputed, but because it appears to me that much of the obscurity which has been raised in argument has been caused by reasoning on assumptions inconsistent with them.

The testator Mr Monteith was survived by a family of one son and four daughters. His daughters all married, and the father settled in their respective contracts of marriage sums amounting in all to £10,000, vesting these provisions in trustees for behoof of the daughters in liferent and their children in fee. These contracts contained no exclusion or discharge of legitim. It is said on the record that the son also obtained some advances from his father, but we are not at present concerned with that matter.

Mr Monteith died in 1879, leaving a considerable fortune, and a trust-disposition and settlement of his whole estate. By this testamentary instrument he left £5000 to his son in full of legitim and all other legal claims, and attached to this legacy some penal conditions. He directed the whole residue of his estate to be made over to the trustees of his daughters in their respective marriage-contracts in equal proportions, under the same trusts and conditions as those expressed in these contracts, these provisions being declared to be in full of legitim or any other legal claim competent to them against his estate.

In these circumstances the son repudiated his father's settlement and claimed legitim. The daughters accepted the provisions made in their favour by the settlement, and have consequently renounced their right to claim legitim, and from this point the present controversy starts.

According to the law as settled in the first case of *Fisher* v. *Dixon*, the son could take no benefit by the daughters' renunciation of legitim, nor does he claim any as far as the legitim fund is concerned. It is admitted that the renounced or unclaimed share accrues to the general disponees. But he claims in this process against his father's trustees, that they, as in right of the daughters, shall collate the advances the latter have received during the father's life, as they must have done had they claimed legitim, and the most important question we have to determine is whether this demand be well founded.

The first and most obvious answer made to this claim is that the doctrine of collation *inter liberos* only arises between children who have claimed legitim, and that it can have no place when legitim is renounced. In the present case the daughters have not claimed legitim, and therefore it is argued there can be no room for collation.

Of the general soundness of this proposition there can be no doubt. I could not gather from the argument at the bar whether this was conceded or not, although the Lord Ordinary in his very clear note assumes such to be the law. That it has always been so is, I apprehend, indisputable; but it is desirable to bear in mind, what was left rather obscure at the debate, the principle on which this rule of law rests. If a father during his lifetime makes advances to one of his children on the ordinary footing of debtor and creditor, such advances must be repaid as ordinary debts whether legitim be claimed or no. But if, as in the present case, the advance is made without any right reserved by the father to demand, or obligation on the recipient to repay, the amount, such sums form no part of the father's moveable succession. He has parted with the money for good, and, excepting in one event, the other children have no concern with it. If the recipient claim a share of legitim, then arises the equitable obligation which the term collation imports, that the sums received by the claimant during the father's lifetime shall be taken into computation—that is, collated. But if the child renounces his right to claim legitim, the other children have no interest in these advances. The rule of the civil law is stated by Voet to be—"*Cessat collationis necessitas si is, qui conferre deberet, abstineat ab hereditate ejus a quo res conferendæ profectæ sunt*"—Comm. in Pand. 37, 6, 25; and that of our own law Lord Fraser correctly summarises in the last edition of his work, in the following words—"It is only in the case where the child demands a share of the legitim that he is obliged to collate, for if he be contented with his provision under his father's will, or with the advance made to him, the other children cannot compel him to communicate it to them" (ii. 1034).

Keeping this elementary and well-established principle in mind, we have here to deal only with the advances in dispute. They do not fall into legitim, nor are they included in the fund which vests in the children under the head of legitim on the father's death, and if legitim be not claimed they cannot be made the subject of a claim for collation.

This being so, the only question which remains on this head is one rather of fact than of law—that is to say, whether the daughters in this case have renounced the right to legitim? This does not seem to admit of dispute. It is as clear that they have rejected their right to legitim as it is that they have claimed their rights under the settlement. That they have done so is the origin of this controversy, and in point of fact cannot be denied.

But this brings me to consider the ingenious and subtle view which, indeed, the Lord Ordinary has sustained, by which the legal inference from these facts is attempted to be avoided. It is said that although the daughters have in form renounced their right to claim legitim, yet in substance a claim for legitim has been made in their right and on their behalf by the trustees under the settlement, and that although it is certain that no such claim has been in form or expression made by the trustees, yet that the claim of the trustees to retain as part of the residue the rejected shares, and their resistance to the demand of the son for collation, are tantamount to a claim for legitim on the part of the daughters.

I am of opinion that this plea is necessarily excluded by the hypothesis from which the argument starts. The claim of the trustees is not a claim for legitim, but a claim for residue. Their title is not, either directly or derivatively, a right at common law, such as that of a child of the house, which is the only title on which legitim can be obtained, but their title is their right to residue under the universal disposition in their favour. If they had claimed legitim on behalf of, or as in the right of the daughters, the latter must have forfeited their interest in the settlement, seeing that it is an express condition of the settlement that they shall not claim legitim; and thus, if the claim which has been made be a claim for legitim, and carries with it the obligation to collate, it

would carry with it also all the other legal consequences of such a claim.

I need not, however, follow out this illustration further, although many examples of it might be adduced, but proceed at once to consider the view on which the paradox is defended, that a renunciation of legitim is equivalent to a claim for it. That the daughters here have done all they possibly could to renounce legitim and to adopt their father's settlement is certain; and it seems to me that the opposite contention proceeds entirely on what I consider a misapprehension or misapplication of the judgment of the House of Lords in the case of *Fisher* v. *Dixon*, which I shall now deal with.

The assumption which underlies this argument is that the trustees here take the shares which the daughters have renounced, in the character of assignees, from them; and that as such they are liable to all the equities and claims to which their alleged cedents would have been subject; and this contention they maintain on the authority of some expressions which fell from the noble and learned Lords in the well-known and leading judgment to which I have referred. But I think these expressions do not convey, and were never intended to convey, any such meaning; and I shall try in a few sentences to explain the view which I take of that decision.

The case of *Fisher* v. *Dixon* was a competition between one of the children who had claimed legitim and the general disponee, and related to the right to certain shares of legitim which other children had renounced. The child who had not renounced claimed the whole legitim fund as vested wholly in herself. The general disponee maintained that the discharge by the renouncing children simply liberated the moveable succession to that extent, and that he, as universal disponee, had so much the less to pay. The House of Lords sustained this view, holding the legitim in substance to be a debt prestable from the general disponee, and that the renunciation of that debt or of any part of it by the creditor accrued to the benefit of the holder of the *universitas* of the moveable estate.

It perhaps may be thought, as the minority in this Court thought, that this result trenched somewhat on the impressions of our older lawyers as to the absolute integrity and segregation of what is called the legitim fund. It is also sufficiently evident that the Court of last resort were not willing to allow the residue to be diminished both by the claim of the renouncing child under the settlement, and also by the abstraction of the whole legitim fund by the child who had not renounced. Lord Cottenham, in the remarks which have been made in the foundation of this argument, had not probably in view so much the technical peculiarities of the Scottish law of legitim and collation as the doctrine of equitable compensation. That eminent person, referring to the arguments at the bar, and the opinions delivered in the Court below, said that the title of the general disponee had been aptly likened to that of a debtor who has paid a debt to the proper creditor; and he proceeded to say it might also be likened to the case of one who has acquired right to a debt by purchase and assignation from the original creditor. These were illustrations only, and Lord Cottenham used them to show that without any express or formal title, or deed of transference, such rights might come to be vested in third parties, under arrangements with which the children claiming legitim had no concern. But he certainly did not mean to say both that the debt had been extinguished by payment, and also that it had been kept up by assignation. Like all illustrations, the categories, although similar, were not identical, and were not and could not have been so represented. The general disponee in the case of *Fisher* v. *Dixon* did not acquire his right by payment, nor did he acquire it by assignation; but he had ceased to be debtor in the abandoned share by the renunciation of the creditor. Before the renouncing child made his choice the general disponee was contingently liable either in the provisions contained in the settlement, or alternatively in the share of legitim to which the child might have claimed right. When the choice to take the first was made, his obligation to pay the last was extinguished, and he retained the amount, not in respect of any derivative title, but solely in virtue of the direct general disposition in his favour.

This was the ground, and the only ground, of judgment in the Court of Session, and it is illustrated so fully and exhaustively by Lord Fullerton, almost every sentence of whose opinion is at variance with the theory I am now considering, that I need not pursue it further.

One passage from Lord Cottenham's opinion clearly expresses the result of the judgment in the House of Lords:—"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?"

That is the final proposition to which the rest of the opinion was intended to lead up. Whether the disponee's right be said to be constituted by payment, or by purchase, or by assignment, or by satisfaction, can be of no moment to this question—because whatever legal category the transaction may fall under, it is one with which the other children can have no concern.

In the case of *Panmure* v. *Crokat*, decided long after *Dixon* v. *Fisher*, that judgment seems to have been quoted in support of some of the same fallacies as those which have been urged in this case. Lord Ivory in a very vigorous opinion seems to have seen the direction in which the analogy of assignation was drifting, and to have dealt with them thus—"But in this discrimination between renunciation and assignation it was overlooked what was the operating effect of the universal disposition of the deceased's estate. By that disposition legitim and all was conveyed, and effectually so, if those entitled to the legitim acquiesced. But the measure of the right of challenge was the extent of the interest in the child challenging, and as each was interested only for his own share, the shares of those who renounced or assigned this challenge enured to the general disponee by force of the general conveyance, while the shares of those who did not renounce alone remained good as a claim against the estate conveyed by that deed" (18 D. 712).

So Lord Curriehill in the same case says, speaking of *Fisher* v. *Dixon*—"It is optional to each of the children to abide by the legal right so vested in him or her, or to accept of the testamentary provision left in lieu or satisfaction of that legal right, and that if any of the children obtain satisfaction of the quota of the legitim so vested in him, the claim to that portion of the legitim is thereby extinguished."

Thus if it be conceded that the other child has no concern with these arrangements, and that the daughters have ceased, no matter how, to be creditors for their legitim, the whole of this mist is cleared away.

I have only to point out in conclusion on this head, that the doctrine contended for must be universal in its application in any case in which legitim is renounced; for the renounced share always accrues to the general legatee or disponee, subject of course to the claims on the residue. Thus, in the very case put by Fraser, in the passage already quoted, of a child who is satisfied with the advances received by him, and claims nothing from the succession, it would still follow that he—or the general legatee as his assignee—would be obliged to collate, contrary to every principle on which the doctrine of collation in our law has been hitherto understood to rest. There would in such a case be no room for any fiction of payment or transaction, but yet the title of the general disponee would be not the less identical with that sustained in the case of *Fisher* v. *Dixon*.

It is true that in this case the daughters, who alone could claim or assign the right to legitim, have a life interest in the income of the residue. They are not strictly the residuary legatees, although it would not affect the argument if they were. The interest which they thus acquire they take solely under their father's conveyance, with which the son, who has repudiated the settlement, can have no concern.

I am therefore compelled to differ from the Lord Ordinary in his estimate of the judgment in question. I cannot think that the case of *Fisher* v. *Dixon* decided or gave any countenance to the proposition that the acceptance by a child of a conventional provision and the renunciation of his legal rights "operates" as an assignation of the legitim to the general disponee. On the contrary, I think it was settled in that case, and has been law ever since, that the general legatee takes the renounced share of legitim solely in virtue of the general conveyance in his favour, and that under this title there can be no claim against him for collation.

A second question has been raised, as to whether, supposing collation to be otherwise demandable, the right to demand it has been competently excluded by the settlement. I must assume in this question that the trustees do not hold this fund in virtue of their general conveyance, but solely in virtue of an implied assignation of the common law right of legitim. But it is quite certain that under the settlement the testator intended the residuary gift to be over and above his previous advances, and I proceed to consider whether such intention could be validly indicated by a testamentary deed.

Now, while it is settled law that the father cannot by testament affect the legitim fund, or remit debts forming part of the moveable succession, it is equally certain that the rules applicable to collation of advances are entirely different, as I have taken occasion to show. It is admitted that any indication of intention on the part of the father to exclude collation, although of course only designed to operate after his death, will be effectual, but this admission has been qualified by the proviso that this power can only be exercised by a deed *inter vivos*. I was surprised to hear it maintained for the son, and apparently conceded by his opponents, that this point was conclusively ruled by authority. Having some years ago had occasion to consider this matter, my impression was very different; and Lord Fraser in his last edition confirms that impression by saying that the point had never been decided. I have since the debate renewed my researches, with the result of finding that the proposition is unsupported by any *dictum* in any institutional writer, and that so far from having been so decided, it has never, as far as I can find, been even presented for judgment. But with a view to remove some misapprehensions on this important matter, I shall consider it with some care.

The rule of the civil law, from which our law of collation is derived, was quite clear and precise on this matter. It was held in that system, which is stated with unusual fulness by Lord Stair (iii. 8, 26), that "if it appeared not to have been the parent's will collation had no place, as if the thing were bestowed with express exemption or prohibition of collation, or if it were left as a legacy or donation *mortis causa*, for thereby the parent's purpose appeared to prefer that child to the rest, even after the parent's death."

Having thus explained the civil law, Lord Stair proceeds, in the subsequent sections, to set out at length the law of Scotland as to succession in moveables—He says (§ 28) The law and customs of Scotland have reduced the matter of testaments and succession in moveables much nearer to natural equity, and made it much shorter and plainer than the Roman law; and he mentions two particulars in which it is so. He then proceeds to say, as to collation, that it is excluded if the father shall, by expression or by implication, declare that a child shall be a "bairn of the house," but he nowhere limits this doctrine to declarations *inter vivos*, nor does he say that our law differs from the civil law in that respect. He concludes his commentary with these words—"Collation, then, hath only place among children where it is not prohibited expressly or implicitly by the father providing that child to be a "bairn of the house" (§ 46). Now, if being a "bairn of the house" had only reference to some privilege or right to be exercised during the lifetime of the father, there might be reason for concluding that a declaration *inter vivos* was alone referred to. But as being a "bairn of the house" means nothing whatever but a right to legitim without collating, to take effect after the father's death, there seems no reason why a declaration in a testament should not be as conclusive an indication of the father's intention as one made *inter vivos*.

Erskine follows Stair, but says nothing more precise, and indeed all our writers express themselves very vaguely on this head. I do not find that the question has ever occurred for decision. Two cases were referred to at the debate, but they do not bear on the subject in dispute. The first of these cases is a case of *Allan*, reported in a

few lines in Brown's Sup. vol. 5, p. 897. But as far as can be gathered from the very barren statement of it, the case had no possible connection with the subject of collation. A son having discharged his legitim in his father's lifetime, the father attempted by testament to repone him against the discharge. But this was plainly beyond his power. At his death the legitim stood discharged by the son's unrecalled deed, and the legitim fund vested in the remaining children, as was found in the case of *Hog* v. *Lashley*. The question related solely to the right to claim legitim—one quite apart from the obligation to collate, which depends on different principles.

The only other authority which was referred to was a case of *Gunn* v. *Grant*, reported in 11 S. 484, and also in the Scottish Jurist, vol. 5. But on reference to the two reports it will be at once seen that the case decides nothing on the point now in issue. In the first place, the advances in that case could not have been the subject of collation, because these were proper debts; and, in the second place, the judgment of the Court expressly bears that all questions of collation were reserved. Nor do the fragmentary observations attributed to the Judges give any countenance to the supposed restriction. Lord Cringletie, who alone thought the discharge inoperative, placed his opinion expressly on the ground that the sums advanced were proper debts, and points out very clearly the distinction between such debts and advances which are the proper subject of collation. According to the report in the Jurist, the Lord Justice-Clerk thought the discharge effectual, while Lord Glenlee and Lord Meadowbank thought that no question of collation was properly raised, and the Court in the end adopted that view, and reserved in their interlocutor all questions of collation.

On the third question, whether money secured on real estate in England falls into legitim, I am of opinion that this has been long settled in our practice in the affirmative, and that the recent statute regarding heritable bonds in Scotland operates no alteration of the law in that matter.

Lord Young—The pursuer, who is one of five surviving children, repudiates his father's will and claims legitim, and the only question is, What is the amount of his legitim? for he has admittedly no right to anything else. The rule, in the words of Erskine (iii. 9, 17), is, that "no legitim can be claimed by children but out of the moveable estate belonging to their father at the time of his death." There being no widow, one-half of that estate is the legitim, *legitima portio*, or legal succession of the children, which the father's will cannot deprive them of, or even apportion amongst them, against the equal distribution which the law enjoins. The pursuer appeals to this law, and his right by it is to an equal share as one of five surviving children (*i.e.*, one-fifth) of a half of the "moveable estate belonging to their father at the time of his death."

But he claims more, relying for the excess, not on the law of legitim, which operates irrespective of his father's will, but on the equitable doctrine of *collatio bonorum inter liberos*, which is founded on the will of the father, expressed or reasonably presumed, and so stands in marked contrast to the law of legitim. The reason and equity of the doctrine is this, that when a father has in his lifetime made a considerable payment or provision to a child it is reasonable—in the absence of any indication of a contrary intention—to presume that he intended that each of his other children should have an equivalent or corresponding benefit in the shape of an increased share of his estate after his death. "The reason of this collation," says Stair (iii. 8, 26), "was the equality of interest and affection of parents to their children of the same degree, and thence their presumed will that these should enjoy equal benefit by their parents. And therefore if it appeared not to have been the parent's will collation had no place." To the same effect Erskine says (iii. 9, 25)—"Collation is excluded when it appears evidently to have been the granter's intention that the child should have the provision as a *præcipuum* over and above his share of the legitim." Mr Erskine speaks of this *collatio* only in connection with legitim, but it is not so limited, and Lord Stair properly treats of it generally as operating on any legal succession of a parent (whether father or mother) which the children have equal right to, and this may of course be the whole moveable succession of an intestate parent, the principle being that the Court will interfere with the equality of division which the law directs to such extent as may be necessary to do justice among the children by producing a real equality with reference to the presumed intention of their parent regarding payments or provisions made in his or her lifetime.

Now, the pursuer's case is, that his father having in his lifetime settled certain tochers on his daughters, the Court ought on this equitable doctrine of collation to give him a share of the legitim larger than his legal share by so much as will make him equal to any of his sisters with her tocher—so, in short, dividing the legitim that taking account of tochers and legitim together all the five children shall be put on a footing of equality, and thus, in the words of Stair, "enjoy equal benefit" by their father according to his "presumed will." And if the Court were satisfied that the father so intended, or had reasonable grounds for presuming that such was his will, they might do so undoubtedly, proceeding, as I have pointed out, not on the law of legitim, but on an equitable doctrine designed to carry out the presumed will of the father with reference to money laid out by him in his lifetime.

Now, if we may legitimately refer to the father's trust-deed for information of his will or intention in this matter it is clear that he did not intend that his son (the pursuer) should enjoy equal benefit with his daughters, and that it would be unreasonable to impute such intention to him, and act on it as his presumed will. But it is urged that the trust-deed being *mortis causa* cannot be referred to for this purpose, inasmuch as the amount or legal division of legitim cannot be affected by a *mortis causa* deed. There is, however, no question of the amount or legal division of the legitim. The amount is one-half of the moveable estate belonging to the father at the time of his death, and the pursuer's share on a legal division is one-fifth. With this the father's will cannot interfere to the prejudice of the pursuer, who repudiates the will. It is when he demands more in order to do him justice in

accordance with the alleged will of his father that he should be made equal to his sisters with their tochers, that the trust-deed, which shows a quite other intention is referred to. It is founded on, not to deny the pursuer's legal right to legitim, but to resist his demand for more on the equity of collation, for which it shows there is no room. For the father clearly intended that his daughters should have his whole estate except only £5000, or if his son preferred it, his legal share of his succession irrespective of his will. There is no room whatever for presuming an intention on the father's part that he should have more in order that he might enjoy equal benefit with his sisters. In other words, there is no room for the presumption on which the doctrine of *collatio inter liberos* rests.

This is sufficient for the decision of the question of collation. But I desire to point out, briefly and without enlarging on the subject, that the argument for collation here seems to me bad on other grounds also. The collation founded on is *collatio bonorum inter liberos* claiming their father's estate. But the controversy here is not *inter liberos*. The pursuer's opponents are not his sisters, who are not claimants at all, but marriage trustees, to whom the residue of the estate is given on trust for various interests. They can have no more of course than the testator had power to give them, but to so much they are absolutely entitled, and I do not see how the doctrine of *collatio inter liberos* can apply to them. They have nothing to collate except the funds which they hold under the marriage-contracts on the trusts there specified, and these they cannot part with except in execution of the trusts. It is hard to follow the suggestion that the testator presumably intended that the residue conveyed to them by his settlement on the trusts specified in the marriage-contracts should be diminished in respect of the funds which they had from him and already held under these contracts, in order that his son might, to that extent or any extent, be put on a footing of equality with his sisters. But this is the result aimed at by some mystical combination of the law of legitim and the doctrine of *collatio bonorum inter liberos*. These trustees have no concern with legitim except in so far as it is pleaded against the will. They take only under and by virtue of the will, and not at all or in any sense by the law of legitim, for I reject the view that they take by implied assignation from the daughters of their shares of legitim, which is founded on a misconception of certain remarks in the case of *Fisher* v. *Dixon*. The daughters are content to abstain from claiming their legitim, and so to allow what they might have so claimed (as I assume, for I cannot admit that they would have been allowed so to frustrate the will) to pass under the will—in other words, they abstain from stating an objection to the will which was legally competent to them. With this the pursuer has no concern, and it is impossible that the Court should impose any condition or terms on their abstinence. The title, not of the marriage trustees as legatees under the will, but of the trustees and executors of the will, may be argumentatively fortified by implying an assignation of the rights which the daughters abstain from using against it, but this not to alter their title so as to frustrate the testator's intention, but to enable them to execute the will according to its terms. But the will gives everything to the marriage trustees, and with the will as their title to it, except only what the law of legitim gives to the pursuer, and I must say that in my opinion the case is not affected by the circumstance that the daughters of the testator have a certain interest in the trusts, and would have been exactly the same had the residue been bequeathed to a charity. The pursuer would of course have been at liberty to object to the extent of his share of legitim, and the daughters to abstain from objecting in respect of their shares, which would then have passed to the charity according to the will, and by virtue of it alone.

The question regarding the Welsh mortgages is, I think, the most interesting and important in the case, and I regret that the defenders' counsel, who at first proposed to abandon their plea on it, should have argued it so perfunctorily when invited by the Court to defend it. The pursuer's proposition is that a domiciled Scotchman cannot dispose *mortis causa* of his money invested or lent on the security of land in England except subject to legitim, and of *jus relictæ* also if there be a widow It is of course a question of Scotch law, for no other governs the succession or testamentary power of a domiciled Scotchman. The general rule undoubtedly favours testamentary liberty, the only exception to it being by the law of legitim and *jus relictæ*, and I think I may say that the policy of the law and the Legislature has been to limit rather than extend the comprehension of the exception, which we seem to have borrowed from England at a remote period. Mr Erskine refers to the Regiam Majestatem, the authorship of which Skene assigns to Glanville (and it is undoubtedly English) for the earliest notice of it in Scotland. Blackstone refers to Glanville for the earliest notice of an exactly similar exception to testamentary liberty in England, although it had disappeared long before he wrote. He says—"We are not to suppose that this power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanville will inform us that by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the others; but if he died without either wife or issue the whole was at his own disposal." Blackstone goes on to say —"But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels, though we cannot trace out when first this alteration began." It is also interesting to notice—I again quote from Blackstone—that "the ancient method continued in use in the province of York, the principality of Wales, and in the city of London till very modern times, when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, these statutes have been provided—the one 4 and 5 W. and M. c. 2 (expd. by 2 and 3 Anne, c. 5), for the province of York; another, 7 and 8 W. III. c. 38, for Wales; and a third, 11 Geo. I. c. 18, for London—whereby it is enacted

that persons within those districts, and liable to these customs, may (if they think proper) dispose of all their personal estates by will, and the claims of the widow, children, and other relations to the contrary are totally barred. Thus is the old common law utterly abolished throughout all the kingdom of England, and a man may claim the whole of his chattels as freely as he formerly could his third part or moiety." Such is the history of this law among our Southern neighbours, from whom we derived it, copying it closely at an early period of their civilisation and ours. We see that they found it intolerable, and destroyed it in its last retreat, the city of London, in the beginning of last century. We continue to give it asylum amongst us, although I cannot say that we treat it as if we loved or even respected it, except perhaps when it gives rise to subtle metaphysical arguments, of which it is wonderfully prolific. In the first place, we give absolute power to exclude it by antenuptial marriage-contract, so that it only hits those who when they married were not in a position to have a marriage-contract, or improvidently omitted to have one —for the exclusion is so invariable whenever there is a contract that the clause of exclusion is one of style in the Style Books, and I do not remember to have seen a marriage-contract prepared by a conveyancer which did not contain it. In the second place, we allow perfect liberty to every man to avoid its operation by the mode of investing his money, for money invested in land or houses, or lent on the security of land or houses, is not subject to it. And this power of avoiding the law of *jus relictæ* and legitim, and securing testamentary liberty by lending on heritable security, was considered so important and valuable that when the Legislature in 1868 changed the succession of money so secured from heritable to moveable, provision was made for the exclusion of *jus relictæ* and legitim, and the preservation of testamentary freedom. It is certainly remarkable that a father's power to provide for his children, and apportion his estate among them according to his judgment of their needs and deserts, should depend on the state of his investments (whether accidental or designed) at the moment of his death, and that he should be put to the shift of regulating these cunningly or skilfully in order to secure the power. If accidental, the operation or not of this law accordingly is absurd. If designed, it is only an inconvenient and roundabout way of making a settlement or giving one validity. The questions that arise about the father having taken the right way or not to avoid the law in restraint of his liberty, which is certainly avoidable by taking the right way, are interesting, but I can hardly say profitable, and we shall probably at last deal with the law as our neighbours from whom we derived it did long ago—that is, abolish it altogether. In the meantime we must apply it, and the immediate question is, does it apply to money lent on the security of land in England?

The argument for the affirmative of the question seems to be this—That the law applies to the whole moveable estate of the deceased husband and father—that is, the whole must be taken account of in applying it; that prior to the Act of 1868 money secured on land in Scotland was exempt as being heritable and not moveable estate, and the exemption of such money by the Act applies only to what the Act converted from heritable to moveable, and so does not include money secured on land in England, which is moveable not by the Act of 1868, but by the law of England, which, and not our own, we follow on the question of heritable or moveable.

Now, I think the validity of this argument must be considered with some reference to the conclusion to which it leads. That conclusion is that with respect to the testamentary liberty, by the law of Scotland, of a domiciled Scotchman, there is a distinction between his money lent on the security of land in Scotland and in England, so that while in the former case there is perfect liberty, there is a restriction in the latter, and that by reason of a reference which the law of Scotland makes to that of England which imposes no restraint, so that a restraint is somehow evolved out of a combination of the two laws neither of which imposes any.

The law of Scotland always allowed perfect testamentary freedom with respect to money lent on land prior to the Act of 1868, because being heritable the only restraint on freedom, viz., *jus relictæ* and legitim, did not apply to it at common law, and subsequently because of the provision of the Act that the exemption should continue notwithstanding the change from heritable to moveable. But on a question of general policy such as testamentary freedom or restraint, what concern have we with any law but our own, and how does it signify whether the land by which the repayment of a debt is secured is in Scotland or elsewhere? It is assuredly the policy of our law that the creditor in a debt secured on land shall have perfect liberty to dispose of it as he pleases, and if the land is in England, the law of England not interfering in the matter, and imposing no restraint on the testamentary power of the creditor if it did, how shall we by reference to it create a restraint on a Scotch testator in opposition to the genius and policy of our own law which governs his succession and testamentary power?

The Lord Ordinary does not think that the question is affected by provisions of the Titles to Land Consolidation Act 1868 in relation to heritable securities, these having reference to heritable securities over lands and heritages in Scotland. Now, it is true that this Act, the leading purpose of which is to simplify titles, deals only, as regards this purpose, with lands and heritages in Scotland, and has no operation on titles to lands and heritages elsewhere. But the claim with which alone we are here concerned deals with a more general subject, viz., the law of succession, and although it will also be limited according to the sense and scope of the enactment, and so affect only the Scotch law of succession when it applies, I can find no satisfactory reason for limiting it to heritable securities over land in Scotland and declining to apply it to securities over land elsewhere, the succession to which is governed by the law of Scotland. The clause is section 117, and it provides that after the commencement of the Act "No heritable security granted or obtained either before or after that date, shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor." And again, "When legitim is

claimed on the death of the creditor, no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim." It is, I think, then that these words apply to heritable securities over land in England—not, of course, affecting the succession to them by the law of England—but furnishing the rule of succession to them by the law of Scotland whenever it applies. We should not, of course, hesitate to depart from the letter and limit the generality of the words by construction in order to give effect to the spirit and true intention of the enactment. But I am, I confess, not prepared so to limit the enactment by construction, in order to sanction a distinction as regards succession and testamentary power by the law of Scotland, according as the debts due to a deceased Scotchman were secured over land in Scotland or elsewhere. Such a distinction is obviously irrational, and could only be attributed, if the law recognised it, to some unfortunate accident or oversight. The law of succession of any country is matter of general policy, and the policy of our law is that heritable securities shall be moveable in point of succession, but shall not pass under the peculiarly Scotch succession termed legitim (or *jus relictæ*) and so shall be subject to the creditor's absolute power of disposal by will. The policy of the law is general, and so are the words of the statute by which it is enacted, and I must decline by construction to limit these words so as to exclude from their operation cases to which the reason and policy of the law itself manifestly apply.

This is sufficient for the decision of the matter, for if the Act of 1868 applies, the heritable securities in question are not "to be held to be part of the creditor's moveable estate in computing the amount of the legitim," and it is unnecessary to consider how the question would have stood before the Act.

But I desire to say that I doubt the proposition which is at the foundation of the pursuer's argument, irrespective of the Act of 1868, and assuming it to be inapplicable, viz., that in a question of succession foreign securities forming part of the estate of a domiciled Scotchman are to be regarded as heritable or moveable according to the law of the foreign country. This is indeed stated in the rubric as the import of the decision in the case of *Downie* v. *Downie's Trustees*, 4 Macph. 1067, and seems to be so, the Lord President saying—"The principle has been recognised and settled that the character of the subject as heritable or moveable depends on the law of the country where it is placed." I cannot think that a satisfactory judgment. No authority for the proposition it sanctions is referred to by the Judges except the case of *Newlands*, 11 S. 65, which certainly does not sustain it, except only by the remark of Lord Glenlee—"We must go to the *lex rei sitæ* to ascertain what is heritable and what is moveable." I venture respectfully to say that the proposition, which is a very general one, may be advantageously reconsidered on a fitting occasion. It appears to me to be erroneous, and to involve a manifest contradiction. If the succession in question is governed by the law of a foreign country in which the subject of it happens to be situated the matter is simple enough—that law has only to be ascertained and applied. But, indeed, when the succession depends on foreign law the foreign tribunal which administers it will not permit the interference of any other, but will themselves give the property, which is within their territory, and usually a part of the territory itself, to the successor by the law of the territory. With respect to money and goods belonging to a foreigner, civilised countries do not on his death interfere with his succession, but leave it to be governed by the law of his domicile, giving up the money or goods to be distributed accordingly by the tribunal of his domicile which administers that law. In the case of a Scotchman, for example, his foreign debts (whether secured or not), and the price of his goods abroad at the time of his death, are sent home to be distributed as the law of Scotland directs according to the deceased's will or on intestacy, as the case may be. Now, I fail to see what in such a case we have to do with any foreign law of succession, and if the deceased had investments in several foreign countries there might be as many diverse laws of succession to be taken account of, observing and following the changes therein from time to time in administering our own law of succession. It is said that we refer to the foreign law only for the character of the thing or the right to it, as heritable or moveable, and then follow our own law of heritable or moveable succession accordingly. But what is meant by the character or quality—say of money lent on the security of land—as heritable or moveable except only the law of succession applicable to it? We have rules of our own for distinguishing between moveables and immoveables, extending greatly the original fundamental distinction, which is only between land, which is naturally immoveable, and things on it which are moveable. These are rules of our law of succession. Stair gives us the force and meaning of the term "heritable" in these two passages:—"The successor in immoveables doth only retain the name of heir, and therefore immoveables are called heritable rights" (iii. 4, 22). Again—"These things with us are called heritable, because they descend not to executors, to whom only moveables befal, but to heirs; and so the distinction cometh ordinarily of moveables and heritables" (ii. 1, 2). If therefore we could imagine the case of an English Court consulting us regarding the quality as heritable or moveable by our law, of say a heritable security over land in Scotland which belonged to a deceased Englishman, we should, before the Act of 1868 have answered "heritable," and after it "moveable," meaning precisely that by our law of succession, had it been applicable, the property would before the Act have descended to the heir, and after it to the executor. But if the succession of the deceased proprietor (creditor) depended on the law of England we should probably have been puzzled to know why the English Court administering it should concern itself either with the provisions of the Act of 1868 or the common law which it altered with respect to the Scotch law of succession. If we similarly inquire respecting the quality, as heritable or moveable by the law of England, of a security over land in England, we can only learn what is the English law of succession respecting it, for nothing else is or can be meant by calling it "heritable" or "moveable" according to the law of England. Suppose the English law were exactly the same as our own,

standing on a statute similar to our Act of 1868, the pursuer's argument would lead to this, that we should include the securities in computing legitim — contrary to the statute law of both countries—the exclusion of legitim by the English Act only operating in England (where, indeed, legitim has in fact no existence), and its exclusion by the Scotch Act applying only to securities over land in Scotland.

It is possible, though the case must be of rare occurrence, that we may have to decide a case on some foreign law of succession. For when a foreign law of succession operates, the Courts of the foreign country will usually, as in the case of succession to land, enforce it themselves. But the notion of administering our law of succession in a case governed by it, with reference to some foreign law of succession which we admit not to supersede, but to partially modify and alter our own, is one which I am unable to follow.

On the whole case I am of opinion that the interlocutor of the Lord Ordinary ought to be recalled, and that the pursuer should have decree only for one-fifth of the half of the free moveable estate of the testator at the time of his death, without computing the English mortgages.

Lord Craighill—There are four questions which in the argument on this reclaiming-note were presented for decision. The *first* is Whether a mortgage and a deed of charge over real estate in Wales, which were parts of the truster's succession, are to be taken into account in computing the moveables, one-half of which—in this case the truster's wife having predeceased him—is "the bairns' part of gear?" The *second* is, Whether the provisions settled by the truster on his daughters and their issue in their several marriage-contracts are to be collated? The *third* is, Whether, if there is to be collation, the actuarial values of the several liferents of the daughters, or the principal sums liferented, are the provisions to be collated? And the last is, Whether, assuming again that there is to be collation, interest is to be added to principal in fixing the amounts which are to be collated? On all these questions except the third my opinion coincides with that of the Lord Ordinary. On the third I differ from him, being of opinion that not the actuarial values of the liferents, but the provisions themselves, are the subjects for collation.

I. On the first question I agree with all that has been said by the Lord Ordinary. The mortgage and deed of charge are executry estate according to the Law of England, which is the Law of Wales. And the reclaimers admit that unless a change in our law has been effected by the Conveyancing (Scotland) Act 1868, these assets must, by reason of the decisions upon this point, all of which are noted on p. 743 of Lord Fraser's Treatise on Husband and Wife, be computed in fixing the amount of the bairns' part of gear. So far as legitim was to be affected by the enactments of that statute, the object, and the only object in view, judging by what has been expressed, was to prevent an increase of the fund which, but for a provision to the contrary, would have resulted from the conversion of heritable into moveable property of debts secured over heritage in Scotland. We have to inquire, however, the reclaimers say, not as to what may have been intended, but as to what has been accomplished, and their contention is that the proviso at the close of section 117, read, as they also say it must be, in the light of one of the definitions of "heritable security" given in section 3, the interpretation clause, is an enactment to the effect that where legitim is claimed on the death of the creditor, no heritable security, whether the real estate over which the debt is secured be in Scotland, or in England, or in Wales, or in any foreign country, shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim. I cannot adopt this construction, for which in my opinion there is no warrant afforded by anything deducible from a reasonable interpretation of this provision or any of the relative enactments of the Conveyancing (Scotland) Act of 1868.

The first thing for observation on this subject is that the part of section 117 which is relied on is a proviso, not a substantive or an independent enactment, and its purpose is to qualify or restrict something which has by that clause been already enacted. Now what is the substantive and independent enactment in this section? The words are "from and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security; and the same, except as is hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would under the law and practice now in force have belonged to the heirs of such creditor." The comprehension of this enactment is plain—as plain as it would have been if the words "in Scotland" had, after the words "heritable security," in the second line of the clause, been introduced. I think so because the securities the destination of which is changed would prior to the Act have gone not to the executors but to the heir of the creditor. Securities over real estate in Wales cannot be within this enactment, for these prior to the Act went to the executors and not to the heir of the creditor.

But this is not all which is presented by the 117th section for observation. There are five provisos superinduced upon the enactment above quoted, of which the last is that relied on by the reclaimers. The first four are so expressed as to show that English or Welsh or any other securities than those over real estate in Scotland are out of the pale of this enactment. The fifth proviso must also be read as applicable only to the same securities, for as it too is simply a qualification or condition superinduced on the same substantive or independent enactment, these are the only securities upon which, and for the restriction of the consequences of which, this proviso, so far as appears, was or could be introduced. Of course section 117 must be read in the light of the definition given in section 3, the interpretation clause. Heritable securities and securities are by the latter said to extend to and include "all deeds and conveyances whatsoever, legal as well as voluntary, which are or may be used for the purpose of constituting or completing or transmitting a security over lands, or over the rents

and profits thereof, as well as such lands themselves, and the rents and profits thereof, and sums —principal, interest and penalties—secured by such securities." These no doubt are wide words, but their import is plainly limited by the consideration, first, that they are technical words in Scotch conveyancing; and secondly, that their comprehension cannot be determined without taking into account the words which precede and those which follow the part of the definition which has been quoted. The former as well as the latter are applicable only to securities over land in Scotland. None of them can be held descriptive of securities over real estate in England.

This, however, is not all. The title and the preamble of the Act tell us in so many words that securities in Scotland are the only securities which were to be affected by the statute. I quote here only a single sentence, and it is that in which it is set forth as expedient that certain changes should be made "upon the law of Scotland in regard to heritable rights, and to the succession to heritable securities in Scotland." A change upon the succession to a mortgage, or charge over land, in England or in Wales or in any foreign country, was not within the purview of the Act, and is, as I think, not accomplished by anything which has been enacted.

For these reasons I think that this part of the judgment of the Lord Ordinary ought to be affirmed.

II. Before proceeding to the consideration of the second question presented for decision, it is necessary to bring into view the circumstances of the truster's family, and the terms of his trust settlement. The truster was predeceased by his wife, but survived by his son and four daughters. The latter married in the lifetime of their father, and to all he made advances on the occasions of their several marriages. These advances were not given to the daughters themselves, but were placed in the hands of trustees for the purposes specified in the marriage-contracts, which, shortly stated, were, the payment of the income to the daughters themselves, who were constituted liferenters, and on the death of the daughters the payment of the fee to their issue, who were constituted fiars. There was no declaration in any of the marriage-contracts that the moneys advanced were not to interfere with or diminish the right of the daughters to legitim, or that the advances were to be in satisfaction to any extent of their respective claims of legitim. By his settlement, again, the truster conveyed his estate to trustees for the benefit of the appointed beneficiaries. These were, first, his son the pursuer of the present action, for whom and for whose children a specified sum was to be held in trust. He is, however, merely liferenter of this money; his issue are the fiars; and this provision, along with advances already made, or any which might be made by the truster during his life, were to be accepted by the pursuer as full satisfaction of any claim of legitim, or other legal claims competent to him against the truster's estate through the truster's death; it being also provided and declared that in the event of the pursuer surviving and repudiating, or failing to accept the provision in his favour as in full satisfaction of his legal claims, the foregoing provision in favour of him and his issue shall be thereby *ipso facto* revoked, and become void and null; the capital sum constituting the provision in that case falling into the residue of the trust estate. The provisions to the daughters are given by the truster in the sixth head of his settlement, where he directs that after paying and providing for all other provisions and legacies, his trustees shall realise the whole remainder of the truster's estate, and divide and pay over the free residue to the marriage-contract trustees of his four daughters respectively, to be held by them exclusive of the *jus mariti* and right of the husbands of such daughters, and not to be affectable or attachable by any deeds or debts of such husbands, or the diligence of their creditors, on the same terms and under the same conditions as the marriage portion provided by the truster to each of his daughters are held respectively; and these provisions the truster declares shall be accepted by his daughters respectively as in full of all claims of legitim or other legal claim competent to them or any of them against his estate through his death, the provisions of those daughters who may repudiate or fail to accept falling into residue. The pursuer has repudiated the provision conceived in his favour, has claimed his legitim, and has raised the present action that the measure of his right may be determined. The daughters on the other hand have accepted their testamentary provisions, and in this last circumstance has originated the questions which still await consideration.

The first of these is, whether the provisions settled by the truster on his daughters and their issue on the occasions of their several marriages must, as the pursuer contends, be collated. One or two things properly preliminary require first to be noticed. And as to these there is no controversy. The first is, that the right of the pursuer to claim legitim is not disputed by the defenders. What is the sum to which he is entitled is the issue, and the only issue, to be determined, and to its decision all the other questions which have been raised or argued are simply ancillary.

The next preliminary point calling for notice is that the right of the pursuer's sisters, or of such person or persons as may represent them, to claim legitim, is not denied by the pursuer. His sisters are still alive; their right to legitim was not renounced; nor was anything in their father's lifetime taken by them as in satisfaction of, or as an equivalent for, legitim. The consequence is that when the truster died, his daughters as well as his son had all the rights belonging to children, the most important of which, and the only one with which we are now concerned, being the right to legitim. So far, therefore, both parties are agreed. The legitim fund is one-half of the free moveable estate left by the truster; and there are five children, the pursuer and his four sisters, who may claim participation. What, then, is the thing about which parties are in litigation? It is this: Must the daughters collate their marriage-contract provisions? In other words, before they, or anyone in their right, shall draw or get credit for anything out of the legitim fund, is the pursuer entitled to receive from that fund a sum equal to the provisions settled on the daughters when they were married, which would be the effect of collation? This, the pursuer says, is necessary if there is to be equality; and to secure this result collation in the general case has been made a rule of the law of Scotland. That rule in

its operation has been thus explained (2 Fraser, 1033)—"Where in the lifetime of the father money is advanced, or a provision made, by him for some of his children, without any declaration as to how it is to affect the claim of legitim, the law, to prevent an inequality among the children, has interfered in favour of those who have received nothing from the parent, and gives the favoured children a right to legitim only, under the condition of the advances or provisions they have already received being taken as in part payment of that claim." This, as I think, being the rule, let us examine the reasons for which, or for some of which, as the reclaimers say, it cannot be applied on the present occasion.

The first, which was urged in the argument for the reclaimers, is that the advances which the daughters received were the subjects of settlement in their several marriage-contracts. These consequently, as was argued, are assimilated to moneys for the payment of which a consideration was given, and in respect of which, therefore, no claim of any kind could by any person be preferred. But it is unnecessary that this point should be dealt with otherwise than by saying that all authority is against this contention. Erskine (iii. 9, 24), Stair (iii. 8, 46), and Bankton (iii. 8, 17) are clear in their statements of the law upon this subject, and the reports show numerous cases in which a provision which was the subject of settlement in a marriage-contract to daughters was viewed simply as tocher, which when legitim came to be claimed by or for them behoved to be collated.

The second reason for which the reclaimers say that the marriage-contract provisions are not subject to collation is, that here there is no claim by or on account of the daughters for legitim. If the thing thus assumed be fact, the conclusion cannot be resisted. The contrary, however, must in my opinion be regarded as the true result. One thing at any rate is certain. Others than the pursuer claim legitim, or credit for payment of legitim, and they claim the portions to which if the daughters were claimants they would lay claim. How came those others to be *in titulo* to a share of legitim, or to credit for legitim, that was or might be claimed by the daughters of the truster? Not because right to such a claim was given by the father. He could impart no right to a share of legitim. That is a fund with which by virtue of any inherent power he cannot intermeddle. The children existing at the father's death, who have not renounced, and they alone, are the sole owners or creditors of this part of his moveable estate. Had they predeceased, they could have transmitted no title for participation. Had they renounced in their father's lifetime, the only effect of their renunciation would have been to reduce the number of the children who were to share in the distribution. These things are elementary truths in the law of Scotland. Whence, then, comes this claim on the part of the testamentary trustees of the father to the shares of legitim, or to credit for the shares of the legitim which at the truster's death, and through his death, became vested in his daughters? Clearly and unquestionably from this source—a transaction, express or implied, with the daughters, by which their father's trustees became entitled to claim as in their right, in consideration that there has been given what the latter have taken in satisfaction of their claim to legitim. Before the decision in *Fisher* v. *Dixon*, 2 Bell's App. 63, 2 D. 1121, it might have been contended that such a transaction with such a result could not be accomplished, because the surrender of the daughters' claim would not have transferred their right to their father's trustees, but would have operated as a discharge by which the claimants on the fund were reduced in number, simply to the benefit of the other children whose claims were unextinguished. But this view of the matter since the case referred to was decided is not maintainable. Nor after that judgment, and the exposition of the law which was given in the House of Lords when the decision of the Court of Session was affirmed, am I able to resist the conclusion that the acceptance by a child of a testamentary provision left by the father as in full of his or her legitim is a transaction by which that claim is transferred to, or a right to credit for the claim is conferred on, the trustees or testamentary executors of the father. It has been said that the idea of transference or assignation arises from, or is bound up in, the assumption that the legitim is a succession inherited by the children, and that this is a misapprehension. Those who say this are of opinion that the legitim is not a thing inherited, but is a claim of debt—the *jus exigendi* accruing at the father's death to the unforisfamiliated children by whom he is survived. There is, I think, some warrant for both views. Regarded as a *unum quid*, the succession may be said to be a succession opening to children as a class. It was so described in *Robertson* v. *Kerr*, June 2, 1742, M. 8204, in the report of which Lord Kilkerran states it as "generally the opinion of the Court that the legitim is a right of succession to the father, otherwise the children would have right to it upon their existence, though they predeceased their father, as the relict has one part though she predecease her husband." But the moment this succession opens, the *unum quid* falls into parts, and for one of these each unforisfamiliated child may properly be said to be a creditor of his father, or rather of the estate left by the father. The consequence is, taking the latter as a true representation, which was the view presented by Lord Fullarton in the opinion he delivered in the first of the cases of *Fisher* v. *Dixon*, 2 D. 1139, that the acceptance of a testamentary provision given in full of legitim may be taken in its operation to be not the assignment of a right but the extinction of a debt. Viewed, however, in either light, the result, so far as the present question is concerned, will be found to be the same. If a child's portion of legitim is a share in a succession, then the party who acquires the right takes it as an assignee under the burdens by which the right was affected in the person of the assigner. *Ex hypothesi*, the daughters, had they been claimants, must have collated the advances evidenced by their marriage-contracts. And the testamentary trustees of their father, with whom they have transacted, and who through this transaction obtained the right the assigners possessed, can claim only upon the same condition. In other words, the trustees must collate, or give credit, as part of the payment of the daughters' shares of legitim, for the moneys settled upon the daughters in their marriage-contracts. Assume, on the other hand, that the right to legitim is not a

succession, but is a debt, the right to which opened to the daughters through their father's death, What has been done and what ensues from the operation? The daughters have been paid by acceptance of something in satisfaction from those who were the debtors, and the consequence is that the latter will be entitled to credit for something when they come to settle with the pursuer for his part of the legitim fund. But credit for what? Not for more than the debt due, only for that debt—that is to say, the sum remaining unsatisfied after giving credit for the advances which the daughters received on their several marriages from their father. For these reasons I am of opinion that for anything yet considered there must be collation.

The third reason for which the reclaimers resist collation is, that on the evidence afforded by the trust-deed, and particularly the residuary clause, the sound conclusion is that the truster did not intend that the provisions to his daughters should be brought against them as burdens on their claims to legitim; and as a consequence the pursuer is not entitled to insist upon collation. In dealing with this point it is necessary that we should clearly understand the meaning of the words in which this result is said to be implied. In the first place, what is the time at which the intention imputed to the testator was entertained, and when was it to be operative? Was it when the provisions were conferred, or if not then, when was it formed and expressed? In the second place, was it to be operative in the truster's lifetime or only after his death? To these questions I think the answer is easily given. The truster at the times of the advances did not show, and so far as appears did not entertain, an intention to give the moneys as gifts free from the burden of collation should legitim be claimed after his death. Had he so intended, that would have been stipulated as usual in the marriage-contracts of his daughters by which the provisions were settled; but neither there nor anywhere else is such an intention revealed; nor is there the least proof that the truster formed, or directly or by implication expressed, *inter vivos* such an intention at a later period. What is referred to and relied on by the reclaimers is the residuary bequest in his trust-disposition to his daughters and their issue. His purpose, the reclaimers argue, as there shown, is to give them all he could; and this being so, he must, they say, be held to have intended to absolve them from liability to collation. But in my opinion this residuary bequest is not proof of the thing to be established. It does not show that if any of the daughters repudiated the testamentary provision and claimed her legitim, collation was barred. The contrary indeed has been expressed. And this really is, as I think, conclusive of this part of the controversy, because both parties must be, or neither is, bound. Much, I may add, that was urged as to the intention of the truster in cases where the question was whether legtiim could be claimed without forfeiture of a testamentary provision has, on the matter in hand, no application. The issue in the cases referred to depended on the character of the provision—Was it part of a general settlement, or was the provision independent of other testamentary arrangements? The intention of the testator in such cases was the *regula regulans*, but here that test cannot be applied, because the pursuer is seeking nothing under his father's will, and the truster's intention, so far as that is testamentary, is not a thing by which his rights can be affected. A father in a *mortis causa* deed may make the renunciation of legitim the condition of taking a testamentary provision, but unless in this way he cannot touch the legitim fund or the shares of those entitled to participation. Were it otherwise the result would be the bequest of a legacy out of legitim. A father, could he by *mortis causa* deed discharge the liability of any of his children to collate, might indirectly but really bequeath a legacy out of the legitim fund to the members of his family who accepted their testamentary provisions. In other words, by conferring a dispensation from liability to collate, he would in effect take a sum equal to that which would have been the subject of collation out of legitim, and place it in the dead's part of the succession. This, in my opinion, is a thing beyond his power. The Court so decided in *Allan* v. *Allan*, 5 Brown's Supp. 897. In the case of *Grant* v. *Gunn's Trustees*, 11 S. 484, this question was mooted, but in the circumstances of the case a judgment upon it was unnecessary, and so was not pronounced. Lord Cringletie, however, expressed an opinion that a father may declare in his settlement that money advanced in his lifetime to a child need not be collated, but the argument on which this was given does not appear, nor does it appear that the case of *Allan* was mentioned. The other Judges reserved their opinion on the subject of collation. In connection with this alleged power of the father, a word may in conclusion be said upon *Douglas* v. *Douglas*, November 8, 1876, 4 R. 105. Had a residuary bequest been sufficient to discharge the obligation to collate, the statement of such a plea must have ensured success to the party who was worsted in the litigation. But no such plea was stated.

For these reasons, I am of opinion with the Lord Ordinary that those who here seek the legitim, or credit for the legitim, of the married daughters must collate the advances secured to the daughters and their issue by their marriage-contracts.

III. And at what are these to be taken? This is the third of the questions for consideration. The Lord Ordinary held that all that can be brought in is the actuarial value of the daughters' liferent, but in so doing I think he has erroneously decided. My reading of the marriage-contracts is, that the sums advanced, though the fee was given to the children, is still the daughters' tochers. What their children get they in a sense also obtain, and at any rate the destination to their issue must be taken to be at their request and for their benefit. The case appears to me to be in result a grant by the father to his daughters, and the application of the money as much theirs as it would have been if for a time it had been in their power, or as if the father had not been a party to the marriage-contract. The capital sums therefore must, I think, be collated, and so far there ought to be an alteration on the judgment of the Lord Ordinary. I may add that the case of *Cochrane* v. *Johnston*, January 13, 1829, 7 S. 227, is a clear precedent for the decision of this point upon the present occasion.

IV. The last question relates to the interest on

the capital advances. Shall it be added to and form part of the sum to be collated? I think not. On this part of the case I agree with the Lord Ordinary, and have nothing to add to his reasons for judgment.

Lord Rutherfurd Clark—On the question whether in fixing the amount of legitim which is due to the pursuer the defenders are bound to collate the marriage-contract provisions settled on the daughters of the testator, I have felt considerable difficulty; but I have come to be of opinion that they are not.

An examination of the authorities has satisfied me that on the death of the father one-third, or, as the case may be, one-half, of his moveable estate vests in his children in equal shares, or, in other words, that a child has only a proportionate share of the legitim fund. Further, it is settled that the discharge by any child of its right to legitim after the death of the father does not enlarge the share of the other children, but enures to the benefit of the general disponee. From these two propositions it seems to me to follow that a child can claim no more than his share of the legitim fund, and that the general disponee can be required to do nothing further than to satisfy it.

Collatio inter liberos has application only when more than one child claims legitim. Its purpose is to require a child who claims legitim to collate the advances which it has received during the lifetime of the father, and thus to make a nominal enlargement of the legitim fund, in order to the more equitable distribution of the actual fund. But the general disponee cannot be bound to collate, whether he is a child or a stranger, unless he pleads his rights as a child, or as the assignee of a child, in order to limit the right of a child who is claiming legitim. In my opinion he has no occasion to plead any such rights, and does not in fact do so. For a child who claims legitim can claim no more than the proportionate share of the legitim fund which has vested in him. When he can make no higher claim it is necessarily answered by satisfying it, and this is done without pleading the right of any other child.

It is said that the general disponee is the assignee of a child who discharges his right to legitim. I do not think that that is his true legal position. He derives his right to the estate from the will of the testator. When a child accepts conventional provisions he discharges his claim to legitim. He does not assign it. He merely withdraws the restraint which as a child he possessed over the testamentary power of his father.

On the question relating to the securities in Wales I agree with your Lordship in the chair and with the Lord Ordinary.

The following interlocutor was pronounced:—

"The Lords having heard counsel for the parties on the reclaiming note for the defenders against Lord M'Laren's interlocutor of 13th December 1881, Adhere to the said interlocutor so far as it finds that in ascertaining the amount of the moveable estate of the late Duncan Monteith out of which legitim is payable, there fall to be deducted the two sums of £6000 and £4000 mentioned in the 7th article of the condescendence: *Quoad ultra* recal the said interlocutor, and find that the defenders Mrs Janet Margaret Monteith or Ferguson, Mrs Isabella Monteith or Reid, Mrs Sibla Rebecca Monteith or Hossack, and Mrs Annie Lawrie Monteith or Stanford, are not bound to collate their marriage provisions: Remit the cause to the Lord Ordinary with instructions to proceed therein as accords," &c.

Counsel for Pursuer (Respondent)—Pearson—Murray. Agents—J. & F. Anderson, W.S.

Counsel for Defenders (Reclaimers)—Mackintosh—W. C. Smith. Agents—Dove & Lockhart, S.S.C.

Friday, June 30.

FIRST DIVISION.

SPECIAL CASE—CARTWRIGHT AND OTHERS (MAXWELL'S CURATORS) *v.* MAXWELL AND OTHERS.

Entail — Heir in Possession — Feu — Powers of Trustees—Payments to Reimburse Outlays of Capital.

Testamentary trustees held certain lands with power to sell or feu the same, and under direction to convey them if unsold to a certain series of heirs of tailzie so soon as certain purposes of the trust had been fulfilled, and to convey or pay the whole free residue, if any, to a person who was first in the series of heirs of tailzie. In exercise of their feuing powers the trustees granted dispositions to a considerable extent, and for the convenience of the feuars formed sewers, drains, and streets, charging each feuar with a proportion of the cost; thereafter, the purposes of the trust having been fulfilled, the trustees conveyed the estate in tailzie as directed; the heir of tailzie obtained power to continue the feuing plan of the trustees, and sums fell due from new feuars as the proportions of the cost of the sewers, drains, and streets effeiring to them; it was debated whether these sums fell to be paid to the heir of tailzie in possession, or belonged to the executors of him who held that character at the date of the expenditure, and to whom the trustees were directed to pay the free residue of the estate. The Lords thought that the expenditure was in the due course of trust management, and that therefore the benefit of the outlay must belong to the person for whose behoof the trust was administered, *i.e.*, the heir to whom they were directed to convey, and did convey, the estate on the fulfilment of the trust purposes, and preferred the heir.

The late Sir John Maxwell of Pollok, Bart., died on 6th June 1865, leaving a disposition and deed of entail dated 23d July 1863, by which he entailed the estate of Pollok upon his nephew, the now deceased Sir William Stirling Maxwell (therein designed as William Stirling, Esq. of Keir), and the heirs of his body, whom failing upon the other heirs and substitutes therein specified. Of the same date he executed a trust-disposition