to the same effect would have been pronounced if the question had arisen for the first time at the present day.

LORD CULLEN—As regards the question whether the father acquired a residential settlement in Dundee, the doctrine of constructive residence is well established, but in any particular case there must, I think, be a justification for resorting to it through the absence of actual personal residence elsewhere which is qualified to count for the purposes of poor law settlement. Here during the few days which immediately preceded the going of the father to Dundee in 1895, he *de facto* continued to stay along with his wife and part of his family in the parish of Cromdale, where he had previously resided for many years. I am unable to see why this actual personal and family residence in Cromdale should be ruled out and ignored in favour of a supposed constructive residence in Dundee. I see no necessity for resorting to the doctrine of constructive residence in the circumstances. I think that during the few days in question the father's residence for the purposes of the poor law was Cromdale, and that if the question had been whether he had resided long enough in that parish to acquire a residential settlement there these days would have fallen to be counted in.

The second question as to the loss of the Dundee settlement on that view does not arise.

As regards Mr Garrett's challenge of the decision in the case of *Crieff* v. *Fowlis Wester* (4 D. 1538) I agree with what has been said by your Lordship in the chair.

LORD SANDS—I agree that the first question is one of fact and does not require us to pronounce any opinion upon this branch of the law.

The second question argued challenges a rule of positive law which has stood for over three-quarters of a century, and I agree that in view of the somewhat arbitrary character of this branch of the law it is not proper that we should now reconsider that rule.

The Court adhered.

Counsel for the Pursuers—Robertson, K.C.—Garrett. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defenders the Parish Council of Cromdale—C. H. Brown, K.C.—Burnet. Agents—R. Addison Smith & Company, W.S.

Counsel for the Defenders the Parish Council of Dundee Combination—Henderson, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Thursday, July 10.

FIRST DIVISION.

WADDELL'S JUDICIAL FACTOR *v.* WADDELL AND OTHERS.

Succession—Vesting—Object of Gift—Direction to Convey Estate on Expiry of Liferent to "the Parties Legally Entitled thereto"—Period at which Parties to be Ascertained.

Succession—Collatio inter hæredes—Testate Succession—Heir-at-law Taking Heritage under Bequest "to the Parties Legally Entitled thereto."

Succession—Collatio inter hæredes—Collation by General Disponee of Heir-at-law.

Succession—Collatio inter hæredes—Collation of Ancestor's Heritage by General Disponee of Heir-at-law—Whether Heritage Remains Heritable in Heir's Succession.

A testator directed his trustees, on the death of his wife to whom he had left the liferent of his whole estate, to "hold, manage, realise, divide, or convey over to the parties legally entitled thereto" the whole free rent and residue of his estate. He left no issue but was survived by his wife and by a brother and sister, who were his next-of-kin, the brother being his heir-at-law. The brother predeceased the widow, leaving a will by which he conveyed to his eldest son his whole estate, heritable and moveable, possessed by or due to him at the time of his death. He was survived by his eldest son and by five other children, by whom or by whose representatives legitim was claimed. The testator's estate was partly heritable and partly moveable. The testator's sister survived his widow and was at the date of the widow's death the testator's sole next-of-kin. *Held* (1) that the testator's brother took a vested interest in the brother's estate *a morte testatoris;* (2) that the testator's estate fell to be distributed in the same manner as if he had died intestate, the brother having a right to demand a share of the moveables on condition of collating the heritage; (3) (the Lord President *dissenting*) that in the absence of election by the brother to collate or not to collate, his eldest son was entitled as his general disponee to demand a share of the testator's moveable estate on collating the testator's heritage; and (4) (*per* Lords Skerrington, Cullen, and Sands) that in a question between the brother's eldest son and his other children, if the eldest son collated the testator's heritage, one-half of it would remain heritable in the brother's succession.

Thomas Gibson, Writer to the Signet, Falkirk, judicial factor on the trust estate of the late James Buchanan Waddell under his trust-disposition and settlement dated 1st October 1902, *first party;* George Wad-

dell, Whiteinch, Glasgow, hereinafter described as George Waddell (*secundus*), a nephew of the testator, *second party;* Mrs Alice Dunn, Quincy, Massachusetts, U.S.A., a niece of the testator, administratrix of the estate of the deceased Mrs Agnes Waddell or Dunn, Quincy aforesaid, *third party;* and Thomas Waddell and others, the younger brothers and sisters and representatives of deceased younger brothers and sisters of the second party, *fourth parties*, brought a Special Case for the opinion and judgment of the Court as to the manner of distributing the estate of the late James Buchanan Waddell.

By his said trust-disposition and settlement the late James Buchanan Waddell conveyed his whole estate, heritable and moveable, to trustees for certain purposes. The trust having lapsed by the death or resignation of trustees the first party was appointed judicial factor on the estate.

The Case stated—"4. The purposes of the said trust-disposition and settlement were as follows—(1) Payment of the testator's debts, deathbed, and funeral expenses, Government duties, and the expenses of executing the trust; (2) payment of the whole free rents, proceeds, and income of the residue of the testator's estate and effects, heritable and moveable, to his wife the said Mrs Margaret Gray or Waddell afterwards Thomson during her lifetime; and (3) on the death of his said wife the testator directed his trustees to "hold, manage, realise, divide, or convey over to the parties legally entitled thereto the whole free rent and residue of my estates." 5. The testator was survived by his wife Mrs Margaret Gray or Waddell afterwards Thomson, who died as aforesaid on 22nd October 1919. Mrs Waddell accepted the provisions in her favour contained in the testator's trust-disposition and settlement. The testator left no issue, but was survived by a brother, George Waddell (*primus*), who resided at Ellerslie Street, Yoker, and by a sister, Mrs Agnes Waddell or Dunn, wife of James Dunn, residing at 192 Washington Street, Quincy, Massachusetts, U.S.A. The said George Waddell (*primus*) was the testator's heir-at-law and he and the said Mrs Dunn were the testator's next-of-kin at the date of his death. 6. The said George Waddell (*primus*) predeceased the said Mrs Margaret Gray or Waddell afterwards Thomson on 13th October 1905, leaving a will, dated 3rd June 1900, whereby he disponed to his eldest son George Waddell (*secundus*), sometime residing at 1004 Dumbarton Road, Whiteinch, Glasgow, and now at North Lonsdale P.O., North Vancouver, British Columbia, Canada, whom failing to his wife Mrs Martha Thomson or Waddell, and their heirs and assignees, his whole means and estate, heritable and moveable, wheresoever situated, possessed by or due to him at the time of his death, and he appointed the said George Waddell (*secundus*), whom failing the said Mrs Martha Thomson or Waddell, to be his sole executor. The said George Waddell (*primus*) was survived by his second wife Mrs Agnes Robertson or Blair or Waddell, who died intestate in or about June 1907. The said George Waddell (*secundus*), now George Waddell, is the second party hereto. 7. The said Mrs Agnes Waddell or Dunn survived the said Mrs Margaret Gray or Waddell afterwards Thomson, but died on 5th February 1920. At the date of the death of the testator's widow she was the testator's sole next-of-kin. Mrs Dunn died intestate, and her daughter Alice Dunn, residing at Quincy aforesaid, was duly appointed administratrix of her estate by the Probate Court of the county of Norfolk, Massachusetts, U.S.A., on 3rd March 1920. The said Miss Alice Dunn as administratrix foresaid is the third party hereto. 8. The said George Waddell (*secundus*) had six brothers and sisters all of whom survived George Waddell (*primus*). All of them were entitled to legitim out of the estate of George Waddell (*primus*). Two of them have died since the death of George Waddell (*primus*). The survivors of the said brothers and sisters and the representatives of the two deceased brothers and sisters are the fourth parties hereto. They claim legitim out of the estate of George Waddell (*primus*). In the event of the second party being found entitled to collate the heritage belonging to the testator the fund available to meet the claim for legitim by the fourth parties will be increased. . . . 10. Questions have arisen with regard to the division of the trust estate among the parties legally entitled thereto in terms of the testator's trust-disposition and settlement, and in particular as to whether the second party is entitled to any share of the testator's moveable estate. 11. The first party finds is unnecessary to present any contention. 12. The second party contends that the estate of the testator falls to be distributed as intestate estate; that the said George Waddell (*primus*), as the heir-at-law of the testator, acquired a vested right *a morte testatoris* to the testator's heritable estate, and also, as one of the testator's next-of-kin, a right, on collating the value of the said heritable estate, to a share of the testator's moveable estate equal to the excess in value of one-half of the whole estate, heritable and moveable, over the value of the heritage; and that the second party, as universal legatee and executor of the said George Waddell (*primus*), and as representing him, is now entitled to collate the value of the said heritable estate and to claim the said share of the testator's moveable estate. In the event of the foregoing contentions being sustained the second party is willing to collate the value of the testator's heritable estate. He further contends that, on collecting the value of the said heritable estate, and obtaining payment of the said share of the testator's moveable estate, the said share will form part of the moveable estate of the said George Waddell (*primus*), but that the said heritable estate will retain its character of heritage in the succession of the said George Waddell (*primus*) and will form no part of the fund available to meet the claim of the fourth parties for legitim out of the estate of the said George Waddell (*primus*). 13. The third party

contends—(1) That the testator died testate and that collation has no place in the distribution of his estate; (2) That the testator's brother George Waddell (*primus*) took no vested interest in the testator's estate, there being no gift to him apart from the direction to divide the estate at the death of the testator's widow, and accordingly that the second party took the heritable estate of the testator in his own right; (3) That the second party not being one of the next-of-kin of the testator is not entitled to collate the heritable with the moveable estate; and (4) that assuming that the testator died intestate and that the said George Waddell (*primus*) had a right to demand collation, that right was personal to him and is not exerciseable by the second party. The third party therefore contends that she, as administratrix of the deceased Mrs Agnes Waddell or Dunn, is entitled to the whole moveable estate of the testator. 14. The fourth parties, adopting the contentions of the second party, contend that the fee of the testator's estate falls to be distributed as intestate estate; that it vested *a morte testatoris;* that George Waddell (*primus*) as heir-at-law and one of the next-of-kin of the testator became vested *a morte testatoris* with the option to take the heritage then belonging to the testator or to collate the heritage and share equally with Mrs Dunn in the massed estate; that the second party as representing George Waddell (*primus*) is now entitled to exercise the said option. They further contend that the second party having exercised that option, the moveable estate of the said George Waddell (*primus*) will be increased by one-half of the massed estate of the testator, or alternatively by the excess in value of one-half of the massed estate over the value of the heritage."

At the date of the testator's death the trust estate consisted of heritable estate of the value of £900 and moveable estate of the value of £4865.

The *questions of law* were—"1. Does the fee of the testator's estate fall to be distributed as intestate estate? 2. Did George Waddell (*primus*) take a vested right in the succession to the testator *a morte testatoris?* 3. In the event of question 2 being answered in the affirmative is the second party, as representing George Waddell (*primus*), now entitled to collate the value of the testator's heritable estate to the effect of enabling him to claim a share of the testator's moveable estate, or does the whole of said moveable estate pass to the third party? 4. In the event of the first branch of question 3 being answered in the affirmative and the second branch in the negative, will the said heritable estate, upon collation by the second party, remain heritable in the succession of the said George Waddell (*primus*)? or Will one-half of the massed estate of the testator, upon collation by the second party, be brought into the succession of George Waddell (*primus*) as moveable estate?"

Argued for the first and second parties—The third purpose of the settlement was really a direction to convey to those who were the testator's heirs at the date of his death. George Waddell (*primus*) therefore acquired a vested right as heir-at-law at that date in an estate which fell to be divided according to the law of intestate succession—*Lord* v. *Colvin*, 1865, 3 Macph. 1083, *per* Lord Curriehill at p. 1088 and Lord Ardmillan at pp. 1095 and 1096; *Cowan's Trustees* v. *Cowan*, 1887, 14 R. 670, *per* the Lord President at p. 675, 24 S.L.R. 469; *Gregory's Trustees* v. *Alison*, 1889, 16 R. (H.L.) 10, *per* Lord Watson at p. 14, 26 S.L.R. 787; *Haldane's Trusteees* v. *Murphy*, 1881, 9 R. 269, *per* the Lord President at pp. 277 and 280; *Maxwell* v. *Wylie*, 1837, 15 S. 1005; *Wylie's Trustees* v. *Bruce*, 1919 S.C. 211, *per* Lord Skerrington at p. 238, 46 S.L.R. 156; *Anderson's Trustees* v. *Forrest*, 1917 S.C. 321, 54 S.L.R. 282; *Black* v. *Valentine*, 1844, 6 D. 689; *Hendry's Trustees* v. *Hendry*, 1872, 10 Macph. 432, 9 S.L.R. 263; *Cockburn's Trustees* v. *Dundas*, 1864, 2 Macph. 1185; *Baillie's Trustees* v. *Whiting*, 1910 S.C. 891, 47 S.L.R. 684. George Waddell (*primus*) had therefore during his lifetime a right to collate as one of the next-of-kin. Anyone taking under the will was bound to invoke the law of intestate succession. It was not the general rule that an heir-at-law taking under a will was excluded from collation. It was well established that in certain circumstances a person claiming a share of a moveable succession, but who was also *alioquin successurus* was bound to collate—*Murray* v. *Murray*, 1678, M. 2374; *Fisher's Trustees* v. *Fisher*, 1844, 7 D. 129; *Anstruther* v. *Anstruther*, 1836, 14 S. 272, at p. 281; *Little Gilmour* v. *Little Gilmour*, 13th December 1809 F.C.; *Gilmour's Trustees* v. *Gilmour*, 1922 S.C. 753, 59 S.L.R. 563. The observations of the Lord Chancellor in *Anstruther* v. *Anstruther*, at 14 S. 273, referred to a gift of moveables to the heir, and were not against this contention; and in *Sinclair's Trustees* v. *Sinclair*, 1881, 8 R. 749, 18 S.L.R. 539, which might be quoted against this party, the heir did not take the heritage as heir-at-law but under an entail. And here there was no gift of the moveables to the next-of-kin as heirs *in mobilibus* so as to come within the meaning of the passage in Bell's Comm., vol. i, p. 96. (2) George Waddell (*primus*) having made no election as to collation, George Waddell (*secundus*), as representing him, was entitled to do so. The right to collate was not a mere personal right expiring with the heir, but was properly a condition of the heir enforcing a right to moveable estate which he had acquired by survivance of his ancestor, and which he could therefore transmit. There was no direct decision one way or another, but the question had been touched upon in *Fisher's Trustees* v. *Fisher*, 1844, 7 D. 129, and 1850, 13 D. 245, where it was apparently assumed that representatives of the heir who were claiming the fruits were bound to collate, and in *Newbigging's Trustees* v. *Steel's Trustees*, 1873, 11 Macph. 411; *M'Call's Trustees* v. *M'Call's Curator Bonis*, 1901, 3 F. 1965. 38 S.L.R. 778; *Cochrane* v. *Purves*, (O.H.) 1908, 16 S.L.T. 99; Fraser, Husband and Wife. vol. ii, p. 1049. The nearest analogy was to be

found in the right to elect between conventional and legal rights which might be exercised by a child's representatives or by the *curator bonis* of an *incapax*—*M'Murray* v. *M'Murray's Trustees*, 1852, 14 D. 1048; *Stewart's Trustees* v. *Stewart*, 1851, 14 D. 298; *Morison's Curator Bonis* v. *Morison's Trustees*, 1880, 8 R. 205, 18 S.L.R. 160; *Turnbull* v. *Cowan*, 1848, 6 Bell's App. 222. The heir's right to moveables was not a mere equitable privilege but was an inherited right vested in him just as a right to legal provisions vested—*Justice* v. *His Father's Disponees*, 1737, M. 8166; *Panmure* v. *Crokat*, 1856, 18 D. 703; *Napier* v. *Orr*, 1868, 6 Macph. 264; *Kennedy* v. *Kennedy*, 1843, 6 D. 40; Green's Encyclopædia, vol. iii, p. 144, *voce* Collation. (3) If George Waddell (*secundus*) elected to collate, the legitim fund of George Waddell (*primus*) would be increased by the amount of the testator's moveable estate brought in by collation—Ersk. Inst. iii, 9, 3; *M'Caw* v. *M'Caws*, 1787, M. 2383—but the heritage remained heritable in the succession to George Waddell *primus*. It was settled that the heir in collating did not require to convey the specific estate to the executor but could account for its value—*Fisher's Trustees* v. *Fisher* (*cit.*); M'Laren, Wills and Succession (3rd. ed.), vol. i, pp. 152-157; *Napier* v. *Orr* (*cit.*); Bell's Comm. i, 98, rule (2); Bell's Prin., sec. 1913; *Dawson* v. *Dawson's Trustees*, (O.H.) 1913, 2 S.L.T. 210; Fraser, Husband and Wife, vol. ii, p. 1054. In any case only one half of the heritable estate would fall to be treated as moveable.

Argued for the fourth parties—(1) George Waddell (*primus*) had acquired a vested right at the date of the testator's death and had during his lifetime a right to collate, which had been carried to George Waddell (*secundus*) as his representative. (These parties adopted the argument for the second party on this part of the case.) (2) But if George Waddell (*secundus*) did collate he could not retain the heritage as part of the heritable succession of George Waddell (*primus*) but was bound to convey it to the testator's executor — *Murray* v. *Murray* (*cit.*); *Napier* v. *Orr* (*cit.*), *per* the Lord Justice-Clerk and Lords Neaves and Jerviswood at p. 271, Lord Benholm at p. 273, and Lord Barcaple at p. 276; Bell's Comm., i, 99—with the result the moveable succession of George Waddell (*primus*) would be increased by one-half of the testator's whole estate. The view that an heir on collating could retain the heritage and pay over the value for which *Fisher's Trustees* v. *Fisher* (*cit.*) had been taken as an authority—M'Laren, Wills and Succession, 1874, p. 176; Bell's Comm., i, 98, note 2; and Bell's Prin., secs. 1912, 1913, ed. note (*c*)—was not supported by that case, the question there having been only as to how collation was to be operated in very special circumstances—*Napier* v. *Orr* (*cit.*), *per* the Lord Justice-Clerk and Lords Neaves and Jerviswood at 6 Macph. 271, Lord Benholm at p. 273, Lord Kinloch at p. 275, Barcaple at p. 276. But even if the heir was entitled to account for the value of the heritage the collation resulted in an implied constructive conversion to moveables which preceded the accounting — M'Laren, Wills and Succession, p. 158—and the accounting could only operate on the footing that the heir shared the total fund equally with the other next-of-kin.

Argued for the third parties—1. On the terms of the will vesting was postponed until the death of the liferenter. George Waddell (*primus*) therefore never had a vested right as heir-at-law. But assuming that vesting took place during his lifetime, he had no right to collate. This was a case of testate succession, and in testate succession there was no room for collation. The will did not apply the law of intestate succession to the estate, but merely pointed the individuals who were to take under it—*Brown's Trustees* v. *Brown*, 1890, 17 R. 1174, *per* the Lord President at p. 1180, 27 S.L.R. 995. Further, the heir-at-law was not a person "legally entitled" to the moveable estate. He had no initial right to moveables, but only a right subject to the suspensive condition that he exercised his right of collation, which was fundamentally only of the nature of an option to purchase — *Anstruther* v. *Anstruther* (*cit.*), *per* the consulted judges at 14 S. 292, and Lord Medwyn at p. 298; Ersk. Inst. iii, 9, 3; Bell's Comm. i, pp. 95-97; Bell, Dictionary, *voce* Collation; Balfour, Practicks, 233; *Gilmour's Trustees* v. *Gilmour* (*cit.*), *per* the Lord President at 1922 S.C. 767; *Newbigging's Trustees* v. *Steel's Trustees* (*cit.*), *per* the Lord President at 11 Macph. 412; *Sinclair's Trustees* v. *Sinclair* (*cit.*), *per* the Lord Justice-Clerk at 8 R. 755. 2. But in any case George Waddell (*secundus*) was not entitled to collate. If George Waddell (*primus*) had the right to collate, he had elected not to do so by conveying the heritage to George Waddell (*secundus*)—*M'Call's Trustee* v. *M'Call's Curator Bonis* (*cit.*). But if George Waddell (*primus*) had the right and had made no election, the right could not be exercised by George Waddell (*secundus*) either as his father's disponee or as his representative. There was no authority for saying that the privilege of collation ran with the lands or with the blood, and if it was transmissible, it was not transmitted by the general disposition by George Waddell (*primus*). If it had been he could never, after granting the disposition, have been able to grant a conveyance of heritage. Nor was the right separately assignable because no one could exercise it who did not possess the heritage. But the right of collation was not by its nature transmissible. It was a privilege strictly personal to the heir, which expired with him and was uncommunicable — Fraser, Parent and Child, vol. ii, p. 1049; Bankton, iii, 1, 19. At all events if it were transmitted it would require to be done expressly. There was no analogy between collation and legal rights. The latter were debts, while the former was a mere privilege of a person whose primary right was to the heritage.

LORD PRESIDENT (CLYDE)—The right, power, or privilege known in the law of Scotland as the *jus conferendi inter hæredes* belongs to that one of the ancestor's nearest of kin who is also his heir-at-law. According to the legal order of succession such a one has the exclusive right to the ancestor's heritage, but—notwithstanding that he is one of the next-of-kin—he is according to the same legal order of succession excluded from any participation in the ancestor's moveable estate. By resort, however, to the *jus conferendi inter hæredes*, with which the law endows anyone who unites in his person the double character of heir and next-of-kin, he has the very remarkable power of altering the legal order of the ancestor's succession—see *Gilmour's Trustees* v. *Gilmour*, 1922 S.C. 753, at pp. 767-8. In the case of *Kennedy* v. *Kennedy* (1843, 6 D. 40) the decision turned on the true nature of the *jus*. The view that it partook of the nature of a transaction between heir and executor was rejected, and its real character was authoritatively defined in the sense just expressed, namely, a power to alter the legal order of succession of the ancestor into one mass distributable among all the nearest of kin including himself—see also Bell's Comm. (7th ed.), vol. i, p. 95. Further, as was pointed out in the same case, the heir exercises this power "by a unilateral proceeding on his part" (*per* Lord Mackenzie at p. 48) "by an arbitrary, voluntary, unilateral act" of his own (*per* Lord Jeffrey at p. 50). "Collation," as Lord Fullerton said at p. 49, "is not the act of the executors at all, it is the act of the heir and is a contingency necessarily affecting the succession." The next-of-kin (other than the heir) are entitled to protect their exclusive right to the moveable succession from alteration at the instance of any but the person duly qualified at law to use this truly remarkable power by retorting to the claimant for a share of the moveable estate—"Our right to the moveables according to the legal order of succession is indefeasible except by a person empowered or privileged by the law to use the *jus conferendi inter hæredes*—Are you in a position to use it?—Do you unite in your person the character of heir and one of the next-of-kin of our common ancestor?—If you do where is the heritage to which, as his heir, you have exclusive right?" The next-of-kin are, in short, entitled to insist that the heir's *jus* shall be used consistently with its true legal character. They cannot of course compel him to use it.

The person claiming to use the heir's *jus* in the present case is, admittedly, neither the heir of the ancestor nor one of his next-of-kin. He rests his claim on the fact that he is the universal testamentary disponee of a person who survived the testator for three years, and who (throughout that period) might have exercised the *jus conferendi inter hæredes* in respect that he united in his person the character of heir and one of the next-of-kin of the ancestor. There are thus two main questions in the case—(1) Was the position of the claimant's author such as entitled him to exercise the *jus conferendi*? (2) Is the *jus conferendi* transmissible by universal bequest? I shall deal with these questions in their order.

The ancestor left a will by which—subject to a liferent in favour of his widow—he bequeathed the free residue of his heritable and moveable succession to "the parties legally entitled thereto." He was survived by a brother (the claimant's author) and by a sister. The brother was thus heir-at-law, and he and his sister were the sole next-of-kin. Heirs *provisione hominis*—I use the expression "heirs" in its broad sense—may no doubt be testamentarily designated as the persons who (in the absence of testamentary disposition) would be the heirs *provisione legis*; and notwithstanding this method of designation such heirs will possess the character of heirs *provisione hominis*. But in this will the testator designated no heirs. He neither added to nor detracted from the rights of those who might be found to be entitled at law to the property he left behind him on his death. If by a separate instrument he had *inter vivos* assigned to a stranger the reversion of any estate he might leave at his death, subject to his widow's liferent, the stranger would have been the "party legally entitled thereto." There is accordingly in my opinion nothing in the will which would have prevented the testator's brother—uniting as he did in his own person the double character of heir and next-of-kin—from exercising the *jus conferendi* if he had been minded so to do.

The second question raises an important point in the common law of Scotland, namely, whether the *jus conferendi* can exist except in someone who unites in his own person the double character of heir and one of the next-of-kin of the ancestor? The claimant's author did possess the double character. No one else than he could possess the double character once he survived the ancestor. And the claimant does not possess it. Is it possible for one who possesses the double character (and consequently the *jus*) to transmit the *jus* severed from the double character which endowed him with it? In other words is the *jus* capable of surviving the person who acquires it in respect of the double character he happens to enjoy? The peculiar character of the *jus*, as explained in the opening sentences of this opinion, points in my opinion to a negative answer.

It cannot be said to follow that because a particular power, right, or privilege is given by the law to someone who holds a particular character, therefore that power, right, or privilege—once acquired—is a permanent patrimonial right which will remain at the death of the person who enjoyed it *in bonis* of his estate, and be descendable or transmissible *mortis causa*. Nor is it anything unusual in the law that such rights, powers, or privileges, though not surviving the persons to whom the law gives them, should none the less be capable, so long as such persons remain in life, of being made available by their creditors. In the character of husband and wife spouses had (previously to the coming into operation of the recent Married Women's Property (Scotland) Act

1920) a right to revoke donations made by one to the other. The right survived the donee but died with the donor, and the latter's heirs and representatives did not and could not have it transmitted to them. *Morte donantis donatio confirmatur.* Yet it is quite consistent with this that the donor's bankruptcy implied a revocation by him of the gift and that his creditors could enforce such implied revocation — Ersk. i, 6, 32; *Kemp* v. *Napier*, 1842, 4 D. 558. In like manner the insolvency of the heir operates as an exercise by him of his *jus conferendi* when that would be to the advantage of his creditors. "This faculty or privilege," says Professor Bell in his Commentaries (7th ed., vol. i, p. 99), "the creditors of the heir are entitled to exercise, and this is done without any adjudication or previous process." Again, an heir entitled to be served, but for a death-bed deed, had the right or privilege to reduce that deed so far as it was to his prejudice. And as Professor Bell says in his Commentaries (7th ed., vol. i, p. 93)—"While the heir lives his right under his apparency or in virtue of his service may be exercised by creditors," or as Lord M'Laren puts it in Wills and Succession (vol. i, p. 185)—"During the lifetime of the heir, and within the period of prescription, his right of challenge may be made available to his creditors."

It is fair to argue, and it was argued, that a right which is available for the benefit of creditors must be a right capable of transmission *inter vivos*. Be it so. There is still lurking a complete *non sequitur* in the inference—from the assignability of a right which the assignor has for his life—that the right must be deemed to be truly a permanent patrimonial right which endures in the possession (and for the benefit of) the assignee after the assignor is dead. The precise form in which the law allows a creditor or even an assignee to enforce such rights is not of decisive importance. For the right can always be effectually enforced in the name of the living debtor or assignor, and he may well be bound to give his name for the purpose. If that mode is adopted, the strictly personal character of the right is most clearly exhibited. But I am not concerned in this case to question that an individual in whose person the double character of heir and one of the next-of-kin is united may assign *inter vivos* his whole rights as such heir and next-of-kin to (say) a reversionary company, and that if he does the company may be entitled during his life to avail itself of his double capacity in order to exercise the *jus conferendi inter hæredes*. This has, however, no relevancy to the proposition that the *jus* survives as a patrimonial right after the existence (or co-existence) of the double character in the person of the assignor has been extinguished by his death.

In the claimant's argument frequent reference was made to the right of election provided by the law to relicts and children between their legal and conventional provisions. The right of both these classes of persons to claim their *legitima portio* of the deceased's estate was said to be equally assignable *inter vivos* and transmissible *mortis causa*. That is undoubtedly so in the case of the children and—so far as assignability *inter vivos* is concerned — it is equally true of the relict, and I assume for the purposes of this case that the relict's right to elect is also transmissible *mortis causa*, though I am of course saying nothing to prejudice the point if it is not a settled one. But the analogy suggested between these cases and the heir's *jus conferendi* is fallacious and misleading. The relict and the children are creditors of the deceased in respect of their legal provisions, and they are entitled as beneficial owners to the conventional provisions he has given them. These rights are exclusive the one of the other, and neither can be reduced into proprietary possession save as the result of an approbation of the one inferring a reprobation of the other. The death of the relict or of the children can have no effect upon the existence either of the debt or of the vested conventional provisions, nor can it have any effect on their mutually exclusive character. These rights are not analogous to, but are in contrast with, a "faculty or privilege" (as Professor Bell calls it—Comm. (7th ed.), vol. i, p. 99) to alter the legal order of the ancestor's succession. The dual rights of the bairn and the widow are inevitably transmissible by their own nature subject always to the necessity for an election between them, which their mutually exclusive character attaches to them. But the heir, albeit also one of the next-of-kin, has no right of election between heritage and moveables. He is not only not a creditor of the deceased's in any debt, but — according to the legal order which governs his succession — he derives nothing from the ancestor by that succession except the ancestor's heritage. He is not in the position of acquiring any two rights, one of which he must approbate to the effect of reprobating the other. Nor indeed is the *jus conferendi* itself any part of what he acquires from the ancestor. The ancestor had it not to give or refuse. If, in short, the heir determines to use this singular power given to him by the law of altering the legal order of succession to the ancestor's estate his determination involves no election, unless in the sense that any decision to perform or not to perform any lawful act may be called an election. To argue from the rights of legitim creditors and of widows entitled to *jus relictæ* seems to me therefore inadmissible where the "faculty or privilege" of collation *inter hæredes* is concerned.

Why, then, should this right, power, or privilege to alter the legal order of the ancestor's succession—springing into existence from the accident that the double character of heir and of one of the next-of-kin of the same ancestor is united in one person, and founded on the equitable consideration that such a person ought not to be irretrievably condemned (in respect of his exclusive right to the heritage) to a worse position in the distribution of the estate than the other next-of-kin (Ersk., iii, 9, 3)—why, I ask myself, should this right be supposed to

be transmissible to a universal testamentary disponee, the only person interested as such heir and next-of-kin in the distribution of that estate having ceased to exist? The discussion of the case did not provide me with any principled answer to this question. It will be observed that the universal testamentary disponee is a stranger to the ancestor's succession. He does not participate in it. It would be very singular if he has power to alter the legal order of its succession. I suppose that if the heir died intestate leaving an only child, such child would be in the like position as an universal testamentary disponee. But at any rate since 1874 such child is also a stranger to the ancestor's succession. I do not know on what intelligible theory of the rights of succession either the universal testamentary disponee or the only child could be held entitled to alter the order of a succession in which they are not and cannot be participants. It is common ground — and there is ample authority for it — that the right is not conferred by the operation of law on anyone except the ancestor's heir.

But the claimant pled equity in aid, and pointed out with force that in some cases which can be easily figured it might be equitable that the *jus* should be transmissible *mortis causa*. It would be just as easy to figure cases in which the results of transmissibility would be inequitable. But a glance at the opinions in the case of *Anstruther* v. *Anstruther* (1836, 14 S. 272, see esp. pp. 287-8), which contain a variety of illustrations of what the Court in that case called the danger of resorting to equity in applying the doctrine of collation, is enough to show that there is scant room, or rather no room at all, for employing notions of equity to extend it.

It need cause no surprise that in dealing with a right which admittedly comes into existence only as the result of the conjunction in one person of the two characters so often referred to in this opinion, no text-writer and no judge should have expressly pointed out that the "life" of the *jus* depended on the maintenance of the conditions which gave it "birth." But if the claimant's view is well founded, it is difficult to understand how it can have come about that no single instance of the acknowledged survivance of the *jus* — after the death of the person in whom and to whom it arose—has found its way into the books during the 370 years which have gone by since the earliest recorded case of collation *inter hæredes* was decided — *Law* v. *Law*, 1553, M. 2365; see Lord Medwyn's commentary on the case in *Anstruther* v. *Anstruther, sup. cit.*, at pp. 305-6.

The claimant was accordingly unable to cite any direct authority in support of the proposition he is interested to maintain. But he referred to one or two cases—in which indeed his proposition was neither advanced nor argued, nor decided—but in which he said the grounds of decision implied that the Court thought his proposition a sound one. The most important of these is *Newbigging's Trustees* v. *Steel's Trustees*, 11 Macph. 411. The personal representatives of an heir who was also one of the ancestor's next-of-kin, but had neither made up a title to the ancestor's heritage nor confirmed to his moveable estate, claimed a share of the ancestor's moveable estate. They founded (1) on the fact that their author had never been in a position to exercise the *jus conferendi inter hæredes* (because not having made up a title to the heritage—the case was before 1874 — he never became more than heir in apparency); (2) on the Confirmation Act 1823 (4 Geo. IV, cap. 98), the provisions of which Act, they maintained, obviated any difficulty caused by their author's failure to confirm. The answer for the representatives of the next-of-kin was that as the heir did not, and in the circumstances could not, exercise the *jus*, no one in his right could claim a share of the moveable estate. The decision affirmed the validity of that answer; and accordingly Lord Fraser in Husband and Wife (vol. ii, p. 1049), cites the case as an authority for the view (which appears to me to be the only one consistent with the legal character of the *jus*), namely, that if the heir dies without asserting any claim to share in the ancestor's moveable estate, his representatives cannot exercise the right he might have exercised. But in the opinions delivered in the case there are observations to the effect that, not only had the heir—during his own lifetime—not brought the ancestor's heritage into one mass with the moveables by exercising the *jus conferendi* but also that his representatives "did not propose" so to do, "and were not in a position" to collate in respect that the heritage had passed to his son. These remarks are open to the construction that the Court held the view that, if the heir's representatives had been in a position to offer a *pro indiviso* conveyance of the heritage originally belonging to the ancestor, they might have been entitled to exercise the *jus conferendi inter hæredes*, as in right of the heir. Moreover, it happens that the terms of the rubric favour this contention. But I am by no means disposed to place weight on what is at best a speculative inference as to the opinion which may have been entertained by the Court on an aspect of the doctrine of collation which does not appear to have played any part in the argument, and a decision upon which was not pertinent to an adjudication upon the contested issues. Any inference of a similar kind which may be drawn from the opinions in *M'Call's Trustees* v. *M'Call's Curator Bonis*, 3 F. 1065, rests on grounds which seem to me much too slender to support it. Nor do I think that any light on the general question raised in the present dispute can be derived from the highly artificial specialties introduced by the Thellusson Act into such cases as *Watson's Trustees* v. *Brown*, 1923 S.C. 228. I owe to the industry of one of your Lordships a reference to the cases of *Dick* v. *Dick*, 1698 M. 14,898, and *Dick* v. *His Aunts*, 1700, M. 10,326. These cases might perhaps have provided more promising material for an inference such as the claimant seeks to make, if Fountain-

hall's abbreviated notes upon them had been more self-explanatory, and therefore more reliable than they are. It would, for example, be important to know what the heritable property was which Dick junior offered to collate. It cannot have been his aunt Elizabeth's provision of 8000 merks, for that had already been decided to be moveable. Then what was it, and what were its circumstances? Inferential authority seems to me to be, at best, a slippery support for a novel proposition. But I am compelled to decline to accept as an authority a decision which the report of it does not enable me to understand.

It has to be remembered, both generally and with regard to all such cases, that the act by which the heir exercises his *jus* and alters the order of the ancestor's succession is one thing; while the process by which the rights of parties are adjusted to the altered order is another. Professor Bell in his Comm. (7th ed., p. 99) puts it thus:—"It would seem that from the moment of irrevocable declaration on the part of the heir, his right vests as executor, while the right of the executors is precisely of the same nature with that of a purchaser of land under missives of sale." The "irrevocable declaration" is a matter of fact, and the right and competency of the heir's representatives to "collate"—in the practical sense of actually carrying out the massing of the estates, which was legally effected by his voluntary act—may depend upon the question whether what the heir did amounted to an "irrevocable declaration." In the present case we know nothing except that during his three years' survivance of the ancestor the heir never hinted any intention to exercise his *jus*. If my view of the highly personal character of the heir's "faculty or privilege" is correct the fact that he did not exercise it is conclusive. If the opposite view is correct it follows that however little the heir may have wished to use his "faculty or privilege" —however abhorrent even the exercise of it in the actual situation of the ancestor's succession may have been to him—the fortuitous circumstance that he bequeaths his whole estate to a univeral testamentary disponee, or that he dies intestate leaving an heir who succeeds to his whole heritable and moveable estate, irretrievably vests such universal testamentary disponee, or such univeral heir *ab intestato* (as the case may be), in the full right and liberty to subvert the order of succession to an ancestor to whom he does not himself succeed.

I am unable to find either in principle or in any of the cases referred to any ground on which I should feel justified in forming a conception of the qualities of the *jus conferendi inter hæredes* different from that which is naturally consistent with its origin and character.

In respect of the view I take on the main questions in the case I am dispensed from considering the fourth question.

LORD SKERRINGTON—The trust-disposition and settlement of Dr Waddell, who died in the year 1902, is peculiarly expressed, and it was plausibly maintained that he desired to die intestate so far as regards the beneficial fee of the trust estate of which he gave the liferent to his widow. The better construction, in my opinion, is to hold that he sufficiently expressed an intention that the fee should be disposed of by his trustees in the same manner as if he had died intestate, but that he indicated no intention to deprive his heir in heritage of the right to demand a share of the moveables on collation. In this respect Dr Waddell's will was not unlike that which the Court had to consider in *Duncan* v. *Crichton's Trustees*, 1917 S.C. 728.

Collation *inter hæredes* is spoken of sometimes as a privilege and sometimes as a burden, according to the standpoint of the speaker. In either view it is (according to the common law) peculiar to a person who combines in himself the characters of heir-at-law and of one of several nearest of kin. This statement of the law, which I believe to be correct, does not touch the question which is raised in this special case, viz., whether the privilege or the burden may in certain cases transmit after his death to or against the representatives of a person who in his lifetime would have been entitled to demand a share of a moveable succession upon offering to collate but who failed to do so. In this connection I may refer to Kilkerran's report of the case of *Justice*, M. 8166, which bears "that the right to demand collation is a privilege personal and peculiar to the executor-at-law and to no other." According to the method of reasoning to which we were subjected in the course of the debate, it would follow as a necessary and logical consequence of this dictum that as soon as the breath had left the body of an "executor" (who was not also the heir) his right to demand that the heir should collate the heritage as a condition of sharing in the moveables was extinguished so that it could not be enforced at the instance of the representative of the "executor." Of course the learned reporter was not thinking of the transmissibility of the right in question, but merely intended to emphasise and explain the doctrine that neither a widow nor a general disponee of the moveable estate (not being a child entitled to legitim) can require the heir to collate as a condition of claiming legitim. For the reason thus indicated, many of the authorities which were founded on during the debate seemed to me to have no bearing upon the question which we have to decide. There are, however, a few passages in legal treatises and in judicial opinions where there is reason to suppose that the writer or the judge had in view the transmissibility on death of the heir's right to demand a share of the moveables on condition of collating the heritage, and to these authorities alone I propose to refer. I do not, of course, pretend to have examined all the sources from which statements relative to this question might possibly have been collected.

Another reason why many of the authorities cited at the debate were not helpful was that they were applicable to a state of

the law when as a general rule something of the nature of an *aditio hæreditatis* was necessary both in heritable and in moveable succession in order to vest a transmissible right in the person entitled to take up the succession. No doubt the rigour of the common law was mitigated by the ingenuity of conveyancers in the case of heritage and by the Act 1690, cap. 26, in the case of moveables, which provided a means whereby a successor might acquire a vested right to the property of his ancestor as a disponee or special assignee without either service or confirmation — *Brown's Trustees* v. *Brown*, 1890, 17 R. 1174, *per* Lord President Inglis at p. 1180. There was also the principle which was applied in the case of *Spalding* v. *Farquharson* (May 15, 1811, F.C.) to the effect that confirmation of the whole moveable estate by one of several next-of-kin might enure to the benefit of the other next-of-kin. None the less, in our early law the cases were probably comparatively few in which the question of collation had not been considered at the time when the heir completed his titles, and when the next-of-kin, by applying to the Commissary for confirmation, took what Erskine (iii, 9, 30) described as the appropriate step to prove their "right of blood," and consequently their title to the legal succession to the moveable estate. It is, however, significant to find it laid down (Erskine i, 7, 24) that tutors will be liable in damages if by neglecting to complete his title the ward should suffer, whereas it is not suggested that they ought also to keep in view that a valuable right might perish if the ward should die before the Court had authorised the tutors to collate his heritage. No doubt it is a general principle of law that in the case of a person under legal incapacity a right of election is not lost by the mere failure to exercise it—*per* Lord President Inglis in *Morison's Curator Bonis* v. *Morison's Trustees* (1880, 8 R. 205, at 211), but this rule cannot apply to a right which is in its own nature intransmissible.

Although a person who founds upon an alleged right must in the first instance undertake the duty of proving its existence, the burden may shift if the question comes to be whether a patrimonial right is for no adequate reason qualified by a condition of a somewhat unusual character. Of course I appreciate the view that collation on the part of an heir is not a mere matter of pounds, shillings, and pence, but that his choice may be influenced by considerations of good feeling, or of family associations and dignity. Much the same, however, may be said of the election between a legal and a conventional provision upon the part of a widow or of a child. If the heir's election to collate or not to collate is regarded, as I think that it ought to be regarded, as a question of fact and not of pure law, it is unnecessary to resort to the heroic remedy of holding that the right is in its nature intransmissible on death. At this point in the argument I am disposed to think that the burden of proof shifts. The parties have chosen to raise the question in the form of a special case, which precludes us from drawing inferences of fact, which must be presumed to set forth all the relevant facts, and which does not state a single fact from which either election or personal bar can legitimately be inferred as a necessary legal consequence. The case does not state that the question of collation was considered by any of the parties interested in Dr Waddell's succession until it was forced upon their attention by the death of Dr Waddell's widow in the year 1919. She was not only the beneficial liferentrix of Dr Waddell's whole heritable and moveable estate, but she was also the last survivor of his testamentary trustees, who are now represented by a judicial factor, the first party to the special case. Moreover, it is not necessary for George Waddell (*secundus*), who is the second party to the special case and who claims a share of Dr Waddell's moveable estate on collation, to do more than maintain that this right is not always and necessarily intransmissible, and that it has been transmitted to him in this particular case as the universal *mortis causa* disponee of his father George Waddell (*primus*), who was the brother and heir and also one of the two next-of-kin of Dr Waddell — the other next-of-kin being their sister the now deceased Mrs Dunn, whose rights have transmitted to her daughter (the third party to the Special Case) as administratrix of Mrs Dunn's intestate estate. It is not necessary for the second party's counsel to solve the various conundrums addressed to him by the counsel for the third party, *e.g.*, as to whether the right to demand a share of Dr Waddell's moveables on collation could have been exercised by anyone if George Waddell (*primus*) had by his will disponed his heritable estate to one person and his moveable estate to another person. It is true that the will of George Waddell (*primus*) made no mention of his interest in the succession of Dr Waddell, which was not unnatural seeing that Dr Waddell was alive at the date when it was made, but its terms were sufficiently wide to transfer to the second party the whole right, title, and interest (so far as legally transmissible) in the succession of Dr Waddell to which his father subsequently succeeded upon the death of the latter.

In the absence of direct and conclusive authority upon the purely legal question raised in the Special Case it is, I think, material to notice that on various occasions when a dispute could have been simply and triumphantly decided upon the ground that the heir's right to collate was intransmissible, the Court did not affirm this proposition. Thus from the reports of *Dick of Grange* v. *Dicks* (M. 14,898) and its sequel *Dick of Grange* v. *His Aunts* (M. 10,326) it appears that a sum of 8000 merks had been settled by the marriage-contract of Dick's deceased aunt upon "her heirs and executors" if (as actually happened) she should die without children and without disposing of the money by testament. Dick maintained that the money was heritable because the contract required it to be

invested upon good and sufficient security, but the Court decided that being transmissible by testament it was moveable. Dick then claimed that he must have a share by collation, and offered to divide with the two sisters of the deceased. It was answered for Dick's aunts—"1*mo*, he can claim no share of the executry, for his father made his election and served heir. 2*do*, you are now a degree remoter, and his aunts must seclude him, there being no representation *in mobilibus*. 3*tio*, you have no inheritance to give in and collate. 4*to*, by the common law collation only takes place *inter liberos* and not *inter collaterales*. The Lords thought this point deserved a hearing in the Inner House." The case was ultimately decided against Dick by a plurality of the Lords upon the ground that his father, "the late Grange," had been notarially called upon by the executors to concur with them in confirming the testament, "and he refusing during his lifetime and contending to have the sums heritable and so to be as his heir, his son cannot now recur and offer collation with the executors, seeing the *jus conferendi* then offered to him was rejected and repudiated by him, and so being extinct did not transmit to his heir." While this decision may be open to criticism, there can be no doubt that the Court gave no countenance to the contention that service as heir implied as matter of law an election not to collate, or that the *jus conferendi* was extinguished by the mere death of the heir. The opinions of the judges in *Newbigging's Trustees* v. *Steel's Trustees* (11 Macph. 411) and in *M'Call's Trustees* v. *M'Call's Curator Bonis* (3 F. 1065) seem to me to be to the same effect. The same view of the law was assumed in the case of *Watson's Trustees* v. *Brown* (1923 S.C. 228) and in other cases where it was discovered many years after a testator's death that he had died partially intestate. Indeed it is not too much to say that if the third party's legal view is affirmed many cases of resulting intestacy would result also in absurdity and injustice.

I must now refer to two authorities which support the contention of the third party. Lord Fraser (Husband and Wife, vol. ii, p. 1049) states that the Conveyancing (Scotland) Act 1874, section 9, has brought about the result that if an heir "die without asserting his claim to a share of the moveables he will be held to have made his election for the heritage, and his representatives cannot insist upon collating." I am unable to understand why the statute should be supposed to have placed an heir in the position of being deemed as matter of law to have made an election even though it may be an undoubted fact that he did nothing of the kind. As was explained by Lord President Inglis in *M'Adam* v. *M'Adam* (1879, 6 R. 1256) the statute abolished possession on apparency, and made every heir by the mere fact of his survivance the absolute owner of his predecessor's heritable property to the same effect "as if he had obtained a disposition upon which he might have been infeft but was not." Is there either reason or authority for supposing that according to the common law an heir who had completed his title even to the extent of feudalising it and had then died must on that account alone be deemed to have elected, not to collate? I know of none except that to which I am about to refer. Bell (Com. i (7th. ed.), p. 99) indicates that in his opinion the heir's right to demand a share of the moveables on collation does not vest in him or become transmissible to his representatives in terms of the Confirmation of Executors (Scotland) Act 1823 (4 Geo. IV, cap. 98) until the heir has made an irrevocable declaration of his claim to share in the moveables. I do not find anything in the language of the statute which supports this opinion, and it seems unlikely that its wording can have any bearing one way or the other on the question in dispute. It is clear enough, however, that Bell had considered the question whether the right to collate could be exercised after the death of the heir primarily entitled to do so. At least one high authority may therefore be cited in favour of the contention of the third party. There may be others, but if so I have not discovered them. In his Principles (section 1911) Bell states the law much less absolutely, viz., that "if the privilege be renounced by the heir his representatives cannot demand it in the face of such repudiation," and he refers in a note to the case of *Dick*. Moreover, it must be kept in view that on the page of the Commentaries already noted, as also on the previous page, Bell expressed the opinion that an heir entitled to collate cannot, if he is insolvent, renounce the privilege to the prejudice of his creditors, and that this "faculty or privilege" may be exercised by the creditors of the heir "without any adjudication or previous process." As regards the effect of the Act (4 Geo. IV, cap. 98), More in his Notes to Stair (vol. ii, p. 364) appears to favour the claim of the second party.

I have come to the conclusion that the second party, as the general disponee of the whole estate, heritable and moveable, of George Waddell (*primus*), is entitled to demand an equal share of Dr Waddell's moveables along with the third party upon condition of his collating Dr Waddell's heritable estate. If this conclusion is well founded in law there next arises a domestic question between the second party and the fourth parties. These latter are the surviving brothers and sisters of the second party and the representatives of two who survived their father but have since died. They claim legitim out of the moveable estate of George Waddell *primus*. Their right is admitted by the second party, the only dispute being in regard to the extent to which the moveable estate of George Waddell *primus* must be held, in a question with the fourth parties, to have been increased by the second party's election to collate. In my opinion the answer is that one-half of Dr Waddell's moveables must be deemed to have belonged to George Waddell (*primus*) at the time of his death in consideration for the one-half of Dr Waddell's heritable property which fell to be

disponed to Mrs Dunn. I do not think that the second party has it in his power to diminish the legitim fund by electing to retain the whole of the heritable estate in his own possession, even if he has a legal right or is permitted by the third party to adopt this course.

The result in my opinion is that the first question of law as amended should be answered in the affirmative; the second (as amended) in the affirmative; the third in its first branch in the affirmative, and in its second branch in the negative; and that as regards the fourth question we should find and declare that upon collation by the second party one-half of the heritable estate of Dr Waddell will remain heritable in the succession of George Waddell *primus*, and that one-half of the moveable estate of Dr Waddell will form part of the moveable estate of George Waddell *primus*.

LORD CULLEN—I concur in the conclusions reached by Lord Skerrington, although as regards the third question I have experienced much difficulty which has not been entirely dispelled, for I am conscious of the force of the considerations on which the opinion of your Lordship in the chair is based.

LORD SANDS—The first question which arises in this case concerns the construction of the settlement of James Buchanan Waddell. Under that settlement a universal liferent is conferred upon the widow. After her death the testamentary trustees are directed to "hold, manage, realise, divide, or convey over to the parties legally entitled thereto the whole free rest and residue of my estates." In my view this falls to be interpreted as a direction that upon the death of the widow the trustees shall dispose of the estate in the manner in which it would have fallen to be disposed of if the testator had died intestate.

James Buchanan Waddell had no issue and he was survived by a brother George Waddell and a sister Mrs Dunn. It is unnecessary to review the authorities, for I think it is clear that on the death of James Buchanan Waddell his brother and his sister took a vested interest in his estate. The estate was partly heritable and partly moveable. The right to the heritage vested in George Waddell and also a right to a share in the moveable succession on condition of collating the heritage. The right to the moveable succession, subject to George Waddell's claim to a share, vested in Mrs Dunn. There also vested in her a contingent right to one-half of the heritage in the event of George Waddell claiming a share of the moveable succession and collating the heritage.

George Waddell (1) predeceased his brother's widow, the liferentrix, leaving a settlement whereby he conveyed his whole means and estate, heritable and moveable, to his eldest son George Waddell (2), the second party to the case. In virtue of this settlement George Waddell (2) now claims a one-half share of his uncle's estate on the basis that he elects to collate the heritage. The question arises between the heir-at-law and the third party, the executrix of Mrs Dunn, whether he is entitled to claim a share of the moveable succession or whether, on the other hand, his right is limited to the heritage, which is of very much less value than one-half of the whole estate.

The leading case upon the law of collation appears to be the judgment of the Whole Court in *Anstruther* v. *Anstruther*, 14 S. 272. In that case six of the consulted judges deliberately, and perhaps judiciously eschewing "conjectural history" as to the origin of the law, formulated "the rules laid down by our institutional authors of acknowledged authority or expressly sanctioned by the decisions of the Court." The rule applicable to the present case so formulated is—"1. If the heir-at-law claim a share of the estate as one of the next-of-kin he is bound to collate the heritage. This is the general and fundamental rule." The second rule is—"2. If the heir-at-law is himself next-of-kin, and if there are no kindred in the same degree, there is no place for collation for he is both heir and executor."

The manner in which these rules are expressed appears to me negative of the view that in the opinion of the eminent jurists who framed them the heir-at-law is shut out of the front door as one of the next-of-kin, and that the positive basis of his admission to participation in the moveable succession is by a back door through collation. As one of the next-of-kin he has a claim on the moveable succession subject, if there be others of the same degree of kindred, but only in that event, to a removable disqualification. This disqualification may be removed by collation. But as indicated in the first rule (*supra*) his position as one of the next-of-kin is the positive basis of his claim, not collation as certain dicta might seem to suggest. If this be so then I respectfully think that such expressions as "purchasing a right by collation" are loose and inaccurate. A person who accepts testamentary provisions given in lieu of legitim is disqualified from claiming legitim, but if he surrenders these provisions it would be quite inappropriate to describe this as a purchase of his legitim. Similarly it is, as I venture to think, a false analogy to liken the surrender of the heritage to the purchase of a ticket of admission to the moveable succession.

Of less importance than the leading opinion, but not without interest, is Lord Medwyn's dissertation in *Anstruther's* case upon the origin of the right to collation. I shall not presume to attempt to determine how far this is "conjectural history." But some slight acquaintance with the history of land rights lends a certain plausibility to some of his explanations. According to Lord Medwyn after primogeniture had come to be established it was recognised that the heir was unduly favoured and as an equitable adjustment he was debarred from participation in the moveable estate other than the heritage. But as estates became sub-divided it was found that this might operate hardly in certain cases, and accordingly a compensating equity in the form of a right to claim a share of moveables on

condition that he collated the heritage was introduced not by statute but by that Prætorian authority in which so many of our rules of law had their origin.

It is not in dispute that, if the right of succession had vested, George Waddell (1) was entitled to collate the heritage and to claim a share in his brother's moveable estate. Nor, I think, was it seriously argued that, by refraining to intimate election during the three years during which he survived his brother, he forfeited this right. No inference can I think be drawn from his silence during that period. It might have been competent for him to have elected by intimation to the trustees, but this would in the circumstances have been an unusual course and might possibly even have been regarded as somewhat offensive by his brother's widow, upon whose death any enjoyment by him of part of his brother's estate depended. It does not appear whether he was aware of the terms of his brother's settlement, and I doubt whether, in view of the terms of that settlement, the trustees were under any duty to communicate its terms to him, or to furnish him with information as to the value and the investment of the estate. It is maintained, however, by the third parties that the right to collate which was vested in George Waddell (1) was personal and intransmissible. The simplest way of testing the matter is I think to suppose that during his lifetime George Waddell (1) had assigned to a third party his whole interest, heritable and moveable, in the succession of his brother's estate. On the death of the widow, whether occurring before or after that of George Waddell (1) (for if he was completely divested that could have made no difference), could the assignee of his rights have exercised in virtue of the conveyance to him of George Waddell's (1) whole interest in the estate, the right to collate, and to claim a share of the moveable succession? The third parties maintain that he could not on the ground that George Waddell's (1) right was personal and intransmissible.

There may under settlements be rights of patrimonial value which are of this character, but the right here in question is a common law one. The brocard *actio personalis moritur cum persona* has never, so far as I am aware, been invoked in a succession case. Nor did I find any substantial reasons advanced in argument for the recognition of a qualification of right of such a novel character. The contention that for reasons of sentiment the heir might have exercised his right differently appears to me to be somewhat fanciful. If he chooses to pass on the right to somebody else, it can hardly be suggested that he was likely to have been profoundly influenced by sentiment. Moreover, the same consideration applies to other options which are undoubtedly transmissible. The question whether a near relative's testamentary provisions should be repudiated seems to me a much more delicate one from the standpoint of sentiment. If the law be that the heir is under no obligation to convey the heritage but is merely obliged to account for its value, the argument from sentimental attachment to the heritage disappears. I shall deal with this matter later, however, and I do not lay stress upon it. But it seems to me that the fact that many eminent judges and writers have been content to accept this view of the law is indicatory of their recognition of the heir's right as a pecuniary one of debit and credit in an accounting. There are two children. The moveable estate is worth £15,000, the heritage £5000. In these circumstances the heir is entitled to £5000 out of the moveable succession if he claims it. It would, I think, be strange if this solid money claim were to be regarded as of such a personal character as to be intransmissible either *inter vivos* or *mortis causa*, or—for this I think is the logical consequence of regarding it as personal and intransmissible—to a trustee in bankruptcy.

It may be suggested that a certain colour is given to the theory that the heir's right to claim upon condition of collation is a peculiar and personal one by certain dicta and expressions in reported cases. Too much stress need not, I think, be laid upon forms of expression. I had almost in writing the preceding sentence been betrayed into an inaccurate expression which is of constant occurrence, viz., the description of the heir's right as a "right to collate." Collation is not a right of the heir; it is an obligation incumbent upon the heir if he claims a share of the moveable succession. There are, no doubt, as I have already indicated, expressions in the reports suggestive of the idea that the heir has no claim as one of the next-of-kin to a share of the moveable succession and is admitted thereto only as a special and peculiar privilege. I humbly think that this is not a sound view. Upon what does the exclusion of the heir where it is operative depend? Not upon the circumstance that he is the heir of line who is entitled to expede a general service to the ancestor. That does not in any way affect his right to claim a share of the moveable succession as one of the next-of-kin if he happens to be one of that class. The exclusion where it is operative depends not upon his character as heir, but upon the fact that there is heritage which he takes in that capacity. It is not because he is the heir of line but because he gets heritage as such that he is debarred from taking as one of the next-of-kin, but debarred only, be it marked, if there are others of an equally near degree of kindred. Apart from any "conjectural history" the inference appears to me irresistible that the principle underlying the rule is one of equitable distribution.

The view which I venture to take of the matter cannot be more clearly expressed than in the successful argument in the case of *M'Caw* (1787, M. 2383)—"It has been established in Scotland as well as in other countries in which the feudal system prevails that where there are two or more in the same degree of propinquity to a person deceased, the landed property or those effects which are held to be of an analogous nature descend in succession to men in pre-

ference to women, and to the eldest among the males in exclusion of the younger male relations." In order likewise that this privilege may not in any instance prove hurtful to the person in whose favour it was introduced it has been further established that he may renounce the exclusive character of heir, and betaking himself to the common one of nearest-of-kin, receive an equal portion of the whole funds. But for entitling any person to the benefit of this alternative it is not enough that he is called to the succession as heir. He must also on renouncing this succession be in such a situation as enables him to claim as executor or nearest in kin to a share of the moveable effects which belonged to the ancestor. This is laid down by all our lawyers, Mr Erskine alone excepted." The decision in this case corrected the somewhat strange doctrine of Erskine that an heir who was not one of the next-of-kin and had no claim to a share of the moveable succession as such, could by collating the heritage place himself in the position of being able to claim a share of the moveable succession. Doubtless, if Erskine's doctrine had stood uncorrected it would have lent powerful support to the theory that collation of heritage and not kinship is the positive basis of the heir's right—that collation is the source of the right and not merely the condition of its exercise. Although Erskine's doctrine was corrected, I do not think that the idea underlying it was killed. On the contrary, down to the present case the influence of the underlying idea may be traced. That idea I take to be that there is a positive virtue in collation, and that the heir's right to a share in the moveables emanates from collation—that collation is not the condition but the source of the heir's right to a share of the moveable succession, that when the heir elects to collate he alters the legal order of succession.

Whilst tradition and sentiment (at all events old-world sentiment) are not offended by the eldest son taking by virtue of his primogeniture something more valuable than falls to the other members of the family, it would be entirely repugnant to both tradition and sentiment that the eldest son should be in a less favourable position than other members of the family. Accordingly he is not bound to accept the heritage and thereby to disqualify himself from participation in the moveable succession. The law allows him to decline to exercise his right as heir, and to allow the heritage to be divided as part of the general estate in accordance with the law of moveable succession. The moment he does so he is on the same footing as any other of the next-of-kin. If it is the heir's right to take this course, I am unable to understand why it should be treated as distinguished from any other right as being a peculiarly personal "privilege" more than any other right the exercise of which involves the exercise of an option. If special significance is attached to the word "privilege," as it humbly seems to me, this word is no more appropriate to this right of the heir than it would be to the right of the widow to decline her testamentary provision and claim *jus relictæ*. I cannot therefore attach great significance, as importing a peculiar personal character, to the use which undoubtedly occurs in institutional works and reports of the word "privilege." "Privilege" is not a distinctive *vox juris*. It means in strictness, I take it, a right which is not enjoyed by all. In this view the right of the eldest son to the heritage is a privilege of primogeniture. But that in no way involves that it is intransmissible.

The only authority, other than certain somewhat difficult passages in Bell's Comm. to which reference has been made in the opinions already delivered, cited in favour of the view that the heir's right is of a peculiar, personal, and intransmissible character is a sentence in Lord Fraser's work on Husband and Wife, vol. ii, p. 1049—"But by the above statute (37 and 38 Vict. cap. 94) these rules were altered. By mere survivance an heir now acquires a personal right to heritage without service or other procedure, and if he die without asserting his claim to a share of the moveables, he will be held to have made his election, and his representatives cannot insist upon collating." It will be observed that in this passage Lord Fraser does not base his statement upon any peculiar, personal, and intransmissible character of the heir's right. He bases his statement upon election. He is dealing in the passage with the change in the law whereby a right to heritage is vested in the heir on mere apparency. If the right of the heir to claim a share of the moveable succession be inherently personal and incapable of exercise by a representative, there is no need to call in the aid of any presumption of exercise of the option in the case of death. No doubt it may be said that the personal character of the right, though not inherent, is a consequence of this presumption. But in many cases, of which the present is an example, the presumption would be a most unreasonable one. I doubt, therefore, if Lord Fraser really meant more than that the making up of a title by the heir is now eliminated as a factor in considering whether any election is to be presumed to have been made. If an heir, without making up a title, is content to take possession and enjoyment of the heritage on mere apparency, the same inference is to be drawn as would be drawn from the conduct of an heir who made up a title to his ancestor's heritage and did not at the same time make any claim to participate in the ancestor's moveable succession. Under the old law if the heir died, no matter how long after the ancestor, without completing title he was regarded as not having taken up the property, and therefore there could be no presumption of renunciation of the heir's right to claim a share of the moveables. The case of *Newbigging* (11 Macph. 411) to which Lord Fraser refers under the name of *Pomphrey*, though somewhat special is, so far as it goes, adverse to the idea that the judges who decided it regarded the right as personal and intransmissible.

In the case of *M'Call* (3 F. 1065) it seems to have been assumed by all the judges that an heir's right to claim a share of the moveable estate as legitim on collating the heritage passed on his death to his representatives if they were in a position to collate the heritage. No doubt this was a case, not of a claim to a share of the moveables as one of the next-of-kin, but to legitim out of the moveable estate. But although there are technical differences there are strong similarities; both are claims by an heir in heritage upon the moveable estate, neither claim operates automatically as regards the heir, and both are conditional upon collation. The statement of Lord Fraser above quoted is in a paragraph dealing with legitim and seems therefore to be contrary to what is assumed in *M'Call's* case. In the case of *Cochrane* v. *Purves* (16 S.L.T. 99), decided by Lord Guthrie, it was held that the representative in heritage and moveables of an heir was entitled, on collation of the heritage, to claim a share of the ancestor's moveable estate.

A trace of authority in favour of the view of a peculiar personal right of succession which is intransmissible may perhaps be found in a sentence in Erskine iii, 9, 17, which in one way bears a curious resemblance to the statement of Lord Fraser—Legitim "is due to immediate children only, and not to grandchildren or remoter descendants, either because the law considers the legitim as a right so personal to the child himself that unless he claim it during his lifetime it falls by his death, or because a *presumptio juris et de jure* arises from the immediate father not claiming it that he had renounced it before his death upon receiving his just share of the effects of his father." The initial proposition seems directed, primarily at all events, to the case of grandchildren whose father predeceased the grandfather. But the reasons assigned for exclusion apply only to the case where the father had survived the grandfather. The reasons suggested in support of the general proposition are therefore inadequate. Moreover, as pointed out in a footnote, they are unsound, for Erskine himself states in section 30—"The child predeceasing transmits his share of the legitim without confirmation to his own issue." In the case of *M'Murray* v. *M'Murray's Trustees* (14 D. 1048) it was held that "the right to the legitim vests in children at their father's death and transmits to their executors though not claimed by them during their lives."

Prior to the Act 4 George IV, cap. 98, sec. 1, when one of the next-of-kin died before confirmation, his right to a share of moveables did not transmit to his issue. The theory was that until confirmation the moveable estate was still *in bonis defuncti*, and when confirmation came to be expede the issue of the deceased next-of-kin, being a step further removed, were no longer among the next-of-kin. This might suggest that such a question as the present could not have arisen prior to that Act. But the rule had only a limited application. If confirmation to the whole estate were expede in the lifetime of one of the next-of-kin, even though such confirmation were not in his own favour, the next-of-kin or other executor who did confirm to the whole estate took the estate out of the *bona defuncti*, and he held it from that moment in a fiduciary capacity for all persons entitled to share it. In the case of *Spalding* v. *Farquharson* (May 15, 1811, F.C.), the session papers in which I have examined, it was strenuously argued that whilst no doubt this rule obtained as regards an executor-nominate, it did not hold good in the case of an executor-dative, but the contrary was held. This was a very complicated litigation, but I shall endeavour to state the salient facts. David Spalding was survived by a son Daniel who was fatuous. George Spalding, his cousin, was tutor to the imbecile. On Daniel's death George Spalding passing over Daniel served as heir-at-law to his uncle David, Daniel's father. There were three next-of-kin to Daniel, the said George Spalding, his sister, and a cousin. The two latter were confirmed to Daniel's whole moveable estate. After George Spalding's death his son William Spalding claimed a share of the moveable estate. Objection was taken that George Spalding had not confirmed during his lifetime, and that his son William Spalding not being one of the next-of-kin had no claim to a share of the moveable estate. The Court found "that the late Mr Spalding of Glenkilry's claim was so vested in him as to pass to his representatives, and in so far alter the interlocutor of the Lord Ordinary . . . reserving to the petitioners to be heard before the Lord Ordinary on the whole points touching the question of collation."

The question of collation, which is fully argued in the papers, stood thus:—William maintained that he was not bound to collate and was entitled to a share of the moveable succession without collation, because his father having served to David did not take the heritage from Daniel. To this there was a reply founding upon Daniel's long possession on apparency, but the argument chiefly relied upon was that George Spalding, as tutor of Daniel, had been guilty of neglect or fraud in not completing a title in Daniel's person, and was therefore barred from pleading that he did not take the heritage from Daniel.

On the assumption that the heritage was to be treated as Daniel's it was argued, founding, *inter alia*, upon the case of *Dick* (M. 14,898 and 10,326), that George Spalding by his actings during his life—completing a title to the heritage, &c.—had elected to take the heritage and not to collate. I can find, however, no trace in the cases which were drawn by James Moncreiff on the one side and George Cranstoun upon the other of the suggestion that apart from election on George Spalding's part the right of his son as his representative to collate and claim a share of the moveable succession was excluded in respect that this right was personal and intransmissible.

It does not appear what the sequel was as regards collation. It is significant, how-

ever, that the Court held that the claim of George Spalding to a share of moveables was "so vested in him as to pass to his representatives." When this interlocutor was pronounced it was still *sub judice* whether George Spalding was at the date of vesting Daniel's heir and as such entitled to a share of moveables only upon collation. The interlocutor therefore seems to me to import that the contingent claim to a share of the moveable succession on collation vests in the heir and is transmissible.

The right of the heir to assign his claim to a share in the moveable succession is qualified in this respect, that the assignation will be ineffectual unless the assignee is placed in a position to be able to tender the lands for collation. Accordingly the right may be lost by an alienation of the lands unaccompanied by an assignation of the claim to a share in the moveable estate. The suggestion that the right runs with the lands appears to me to involve complete misconception of the nature of the right. On the other hand, there does not seem to me to be any substance in the suggestion that if the right of election is not a personal one, which perishes with the heir or with his alienation of the lands, even though accompanied by an assignation of the claim to moveables, this implies the subsistence, it may be for generations, or at all events for the period of the long prescription, of a claim which may be made at any time. There is no right in relation to the law of succession more sacrosanct than the right to legitim. But if when the time comes for the division of an estate a child entitled to legitim makes no claim to legitim and allows the estate to be divided under the settlement his claim is at an end. Similarly if when the time comes for the division of a mixed succession the heir or the party in his right makes no claim to a share of the moveable succession, that is an end of the matter.

In the course of the argument I ventured to put the case of a parent who dies leaving a son and daughter and an estate consisting of £100,000 of moveables and a cottage worth £500. In this case the heir would undoubtedly collate, and why his right to do so should be called a singular power to alter the order of succession I have difficulty in understanding. According to our law of succession the heir takes the heritage, the next-of-kin the moveables. The heir may be one of the next-of-kin, but if he claims as such he must collate the heritage. The last proposition appears to me just as much part of the law regulating the order of succession as any of the other propositions, and I do not know why the heir is described as altering the order of succession when he acts in accordance with his right. But suppose that, in the case figured, the son dies before the division of the estate without having intimated any claim, it may be because he died soon after his father, or it may be, as in the present case, because the division was postponed by a liferent to the widow, In this case, if the right be personal and intransmissible, the family of the son would take the cottage and the daughter the £100,000. Now, if it were a clearly established rule of law that in such a case the son's right to a share in the moveable succession was so personal that it perished with him, the hardship of such a result would be an irrelevant consideration. But this, in my view, is certainly not a clearly established rule of law. It is a doubtful inference which the Court is asked to deduce for the first time, so far as the reported cases go, from certain forms of expression by eminent lawyers whose attention was not at the time directed to this particular question. In these circumstances the unreasonable character of the rule and the unconscionable results to which in certain cases it would lead, seem to me to be legitimate considerations in determining whether any such inference should be drawn or any such rule be for the first time judicially recognised as law.

Accordingly I arrive at the conclusion that the right of the heir to claim a share of the moveable estate upon collating the heritage is not so personal as to be intransmissible. The case which I put at the outset was that of a conveyance of the whole rights in the ancestor's estate *inter vivos*. But I do not think that in this regard any satisfactory distinction can be drawn between a conveyance *inter vivos* and a conveyance *mortis causa*.

When the rights of the heir pass on his death complications may arise, and a claim to a share of his ancestor's moveable estate may be defeated by a severance of the heir's personal estate from the lands and consequent inability on the part of the representatives claiming in virtue of the heir's right to tender the lands for collation. No such complication arises in the present case, for George Waddell (2) is the universal testamentary disponee of his father and every interest is concentrated in him. I am not prepared, however, to affirm that even if it had been otherwise, and George Waddell (1) had died intestate, his heir and younger children might not have claimed the share of the moveables as their father's representatives on tendering the lands. I doubt if it would have been open to the third party to take the objection, "You tender the lands but only one of you has the right to them." It is unnecessary, however, to determine that question, for here there is no severance either of interest or of title.

The question remains, however, whether on the assumption that the claim of George Waddell (1) to a share of the moveable estate of his brother on collating the lands was transmissible, the terms of his settlement were habile to transmit them. He conveys to George Waddell (2) "my whole means and estate, heritable and moveable, real and personal, wheresoever situated, possessed by or due to me at the time of my death." In my view this conveyance covers every patrimonial right or claim, real or personal, certain or contingent, vested in George Waddell (1) at the date of his death —in a word everything that spelt or might spell either in land or money which it was in his power to convey.

I am accordingly of opinion that as between the second party and the third parties to this case the second is entitled to prevail.

The second question in this case arises only in the event of its being found that George Waddell (2) is entitled to a share of the moveable estate of his uncle. The younger children of George Waddell (1) not being beneficiaries under their father's settlement, have not in any view a direct claim to a share in the estate of their uncle. But they are entitled to legitim out of their father's moveable estate, and the question therefore arises for determination whether and how far the interest of George Waddell (1) in the estate of his brother was moveable.

The position of matters at the death of George Waddell (1) was that there was vested in him a right to the heritage of his brother and a right to a share in the moveable estate on condition that he collated the heritage. We had a great deal of argument upon the question whether collation infers an obligation to surrender the heritable estate for division, or merely an obligation to submit to its value being taken into account in the division. In the case of *Fisher's Trustees* (13 D. 245) the Court under somewhat special circumstances held that it was sufficient that the value of the heritage should be taken into account without any obligation to convey it. I do not think that the report of that case warrants the affirmation of this right as a general rule. But undoubtedly some eminent jurists have affirmed the rule as a general one on the authority of that case, although so late as 1868 there is a dictum by Lord Benholme in the case of *Napier* v. *Orr* (6 Macph. 264, at p. 273) which is clearly to the contrary—"There is a general concurrence of all our authorities that the obligation of the heir is to convey the heritage and not merely to account for its value," and he quotes the authorities for that and treats the case of *Fisher* as entirely special. In the view I take of the present case it is unnecessary to determine this question. The obligation of the heir to convey was certainly the old theory, and, as it appears to me, any modern relaxation does not affect the present question, which must be determined on the footing that the heir will act as he is entitled to do in the manner directed by the old theory. It might possibly have been otherwise if it had been held that the heir was bound to abide by the heritage and accept its value as a *pro tanto* satisfaction of his rights in the moveable succession. But this seems never to have been suggested.

The claim vested in George Waddell (1) at his death to a share in the moveable estate of his brother was a contingent one. It might yield nothing. But legitim is payable out of the proceeds of a contingent claim to moveables. Accordingly in my view—and this I did not understand to be contested by either party—if the claim to a moveable succession has yielded anything, this is moveable estate and subject to a claim of legitim. Now I shall assume that George Waddell (1) or the party in his right proceeds strictly by the rule of the old law without any short circuiting, intimates a claim to a share of the moveable estate, and conveys the heritable estate to James Buchanan Waddell's executors. The executors having satisfied themselves that there were only two next-of-kin will then divide the moveable estate into two equal portions, and make one of them over to George Waddell (1) or his representatives and the other to his sister. As regards the heritable estate, they will dispone it *pro indiviso* to George Waddell (1) or his representatives and his sister. Accordingly the proceeds of the claim of George Waddell (1) against his brother's estate will be a *pro indiviso* half of the heritage and a half of the moveables. If I am right in this view, I think it follows that on the assumption that what is actually done is to take the value of the whole heritable estate into *computo* as retained by the representatives of George Waddell (1), the estate to be divided according to the rule of moveable succession is the share of the moveables actually to be made over to George Waddell (1) or his representatives plus one-half the value of the heritage. We had an ingenious argument from Mr Stevenson to the effect that as the heritable estate was theoretically thrown into a general estate to be divided according to the law of moveable succession, the whole of this estate must be regarded as moveable. But this argument is, I think, fallacious. On being thrown into the general estate it falls to be divided in the same proportions as if it had been moveable, but it does not necessarily or otherwise than of consent fall to be realised and divided in money. It remains heritage in which the brother and the sister had an equal interest.

There may at first sight appear to be a certain incongruity in the idea of the character of a person's succession as heritable or moveable depending upon something that happens after his decease. But this incongruity is, I think, only apparent. On the death of the heir without having made an election there "vested in him an interest in a mixed estate." What he and his representatives may get out of that estate is contingent. It may be heritage or it may be moveables. In so far as the proceeds of the claim may turn out to be moveable they are subject to a claim of legitim. It is no objection that the amount of the moveables, and whether there will be any moveables at all, is contingent, for a contingent claim to moveable estate is subject if it matures to a claim of legitim. The case might, no doubt, be different if the view were taken that what happens when the heir determines to collate is that he takes the heritage and purchases with it a share of moveables. As I have already stated, I am unable to accept this view. He does not take the heritage, he renounces it, and except for convenience in the completion of title he does not touch it until a share of it is conveyed to him in the division of the *universitas*.

I am accordingly of opinion that the ques-

tions should be answered in the manner proposed by Lord Skerrington.

The Court answered questions 1 and 2 in the affirmative, the first part of question 3 in the affimative and the second part in the negative, and found and declared in answer to the question 4 that upon collation by the second party one-half of the heritable estate of the testator would remain heritable in the succession of George Waddell (*primus*), and that one-half of the moveable estate of the testator would form part of the moveable estate of George Waddell (*primus*).

Counsel for the First and Second Parties —Burnet. Agent—Henry Smith, W.S.

Counsel for the Third Party—Aitchison, K.C.—King. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Fourth Parties—Stevenson. Agents—Bruce & Black, W.S.

Friday, July 11.

FIRST DIVISION.

STEWART'S TRUSTEES *v.* LAWRENCE AND OTHERS.

Succession — Will — Construction — Residue or Intestacy — Lapsed Bequest out of Residue—Net Residue.

A testator after providing for payment of certain legacies, and for payment of the free income of the "residue and remainder" of his estate to his wife during her lifetime, directed his trustees in the event which happened of his dying without issue, on the termination of the wife's liferent, to pay "out of the residue" a legacy of £10,000 free of death duties to his niece or her issue, and to pay the "net residue" to his brother or his issue. Vesting of the £10,000 in the niece and of the "net residue" was expressly postponed until the termination of the liferent. The legacy lapsed owing to the niece predeceasing the testator without issue. The wife and the brother survived the testator, the brother predeceasing the wife and leaving issue. The testator was also survived by sisters and children of a predeceasing sister. *Held* that on the terms of the deed there was an ultimate residuary gift to the brother which was intended to be affected by the additional legacy of £10,000 in the same way as it was affected by the other legacies, and that therefore the legacy of £10,000 did not fall into intestacy, but fell to be included in the "net residue" payable to the brother.

Allan Fullarton Baird, LL.D., writer, Glasgow, and Archibald Duncan Campbell, writer, Glasgow, the trustees under the trust-disposition and settlement of the late Walter Stewart of Balloch, *first parties;* James Lawrence, Manchester, and Hugh Mulleneux Lawrence, Blackburn, the surviving children of the late Mrs Elizabeth Stewart or Lawrence, a sister of the late Walter Stewart of Balloch, *second parties;* Mrs Stewart or Love and Miss Edith Stewart, Hillhead, Glasgow, sister of the late Walter Stewart of Balloch, and the executors of the late Miss Agnes Stewart, another sister of the late Walter Stewart of Balloch, *third parties;* the said Mrs Stewart or Love, *fourth party;* the said Miss Edith Stewart, *fifth party;* Mrs Mabel Ellen Taylor or Coulson, Teignmouth, Devonshire, sole trustee under the will of the late Mrs Ellen Stewart or Taylor, a sister of the late Walter Stewart of Balloch, *sixth party;* Frederick Stancliffe Stancliffe, solicitor, Manchester, trustee under the will of the late John Stewart, a brother of the late Walter Stewart of Balloch, *seventh party;* and a son and two daughters of the late John Stewart, and the trustees on the daughters' antenuptial settlements, *eighth parties*, brought a Special Case for the opinion and judgment of the Court upon questions which had arisen between the parties as to whether a legacy of £10,000 bequeathed by the late Walter Stewart of Balloch under a trust-disposition and settlement dated 12th January 1904 to his niece Esther Mary Lawrence, who predeceased him, fell to be distributed as intestate succession of the testator.

The late Walter Stewart of Balloch died without issue on 11th February 1909 leaving a trust-disposition and settlement dated 12th January 1904 (described in the Case as "said will").

The Case stated—"2. By his said will the testator assigned, disponed, and conveyed to and in favour of the trustees therein named, and to such other persons or person as might be nominated by him or assumed to act in the trust thereby created, and the acceptors or acceptor, survivors and survivor of them, all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description and wherever situated, which should be owing and belonging to him at the time of his death, . . . in trust always for the ends, uses, and purposes following, *videlicet* (the first four purposes related to the payment of the testator's debts and certain legacies): (*Fifth*) For payment to his wife, the said Mrs Agnes Aitken Riddell or Stewart, during all the days and years of her life, of the whole free income of the residue and remainder of his means and estate. (*Sixth*) On the determination of the said liferent provided to his wife, or in the event of his wife predeceasing him, he directed and appointed his trustees to make payment of the residue of his means and estate to and among any child or children he might leave, and the survivors and survivor of them, and the issue of any of them who might have predeceased him leaving issue, equally among such children and issue *per stirpes;* and 'in the seventh place, in the event of my decease without children or remoter issue, I direct and appoint my trustees to make payment of the residue of my means and estate as follows:—(*First*) My trustees shall out of the residue make payment of a legacy of ten thousand pounds free of death duties to