party arraigned in the inferior court to bring up the judgment convicting him. At all events, it is plain from the 17th section and its relative Schedule F that the new form of appeal was intended to bring up at the instance of either party any steps of procedure from the original warrant of commitment to the final judgment. But in my opinion it is equally plain that the removal of the proceedings, at whatever stage it might take place, was intended solely to prevent miscarriage in that particular case and no other.

"Now, in this particular case the appellants cannot plead miscarriage, because they have got a judgment of absolvitor. When that was pronounced they had no further interest in the proceedings, and took no further part in them. If the Justices had afterwards done anything so flagrant as to attempt to recal their judgment of absolvitor, I daresay an appeal would have been competent, because that would have been an unwarrantable attempt to prejudice the appellants in that particular case. But the granting of a certificate, however irregular in itself, which did not profess to affect the final decision, seems to me to stand in a different position. Let its validity be determined when, if ever, it is attempted to be put in force. I conceive that a statutory right of appeal ought not to be stretched beyond the obvious purpose for which it is designed."

Counsel for the Appellants — Ure, Q.C. — M'Lennan. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent — Sol.-Gen. Dickson, Q.C. — Kennedy. Agent — R. Pringle, W.S.

Saturday, December 18.

OUTER HOUSE.

[Lord Stormonth Darling.

LIQUIDATORS OF EMPLOYERS' ASSURANCE COMPANY OF GREAT BRITAIN.

Process — Expenses — Company — Liquidation—Expenses of Double Agency.

The liquidator of a company is not entitled to allow the expenses of the attendance of both Edinburgh and local agents at a discussion in the Court of Session unless there are special reasons for double attendance.

This was a note by the liquidators of the Employers' Assurance Company of Great Britain, objecting to a report by the Auditor of the Court of Session under the following circumstances:—In the course of the liquidation the Glasgow agents of the liquidators had on their instructions attended a discussion in the Court of Session. It was also attended by the Edinburgh agents. In their accounts the liquidators charged the expenses of the attendance both of the Edinburgh and of the Glasgow agents. The Auditor disallowed the charge for the Glasgow agents, and the present note was presented for authority to make that charge.

LORD STORMONTH DARLING—I have disallowed what is practically an appeal from the Auditor as regards a fee to the Glasgow agents of the liquidators for attending a debate in this Court, because I think the Auditor's rule, which (he tells me) has prevailed in his office for many years, is a salutary one. Liquidators are really in the position of trustees, and though it may be a satisfaction to them to have their local agents in attendance on judicial proceedings in Edinburgh, and though they may give instructions accordingly, it does not follow that the trust-estate should bear the cost of double agency. In the present case I agree with the Auditor that there were no special reasons for allowing such a charge.

Counsel for the Liquidators — Lorimer. Agents—Melville & Lindesay, W.S.

Tuesday, January 4, 1898.

OUTER HOUSE.

[Lord Stormonth Darling.

COLLINS *v.* COLLINS' TRUSTEES.

Parent and Child—Legitim—Collatio inter liberos.

The plea of collation *inter liberos* in answer to a claim for legitim can only be maintained by a party entitled to share in the legitim, and not by trustees representing the interest of the residuary legatee—*Nisbet's Trustees* v. *Nisbet*, March 10, 1868, 6 Macph. 567, *not followed.*

The facts of the case appear sufficiently from the opinion of the Lord Ordinary.

On 4th January 1898 the Lord Ordinary (STORMONTH DARLING) decerned in terms of the conclusions of the summons.

Opinion.—"The pursuer, as one of the eight surviving children of the late Sir William Collins, here sues his father's trustees for legitim. He does not claim more than one-eighth of the legitim fund, which (Sir William having died without leaving a widow) consists of one-half of his free moveable estate as it stood at his death. It is not maintained by the trustees that the pursuer's claim has been discharged or renounced, but they say that he is bound to collate certain payments made to him by his father during his life amounting to £8000, with interest from the date of payment, the effect of which would be to wipe out the claim altogether. And the question is, whether this contention of the trustees is well founded.

"Sir William Collins was very successful in business as a publisher and stationer in Glasgow, and in 1880, when his firm of

William Collins, Sons, & Company, was turned into a limited liability company, he was worth £200,000. In that year apparently he resolved to make gifts to his wife of £16,000 and to each of his children of £8000, partly in money, but chiefly in shares of the new company. Each of the unmarried daughters and the youngest son received at that time preference shares to the value of £4000, a like amount being placed to their credit and interest paid on it; but the youngest son received 180 ordinary shares, valued at £4000 in 1889, and 70 ordinary shares valued at £1400 in 1892. No further payment or transfer was made to the unmarried daughters during Sir William's life, but their position was more than equalised with the others by his will. In the case of each of the married daughters and one of the sons the transfer, the full £8000 (or its equivalent in shares), was actually made in 1880. In the case of the pursuer, who was the eldest son, Sir William effected his purpose by a transfer of 180 ordinary shares in January 1880 and by writing £4000 off a debt of larger amount due to him by the pursuer in May 1881. A similar course was adopted in the case of the second son.

"So far it is clear (1) that Sir William's aim was substantial equality among his children, (2) that what he did for the pursuer was to make a gift and not to create a debt, and (3) that he took from him no discharge of his legitim.

"I do not think that the true question at issue is much affected by these advances to the pursuer having been gifts and not debts. If they had been debts, the obligation on the pursuer would have been, not to collate with the other children, but to repay to the general funds of the executry. No doubt a father may make a gift of such a nature or in such a way as to show that it is not intended to be made the subject of collation. But these gifts were not of that nature nor made in that way. Their purpose was to strengthen the pursuer's position in a business to which he had already been admitted as a partner. That is almost a typical instance of the kind of advances which is a proper subject for collation, nor does it seem to me that anything can be made of the probable inference which appears from an examination of Sir William's private ledger that the original heading of the account was "Gifts to my Family"—a heading which still keeps its place in the index — and that the word "Gifts" was scratched out, and the present heading substituted, which runs — "Advances made to" my family during my life in discharge of any claim my children can make as legitim or others competent to them. It seems nearly certain that this change was made some time between January 1882 and January 1883 in a draft settlement bearing the first of these dates; the page in the ledger is referred to as headed "Gifts to my Family," and in another draft settlement of the second date it is referred to under the longer heading given above. The argument founded on all this s that Sir William could not by an *ex post facto* entry in his ledger alter the character of the gifts. It is true that he could not by any entry in his own books, whensoever made, affect the footing on which the gifts were accepted; he could not in other words make a bargain with his children. But he could indicate his own intention; and it is the intention of the parent which lies at the root of the obligation to collate. When he says nothing to the contrary, the law presumes that advances of a certain kind, such as setting up or forwarding a child in business, are intended to be imputed towards legitim. And the situation could not be made worse for those who demand collation, because the parent instead of remaining silent makes a declaration of his intention albeit the declaration is subsequent to the gift.

"If, therefore, the plea of collation in this case were stated by persons *in titulo* to state it, I should have little doubt that it ought to prevail. But the question comes to be, whether the plea of collation is stateable by trustees, or, in other words, by the residuary legatee. On principle I should think it clear that it is not. *Collatio bonorum inter liberos* is, as the name implies, an equitable rule borrowed with much modification from the Roman law for the purpose of preserving equality in the distribution of legitim, and it arises *inter liberos* only. It attains its purpose of preserving equality very imperfectly, but that is its sole intention; the intention has some probability of success so long as it applies to the legitim fund which is itself divisible in equal shares.

"Mr Erskine says (iii. 9, 25) — 'As this kind of collation is introduced that equal justice may be done to all who have a right in the legitim it does not affect the rights of third parties. Hence a widow cannot be compelled to collate legacies or donations given to her by her husband and thereby to increase the legitim; nor, on the other hand, are children *in familia* obliged to collate their provisions with the widow in order to increase the *jus relictæ*.' In his Principles Mr Erskine emphasises this point by stating the object of the rule as being to preserve an equality 'among all the children who continue entitled to the legitim.'

"Now, no child continues 'entitled to his legitim' who has accepted testamentary provision in lieu of it. That is the situation here. The pursuer is the only child claiming legitim, all the others have accepted their testamentary provision, and the plea of collation put forward by the trustees is stated, not for the purpose of preserving equality in the distribution of legitim, but for the purpose of increasing the estate divisible under the will.

"With one exception, to which I shall presently refer, the course of decision has been uniformly to reject the plea of collation when stated for this purpose.

"So long ago as 1804, in the case of *Lashley* v. *Hog*, 4 Pat., at p. 642, Lord Eldon, after stating that it was doubtful when one child or more than one would be entitled to legitim, added—'If only one turns out

finally to be entitled to the legitim, the collation cannot prejudice the estate of that child, because it would then be collation only to itself, for as I read the books the collation is between those who are entitled to the legitim.' Next, in the case of *Clark* v. *Burns and Stewart*, 13 Sh. 326, it was expressly decided that one of the three daughters was not bound to collate a special provision in her favour before claiming legitim, where her two sisters had both discharged their legitim. Lord Moncreiff, who was Lord Ordinary in the case, and whose opinion on this point was approved in the Inner House, gave as his reason for so deciding that collation 'is admitted only among those who are entitled to a legitim, and further that collation does not take place as to the dead part.'

"In the still more authoritative case of *Breadalbane* v. *Chandos*, 2 Sh. and M. 377, three points were decided. The first was that Lady Chandos had not discharged her legitim by the terms of her marriage-contract. The second was that Lord Breadalbane could not claim legitim without collating his life interest in the entailed estates.

"The latter conclusion deprived Lord Breadalbane of any interest to claim legitim, but he and his father's trustees still maintained that Lady Chandos was bound to collate the provision of £30,000 made for her by her father in her marriage contract, £20,000 of which had been paid down during her father's life, and the balance remained to be satisfied after his death.

"The interlocutor of the Second Division, which was affirmed by the House of Lords, dealt with this contention thus. It bore that Lady Chandos' claim of legitim was 'not to be reduced in amount by imputing thereto any part of the sums provided to her by her said father in her contract of marriage, and which sums, in so far as not yet satisfied, must form a deduction from the trust funds *in medio*.' The *ratio decidendi* was thus stated by the Lord Chancellor at p. 401 of the report—'As to her collating or bringing the portion into hotch-pot, that question can only arise where there are more children than one to share the legitim, and as Lady Elizabeth Pringle has already expressly renounced, and as Lord Breadalbane cannot claim any share without collating his entailed estate, which he does not offer to do, no question can arise as to Lady Chandos collating or bringing her portion into hotch-pot with the legitim.'

"This was the third point decided by that case, and it seems to me a direct decision of the highest authority on the very question which is here at issue.

"The trustees and Lord Breadalbane had exactly the same interest to demand collation as the trustees of Sir William Collins have here.

"The sustaining of the plea would have been in the direction of equality if the whole pecuniary benefits derived from the the testator by his children had been taken into view, yet the plea was repelled expressly on the ground that collation could only arise 'where there are more children than one to share the legitim,' or in other words, that the equality which is the object of the plea is only equality in the distribution of legitim.

"Once more the question was directly raised as one of the many points in the well-known case of *Keith's Trustees* v. *Keith*, 19 D. 1040. Lord Ardmillan, whose judgment on this point was adhered to by the First Division, entered, at p. 1051, on an interesting examination of the law of *collatio inter liberos*, and stated the broad proposition that 'collation prevails among the claimants competing for legitim, and has no place beyond the sphere of that competition.' He treated the judgment in *Breadalbane* v. *Chandos* as conclusive, adding—'This decision settles the point that *collatio bonorum* is a plea *inter liberos* and in distribution of legitim, and not a plea which can be maintained against a child by a party not sharing the legitim.' The language of Lord President M'Neill is to the same effect (at p. 1057)—'I do not think this is a case for collation. What is contended for is collation, not *inter liberos*, but as between Mrs Villiers and the trustees. That is an application of the principle of collation which I cannot recognise. It is quite contrary to the principle described in Stair and Erskine, and as fully recognised in the first case of *Breadalbane* in 1836.'

"Lord Curriehill is equally emphatic (at p. 1066)—'The trustees are not entitled to plead collation, that plea being competent only in a question as to division of legitim among the children themselves and not being competent to the executors or general representatives of the defunct to the effect of increasing the dead's part.' The sums of which collation was demanded in that case were marriage-contract provisions; but that does not in the least detract from the force of the decision because marriage portions have always been treated as appropriate subjects for collation.

"As might be expected, the opinions of the later writers of authority on this branch of the law are in conformity with these decisions. The late Lord Fraser (Husband and Wife, p. 1043) says—'Where again the question arises between a child and the father's executor or residuary legatee, the child would not be bound to collate if there were no child unforisfamiliated but himself, and if the question were solely between him and the father's disponee, the latter not being a child entitled to legitim.' By these latter words Lord Fraser obviously means 'not being a child entitled to claim and claiming legitim.'

"So Lord M'Laren (Wills and Succession, p. 164).

"The sole object of *collatio* in the law of Scotland is to secure an equitable division of the legitim fund irrespective of the claims of other parties interested in the distribution of the father's estate. The right to call for the collation of advances pertains, therefore, solely to the claimants

of legitim, who alone take benefit by the collation of such advances. Accordingly children claiming legitim are not bound to collate with the father's residuary legatees or trustees; and where one of the children of the family becomes entitled to the entire legitim fund in consequence of the rights of the other children having been excluded or discharged, the claimant cannot be required to impute a provision received in the father's lifetime to account of the legitim.'

"I have insisted (I hope not tediously) on the unbroken character of this chain of authority, because I am bound to give reasons of more than ordinary cogency for declining to follow a decision of this Court which I admit to be directly in point. That decision was pronounced in 1868 by three Judges of the Second Division (the Lord Justice-Clerk being absent) in the case of *Nisbet's Trustees* v. *Nisbet*, 6 Macph. 567. The rubric briefly and correctly expresses the judgment thus — 'Advances were made by a father to a son (without taking from him any obligation to repay) for purchase of a commission in the army and of steps of promotion. *Held* (1) that the advances were to be regarded as advances to account of legitim, and not as constituting debts due to the father's estate; and (2) that they must be imputed in a claim by the son for legitim, although the other children entitled to legitim had since their father's death discharged their claims.' I concede that no circumstances could more nearly resemble the present case.

"The cases of *Clark*, *Breadalbane*, and *Keith* were fully before the Court, and yet, in my humble judgment, the decision went directly in the teeth of them. What makes this the more remarkable is that none of the Judges in the Inner House takes the slightest notice of these cases. The leading opinion, Lord Cowan's, is chiefly based on the well-known case of *Fisher* v. *Dixon*, as deciding that the acceptance by a child after the father's death of a provision declared to be in satisfaction of legitim operates in favour of the general disponee. The *ratio decidendi* is, I think, summed up in four sentences from Lord Cowan's opinion (at p. 574)—'The child who has not lost right to legitim cannot be injured by anything done by the other children in the way of accepting the conventional provisions in satisfaction of legitim after the father's death, but as little can he be benefited. 'Whatever amount he could have claimed out of the legitim fund as at his father's death he is entitled to claim still, whatever may have been done by the other children, but he is entitled to no more. On that event the position of each child entitled to share in the legitim fund becomes that of a debtor to the extent of his share and interest in the funds of the general estate of the father. And when any one of them accepted the conventional provision in the settlement, his doing so satisfied the debt he could otherwise have claimed, and the general disponee in any question in regard to the amount of it takes the child's place.' With reference to this passage I venture respectfully to observe, first, that it is rather a fallacy to speak of the acceptance of their conventional provisions by the other children as enabling the repudiating child to claim more than he could otherwise do.

"The amount of this legitim is irrevocably fixed at his father's death, and he never can claim a farthing more than the share then fixed. It is quite another question whether he can be called upon to deduct from it prior advances when there are no other children interested in the legitim. Secondly, I think Lord M'Laren is right in saying 'that the ground of judgment to be collected from the opinions is that of a transfer by operation of law of their shares of legitim from the children who elect to abide by the will to the executors or residuary legatees of the will, carrying with it the attendant right to have the legitim fund enlarged by the contributions of the child or children to whom advances were made by the father.'

"Now, as Lord M'Laren further points out, this principle would equally enable a child who claimed legitim but had not received advances, to call upon the executors or residuary legatees to bring into the legitim fund any advances which had been made to the other children who elected to abide by the will. But this was one of the points raised in the case of *Monteith* v. *Monteith's Trustees*, 9 R. 982, and it was decided adversely to the demand for collation in such circumstances.

"There the daughters of the testator acquiesced in the settlement, but the only son claimed legitim and demanded that his sisters should collate their marriage contract provisions.

"The late Lord Justice-Clerk in his opinion elaborately discusses and rejects the motion that the acceptance by a child of a conventional provision operates as an assignation of the legitim to the general disponee. Lord Rutherfurd Clark says— 'When a child accepts conventional provisions he discharges his claim to legitim. He does not assign it; he merely withdraws the restraint which as a child he possessed over the testamentary power of his father. In another place his Lordship says—'*Collatio inter liberos* has application only when more than one child claims legitim.' It seems to me that the whole reasoning of the majority in this case points to the conclusion that the sphere of collation is confined to the adjustments of the accounts among those children who are claiming adversely to the will. But at all events the case effectually disposes of the theory of assignation of legitim by operation of law which is the foundation of the judgment in *Nisbet* v. *Nisbet*. I do not wonder therefore that Lord M'Laren (Wills, p. 167) says—'The cases of *Nisbet* and *Monteith* do not stand very well together.'

"I understood the Solicitor-General to say that the cases of *Skinner*, M. 8172, and *Douglas* v. *Douglas*, 4 R. 105, were both cases in which collation was allowed

although there was only one child claiming legitim. But that is not so. *Skinner* was a case of intestate succession and both the pursuer and defender claimed legitim. In *Douglas* it is clear, both from the interlocutor of the Sheriff-Substitute which was affirmed, and from the note of the Sheriff-Principal, that the case was treated as if the defender was claiming legitim as well as the pursuer. I do not quite see why he should have made any such claim, because he was executor and universal disponee under his father's will, but apparently he did make it, and the argument in the Court of Session seems to have conceded the obligation to collate, the only question being whether the gifts made by the father were proper subjects for collation. I am not myself aware of any case except *Nisbet* in which the plea of collation has been sustained at the instance of anyone but a child claiming legitim or his representatives. I view that case as a solitary decision inconsistent with prior judgments of this Court and the House of Lords, and irreconcileable with a later judgment of the same Division of this Court. The authorities against it being thus both higher and later, I think it is my duty to disregard it and to hold that the pursuer is not bound to collate as in a question with the defenders."

Counsel for the Pursuer — D.-F. Asher, Q.C.—Cook. Agents—Traquair, Dickson, & MacLaren, W.S.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—R. E. M. Smith. Agents—Beveridge, Sutherland, & Smith, W.S.

Friday, January 14.

OUTER HOUSE.

[Lord Kincairney.

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LIMITED *v.* GLASGOW FLESHERS' TRADE DEFENCE ASSOCIATION AND OTHERS.

Reparation—Relevancy—Combination in Restraint of Trade—Sale by Auction—Conditions in Article of Roup—Competency.

If A informs B that he will not deal with him unless he cease to deal with C, and C thereby loses the custom of B, C has no action against A, although he may, in fact, have suffered loss through his interference.

An auctioneer is entitled, on giving due notice, to refuse the bids of any individual or class of persons.

An association of the butchers in a particular locality intimated to the cattle salesmen in a particular market that they would not in future bid at the auction sales in that market unless the salesmen declined to receive bids made by the co-operative stores. In consequence the salesmen inserted a notice in their conditions of roup to the effect that they would not accept bids from anyone representing the co-operative stores, and, in pursuance of such notice, refused such bids. The market in question was held on a public wharf, where anyone was entitled to transact business or to act as salesman, but it was for the time being the only place in Scotland licensed for the landing of American and Canadian cattle. The co-operative stores brought an action against the salesmen and against the butchers, concluding against the salesmen for interdict against the insertion of the condition above referred to in their articles of roup, and against the butchers for damages for the loss which they alleged they had sustained through the action of these defenders in inducing the salesmen not to sell to them. *Held* (*per* Lord Kincairney) (1) that it was competent to sue both sets of defenders in the same action; but (2) that the action was irrelevant, in respect (*a*) that the salesmen were entitled to insert the conditions of sale complained of; and (*b*) that the butchers were not liable for damages for inducing the salesmen to do an act in itself lawful by means which they were entitled to adopt.

The facts of this case and the arguments of the parties are fully set forth in the opinion of the Lord Ordinary.

On 14th January 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Repels the plea to the competency of the action stated by the defenders other than the Glasgow Fleshers' Trade Defence Association and others: Repels also the plea to title as a plea to exclude the action: Finds (1) that it is not relevantly averred that the defenders, the Glasgow Fleshers' Trade Defence Association, in so far as they may have induced the defenders, Edward Watson and Ritchie, and other cattle or meat salesmen, to refuse bids on behalf of the pursuers for cattle exposed by them for sale at the Yorkhill Wharf or Market in Glasgow, and in so far as they may have induced Robert Ramsay & Company and Thomas MacQueen mentioned on record to refrain from purchasing hides, tallow, and other articles from the pursuers, did so wrongfully or illegally, or incurred liability in damages therefor: Finds (2) that the conditions set forth on record inserted by the said Edward Watson and Ritchie and others in their conditions of sale or articles of roup used by them in their sales of cattle at the said Yorkhill Wharf or Market are not illegal or invalid; and (3) that there are no relevant grounds for subjecting the said Glasgow Fleshers' Trade Defence Association in damages to the pursuers: Therefore repels the pleas-in-law for the pursuers, assoilzies the whole defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses," &c.