and from the first sub-head of the second alternative of the first declaratory conclusion and the relative conclusions for decerniture in respect of these first conclusions, and *quoad ultra* dismiss the action.

LORD KINNEAR—I agree.

LORD DUNDAS—I am of the same opinion.

Counsel for the Pursuer and Reclaimer—J. R. Christie. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Respondents—M'Lennan, K.C.—Skinner. Agents—Cumming & Duff, S.S.C.

Thursday, December 23.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

YOUNGS *v.* GRAY AND OTHERS (YOUNG'S TRUSTEES).

Parent and Child — Legitim — Collation inter liberos — Advances by Father to Child on Account of Share of Legitim.

A son wrote a letter to his father in which he acknowledged he had received from him certain sums of money—"And I further acknowledge that these various sums are all payments to me on account of the share of legitim or bairn's part of gear which may become due to me by and through your decease, and which share of legitim or bairn's part of gear is now discharged by me to that extent." On his father's death the son raised an action of declarator that in the event of his electing to claim legitim he was not bound in a question with his father's trustees to collate or bring into account any sums paid to him, but that said sums only fell to be collated by him in a question with his father's other children in the event of their electing to claim legitim, and on condition of their also collating such sums as they had received to account of legitim.

Held that pursuer was not entitled to the declarator sought.

Opinion by the Lord President and Lord Kinnear that this was not, properly speaking, a question of "collation."

Opinion by Lord Johnston that the trustees were, as in right of the children who accepted provisions and discharged legitim, entitled to call on the pursuer to collate with them.

By the Lord President—"When a father bargains with a son he does not bargain that a certain sum which he has given shall be a payment to account of a possible debt that becomes due after the father's death . . .; he bargains on account of his estate-general and not on account of a particular debt against his estate, namely, the legitim fund."

Semble, that the bargain is not solely for the benefit of the dead's part, any more than it is solely for the benefit of the legitim fund, but that where a son with whom such a bargain has been made claims legitim in order to the more equitable distribution of the actual moveable estate, both legitim fund and dead's part are calculated from a nominally enlarged moveable estate, *i.e.*, from the sum arrived at by adding to the moveable estate the sum so advanced.

Nisbet's Trustees v. *Nisbet*, March 10, 1868, 6 Macph. 567, 5 S.L.R. 369, and *Monteith* v. *Monteith's Trustees*, June 28, 1882, 9 R. 982, 19 S.L.R. 740, *commented on.*

Robert Young and Mrs Georgina Young or Stoddart, being the eldest son and the second daughter of the deceased James Robertson Young senior, raised an action against (1) Mrs Mary Young or Gray and others, their father's testamentary trustees; (2) Mrs Gertrude Luck or Young and Madge Robertson Young, being respectively the widow and daughter of James Robertson Young junior, second son of James Robertson Young senior; (3) Mrs Jane Young or Allison, daughter of the said James Robertson Young senior, James Allison, her husband, and their marriage-contract trustees; and (4) the said Mrs Mary Young or Gray, a daughter of the said James Robertson Young senior, as an individual. The pursuers in their summons as amended sought to have it found and declared "(1) that in the event of pursuer Robert Young electing to claim legitim from the estate of his father, the said James Robertson Young senior, he is not bound in a question with the defenders, the said James Robertson Young senior's trustees, to collate or bring into account any sums paid to him by his father to account of his legitim, and in particular the sum of £3900 referred to in an acknowledgment granted by the said pursuer to his father on 20th December 1897, or any part thereof, and that the said defenders are not entitled to set off said sums or any part thereof against his claim to legitim, but that said sums only fall to be collated by the said pursuer in a question with the other pursuer or with the defenders other than the said James Robertson Young senior's trustees in the event of their electing to claim legitim, and on condition of their also collating respectively such sums as they or their authors have received from the said James Robertson Young senior to account of legitim, and in particular on condition of the defenders the representatives of James Robertson Young junior, in the event of their so claiming, collating the sum of £3000 paid to him by his father and referred to in acknowledgment granted by the said James Robertson Young junior on 17th December 1897; and (2) in the event of its being so found and declared, the defenders first called ought and should be decerned and ordained, by decree foresaid, to hold just count and reckoning with the pursuers

on the basis above set out, whereby the true amounts due by them to the pursuers may appear and be ascertained by our said Lords; and the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuer Robert Young of the sum of £2000 sterling, and to the pursuer Mrs Georgina Orrock Young or Stoddart of the sum of £6000 sterling, or of such other sums as shall appear and be ascertained by our said Lords to be due by the defenders to the said pursuers. . . ."

The action was defended by the parties first called.

J. R. Young senior died on 25th February 1907, predeceased by his wife and survived by two sons and three daughters. By his trust-disposition and settlement, dated 11th March 1904, and codicils dated 22nd November 1905 and 26th February 1906, he bequeathed (1) to the pursuer Robert Young a gold watch and chain and the sum of £500; (2) to the pursuer Mrs Stoddart a liferent of the sum of £3000; (3) to James Robertson Young junior an alimentary liferent annuity of £120; (4) to the defender Mrs Allison the liferent of £4000; (5) to the defender Mrs Gray the house 38 Chalmers Street, with the furniture, &c., therein, the liferent of £4000, and the residue of the estate. On the death of each daughter the capital of the sums liferented by them respectively fell to be paid over to their issue equally. The settlement provided that the provisions to children, together with sums paid to sons during the testator's lifetime, were to be accepted by them in full of their legal rights. The settlement also conferred various legacies on other persons and on certain institutions. Prior to 1st June 1896 the testator gave to his son James Robertson Young junior the sum of £3000 sterling, and on or about 17th December 1897 the latter granted a written acknowledgment of the receipt of the said sum as a payment to account of his share of legitim. During his lifetime the testator gave to the pursuer Robert Young various sums of money, and on or about 20th December 1897 the latter signed a written acknowledgment to the effect that he had received sums amounting to £3900 from his father on account of his share of legitim.

The acknowledgment was in the following terms—"My dear Father, I hereby acknowledge to have received from you the following sums of money, viz.—(1) The sum of Two thousand pounds (£2000) prior to the 1st day of June 1896, and the further sum of One thousand pounds (£1000) on the said 1st day of June 1896, making together the sum of Three thousand pounds (£3000), which I of that date lent to my brother in connection with his partnership of Messrs J. F. Macfarlan & Co., manufacturing chemists, Edinburgh and London; (2) the sum of Six hundred pounds on the 15th day of May 1890, to enable me to purchase a dwelling-house at No. 5 East Mayfield, Edinburgh; and (3) the sum of Three hundred pounds (£300) on the 11th day of November 1896, to enable me to purchase a dwelling-house at Eastfield, Magdalene Bridge: And I further acknowledge that these various sums are all payments to me on account of the share of legitim or bairn's part of gear that may become due to me by and through your decease, and which share of legitim or bairn's part of gear is now discharged by me to that extent. Yours faithfully, R. Young."

The deceased's estate amounted to £32,461, 19s. 3d. The legitim fund was thus £16,230, 19s. 7d., which if equally divided among the five children of the deceased would yield £3246, 3s. 11d. to each child. The trustees paid to Mrs Stoddart the interest on £3000 until October 1908, and then on the understanding that she claimed or intended to claim legitim they consigned in bank £3246, 3s. 11d., which they regarded as her share of legitim. The other pursuer Robert Young received from the trustees £500 and a gold watch, but, as he averred, he had not been informed of his legal rights.

The position taken up by the parties appears from the following condescendence and answers:—"(Cond. 6) The defenders first called maintain that they are entitled, in paying the amount which may be claimed in name of legitim, to deduct advances made by the deceased to the claimant, to account of legitim, during his lifetime, and they propose to distribute the estate of the deceased on that footing. In point of fact, the legal result of the advances so made is that the children to whom they are made are bound, if they claim legitim, to collate with the children who have received no advance and who also claim legitim. (Ans. 6) Denied. Explained that the position of the defenders, as trustees foresaid, is as follows:—By the general conveyance in said trust-disposition and settlement the testator conveyed his whole moveable succession, including the legitim fund, to the defenders. Each child has only right to his own particular share of said fund, and the defenders are only liable to each child individually. The share of Robert Young, as admitted, is £3246, 3s. 11d., but as by contract with his father he renounced his legitim to the extent of £3900, his claim is satisfied. The same rule applies to the case of James Robertson Young junior and his representatives, to the extent of the sums paid to him. Robert Young is not bound to repay, or to collate with any of his brothers and sisters also claiming legitim, the excess paid to him over his share. (Cond. 7) The following is the result, according to the pursuers' view, if they claim legitim:—The pursuers would each be entitled, out of the legitim fund of £16,230, 19s. 7d., to £3246, 3s. 11d., being £6492, 7s. 10d. to the two pursuers. The pursuer Robert Young would, however, have to collate £3900. He would thus receive £1296, 3s. 11d., and the pursuer Mrs Stoddart would receive £5196, 3s. 11d. If, on the other hand, the pursuers and the defenders second called (on behalf of James Robertson Young junior) claimed legitim, each of the three would be entitled out of the said legitim fund to £3246, 3s. 11d., viz. £9738, 11s. 9d. The sums of £3900 and

£3000, however, would fall to be collated, leaving a total legitim fund of £16,638, 11s. 9d. divisible as follows:—To the pursuer Mrs Stoddart £5546, 3s. 11d.; to the pursuer Robert Young £1646, 3s. 11d.; to the second defenders £2546, 3s. 11d. (Ans. 7) The pursuer's view and resultant figures stated are referred to. *Quoad ultra* denied."

The defenders pleaded, *inter alia*—"(1) The pursuers have no title or interest to sue the present action. (2) The pursuer Robert Young having homologated said trust-disposition and settlement is barred from insisting in the present action. (3) The action is incompetent in respect, *inter alia*, (*a*) That there is no pretence of a competing right or rights on the legitim fund; (*b*) that the decree of declarator and payment concluded for depends upon acts of election which have not been and may never be made; *et separatim* (*c*) that the pursuers have ignored in the grounds thereof acts of election which may be made by other beneficiaries under said trust. (4) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed with expenses. (5) On a sound construction of said trust-disposition and settlement and acknowledgments and discharges the pursuers are not entitled to decree in terms of the first conclusion of the summons."

On 16th July 1909 the Lord Ordinary (SKERRINGTON) repelled the first, second, third, fourth, and fifth pleas-in-law stated for the defenders J. R. Young's trustees, and decerned in terms of the declaratory conclusions of the summons as amended; *quoad ultra* continued the cause; reserved all questions of expenses, and granted leave to reclaim.

Opinion.—"The conclusions of the summons as originally framed were such as to give some support to the objection that the question upon which the pursuers desired to obtain a decision was a speculative one. I am, however, of opinion that the question is a practical one, and that it requires to be immediately decided in order to enable the pursuers and the other children of the late James Robertson Young senior to elect intelligently between their legal and their conventional provisions. I accordingly repel the preliminary pleas stated for the compearing defenders, who are Mr Young's testamentary trustees.

"The question on the merits is as to the construction and legal effect of two discharges which were granted in favour of the late Mr Young by two of his sons, viz., the pursuer Robert Young and the now deceased James Robertson Young junior. The latter survived his father, and accordingly his representatives are entitled to claim legitim. The discharge granted by the pursuer Robert Young acknowledges the receipt of sums amounting in all to £3900, and then proceeds—'And I further acknowledge that these various sums are all payments to me on account of the share of legitim or bairn's part of gear that may become due to me by and through your decease, and which share of legitim or bairn's part of gear is now discharged by me to that extent.' The discharge by James Robertson Young junior acknowledges the receipt of £3000 on account of legitim, and is in substantially similar terms.

"Both parties agree that these advances are not loans by Mr Young to his sons, but they differ as to the construction and legal effect of the discharges. The pursuers maintain that the transaction evidenced by each discharge is an advance made by a father to a son on the footing that it shall be collated if such son claims legitim, and if other children claim legitim and demand collation. The defenders, on the other hand, maintain that in a question between them and the child who received an advance, the amount advanced diminishes *pro tanto* their liability towards such child for his share of legitim. As each child's one-fifth share of the legitim fund amounts to about £3200, it follows that, if the defenders' view is correct, Robert Young has been overpaid, and that the representatives of James are entitled to receive only about £200.

"It is obvious that so long as a father is alive legitim is not a debt due by him to his children. On the other hand, I see no reason in principle why, if a father during his lifetime purchases from a child a total or a partial discharge of legitim, that discharge should not receive effect in the ordinary way if and when the legitim becomes a proper debt in consequence of the death of the father and the survivance of the child. It is, however, well settled that if a father takes from one of his children a total discharge of legitim, the effect is the same as if such child had died. Accordingly, if there are other children *in titulo* to claim legitim after the father's death, the discharge operates in their favour, and not in favour of the father's executors. In other words, the discharge does not increase the dead's part or diminish the legitim fund, but merely diminishes the number of claimants upon the latter fund. I was not referred to any case where a father had taken from a child a partial discharge of legitim, similar to those taken by Mr Young, though, of course, there are many cases relating to advances made on the footing that they should be collated. Such advances may, however, be correctly described as 'payments on account of legitim.' Thus Stair (iii. 8, 45), referring to collation, says that all that the children 'receive from their father must fall in under the account. So their tochers, gifts, provisions, &c., are imputed in a part of the legitim, but are never presumed to be the whole unless it were expressed.' It follows, in my opinion, that if an advance is made on the footing of collation, or, in other words, on account of legitim, the child's right to legitim is *pro tanto* discharged, and it does not seem to be material whether this legal result is expressed in so many words, as in the present case, or is left to be implied. It is, however, very material to ascertain the

parties in whose favour the partial discharges founded on by the defenders were intended to operate. I am of opinion that these must be construed and must take effect *secundum subjectam materiam*, and that as they relate to legitim their effect is simply to require that the advances should be collated. I accordingly pronounce decree in terms of the declaratory conclusions of the summons as amended, and *quoad ultra* continue the cause."

The defenders reclaimed, and argued—(1) The Court were being asked to advise *ab ante* what the result would be if a certain course were pursued; such an action was incompetent—*Earl of Galloway* v. *Lord Garlies*, June 26, 1838, 16 Sh. 1212; *Murray* v. *Murray*, May 21, 1833, 11 Sh. 629; *Parochial Board of Bothwell* v. *Pearson*, February 6, 1873, 11 Macph. 399, 10 S.L.R. 250; *Harveys* v. *Harvey's Trustees*, June 28, 1860, 22 D. 1310. It was true the strict older practice had been somewhat relaxed in the later cases—*Chaplin's Trustees* v. *Hoile*, October 30, 1890, 18 R. 27, 28 S.L.R. 51; *Falconar Stewart* v. *Wilkie*, March 15, 1892, 19 R. 630, 29 S.L.R. 534; *Davidson* v. *Davidson and Others*, October 27, 1906, 14 S.L.T. 337, but none of these cases indicated that such an action as the present was competent. (2) Even assuming the action were competent the pursuers were not entitled to the declarator sought. Even apart from a special bargain, an advance by a father to his son, neither a gift nor an ordinary debt, must be brought into account in a question with his father's trustees—*Nisbets Trustees* v. *Nisbet*, March 10, 1868, 6 Macph. 567, 5 S.L.R. 369. The decision there was directly in point, and if sound was decisive in their favour. They maintained that it was sound, and that its authority was not affected by the decision in *Monteith* v. *Monteith's Trustees*, June 28, 1882, 9 R. 982, 19 S.L.R. 740. The reasoning in the two cases might not be reconcilable, but the decisions were. It might be that the word "collation" was not quite accurately used in *Nisbet's* case, but in any case the advance had to be brought into account. That *Nisbet's* case was sound was supported by the reasoning in *Fisher* v. *Dixon*, June 16, 1840, 2 D. 1121 (*esp.* Lord Fullerton at 1138-1139), *affirmed* 6th April 1843, 2 Bell's Ap. 63 (*esp.* Lord Cottenham at p. 71). It was to be noted that in *Monteith*, the Court proceeded largely on what they held was the intention of the testator. As to the conflict, if any, between *Nisbet* and *Monteith*, they referred to M'Laren on Wills, vol. i, p. 165, and *Collins* v. *Collins' Trustees*, January 4, 1898, 35 S.L.R. 641. But further, the trustees were here in a stronger position than in *Nisbet*, because there was here a special bargain between father and son. That bargain must have been made in favour of the debtors or prospective debtors in the obligation to pay legitim, namely, the trustees, and not in favour of the creditors in the obligation, the children claiming legitim. The advance was a gift subject to the condition that if the son survived and claimed legitim from the trustees he would have to account to them for the advance made by the father, just as he would had the advance been made by the trustees themselves before the exact amount of legitim had been ascertained. If the son accounted to the trustees he remained a bairn in the house; if he would not account, he contravened the condition of the gift, and was so no longer. There was nothing to prevent a father attaching such a condition to a gift—*Smith* v. *Elleis*, 1622, M. 4777; *Spence* v. *Stevenson and Others*, 1766, M. 8178.

Argued for the pursuers and respondents—(1) The action was competent, for if the pursuer's contention were right they would gain by claiming legitim — *Barbour* v. *Greirson*, May 12, 1827, 5 S. 663 (565); *Mackenzie's Trustees* v. *Mackenzie's Tutors*, July 1, 1846, 8 D. 964; *Chaplin's Trustees* v. *Hoile* (*cit. sup.*); *Falconar Stewart* (*cit. sup.*); *Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, 44 S.L.R. 96. In *Earl of Galloway* v. *Lord Garlies* (*cit. sup.*) and *Murray* v. *Murray* (*cit. sup.*) there was no *lis*. (2) The right to legitim did not emerge until the father's death, and a sale by a son to his father of his *spes successionis* did not affect the amount of the legitim fund—*Fisher* v. *Dixon* (*cit. sup.*), *esp.* Lord Fullerton's opinion; *Baron Panmure* v. *Crokat*, February 29, 1856, 18 D. 703. The father could not by bargain affect the amount of the legitim fund; all that he could do was to make it clear that the money passing passed as an advance—*Spence* v. *Stevenson* (*cit. sup.*) On the death of the father the legitim fund became fixed, and the right thereto vested in the children in equal shares. Accordingly here each of the pursuers claimed one-fifth part of the fund. It was true Mrs Stoddart (or any other child claiming legitim) was entitled to demand that the other pursuer should collate with her (or them) the advances he had received. Here the pursuer Robert Young offered so to collate, thus making "a nominal enlargement of the legitim fund in order to the more equitable distribution of the actual fund," but the right to make this demand for collation only belonged to the other children, and only if claiming legitim; neither the trustees nor those entitled to dead's part or *jus relictæ* could so claim—*Fisher* v. *Dixon*, 2 D. 1121, Lord Fullerton at 1138-1139, Lord Murray at 1149; *Baron Panmure* v. *Crokat*, February 29, 1856, 18 D. 703, Lord Ivory 710-712; *Marquis of Breadalbane* v. *Marchioness of Chandos*, January 20, 1836, 14 S. 309, August 16, 1836, 2 S. & M. 377; *Keith's Trustees* v. *Keith and Others*, July 17, 1857, 19 D. 1040, Lord Ardmillan, Ordinary, at 1051, Lord President M'Neill at 1057, Lord Curriehill at 1066; *Lashley* v. *Hog*, July 12, 1804, 4 Pat. Ap. 581, Eldon, L.Ch., at 642; Ersk. iii, 9, 24 and 25; Stair iii, 8, 45-46; *Nisbet* (*cit. sup.*) and *Monteith* (*cit. sup.*) could not stand together. The sound law was that laid down in *Monteith*, Lord Justice-Clerk Moncreiff, p. 988, at 992 Lord Rutherfurd Clark at 1008: *Monteith* had been

followed, and *Nisbet* expressly disregarded by Lord Stormonth Darling in *Collins* (*cit. sup.*)

[The LORD PRESIDENT referred to *Justice* v. *His Father's Disponees*, November 10, 1737, M. 8166.]

At advising—

LORD PRESIDENT—The question that is raised in this summons is between two of the children of the late Mr Robertson Young and the testamentary trustees of that gentleman. But although there are two pursuers, the conclusions of the action only deal directly with the interests of one. It is only incidentally the interests of the other are affected by the question which has to be decided. The question arises out of a transaction which took place in the lifetime of the late Mr Young between him and his son, the pursuer Robert Young, and that transaction is embodied in a letter dated the 20th December 1897. That letter is in these terms—it is addressed to the father—"My dear father, I hereby acknowledge to have received from you the following sums of money, viz.," and then certain sums of money are related, making in all £3900; and the letter goes on — "And I further acknowledge that these various sums are all payments to me on account of the share of legitim or bairn's part of gear which may become due to me by and through your decease, and which share of legitim or bairn's part of gear is now discharged by me to that extent." Mr Robertson Young died, and he left a trust-disposition and settlement by which he gave the whole of his property to trustees, and the trust purposes are for division among his family in various proportions. These provisions bear to be in full of legitim and all other claims.

It is, of course, competent to any child, legitim not having been renounced under a marriage-contract or by other deed, to claim legitim, and the pursuer Robert Young brings this action with this conclusion—he wishes it found and declared that in the event of him, the pursuer, electing to claim legitim, he is not bound, in a question with the defenders, the trustees, "to collate or bring into account any sums paid to him by his father to account of his legitim, and in particular the sum of £3900 referred to in an acknowledgment granted by the said pursuer to his father on 20th December 1897, or any part thereof, and that the said defenders are not entitled to set off said sums or any part thereof against his claim to legitim, but that said sums only fall to be collated by the said pursuer in a question with the other pursuer or with the defenders other than the said James Robertson Young senior's trustees, in the event of their electing to claim legitim," and on condition of their also collating such sums as they or their authors had received to account of legitim, and in particular £3000 is mentioned which had been advanced on the same terms as the advance was made to Robert Young, to another brother, James Robertson Young junior.

Now it is admitted between the parties that the moveable estate left by the deceased came to £32,461, 19s. 2d. There was no widow, and therefore the legitim fund is represented by a sum of £16,230, 19s. 7d. It is admitted also that Mr Young was survived by five children, and therefore one-fifth of that sum of £16,230, 19s. 7d. amounts to £3246, 3s. 11d. It therefore becomes at once apparent that the sum of £3900 being greater than the sum of £3246, 3s. 11d., if the letter I have read is taken according to what would be the ordinary reading of it, the pursuer has been already overpaid. But the pursuer argues that that is not so, and his argument is really adumbrated in the terms of the conclusion which I have already read. Put in ordinary language what it comes to is this. He says—True it is that I am bound to bring into account the £3900 which I have received, but I am not bound to bring it into account with anybody except my brothers and sisters, because *collatio bonorum* is only *inter liberos* and no one else has a title to ask me to collate; and accordingly if my brothers and sisters choose (as he hints some of them will choose) to adhere to the provisions of my father's settlement and not to claim their legitim, I am not to have this document put forward against me by the trustees—they have no concern with it, as they have no title to make me collate.

The whole question is undoubtedly one that is surrounded with subtleties, and I do not think anyone can call it easy to determine. How difficult these subtleties are, I think, may very easily be appreciated by anyone who will compare the cases of *Nisbet* (6 Macph. 567) and *Monteith* (9 R. 982). Though the actual decisions do not conflict, I think it will puzzle the wits of most to make the reasons given by the learned Judges in the two cases square with each other. While I admit that, I think it is also worth noticing, that if we had had no decided cases, and if anyone was shown that document who knew nothing about the very great intricacies of collation, he would come to only one conclusion. He would say—Here is a person who has got an advance from his father during his lifetime upon the bargain that that advance shall be held as payment of his share of the legitim *pro tanto*, and then, finding that the share of the legitim was not so great as the advance, he would say, Well, this amount has already been paid.

After very careful consideration—and I confess not without difficulty—I have come to the conclusion that the view which I have just stated, which I might call the common-sense view—the view that all ordinary business men would take—is the true view; and I think that the fallacy that lies underneath the other argument is the fallacy that is very naturally put in the forefront of the conclusion by using the word "collate." I do not think this is, in the true sense of the word, a case of collation *inter liberos* at all. What we have to discover is, what was the true meaning of the bargain which the father

made with his son? And I really think that I have said enough by merely stating the case as to what the ordinary commonsense view of the document is.

But of course the matter does not end there, because I have got to deal with the cases—I cannot pretend ignorance of them. I have already indicated that it is very difficult to reconcile, not perhaps the judgments, because they do not actually conflict, but the reasons given in some of the cases, and it is certainly the fact that if you took *Nisbet's Trustees*, and *Monteith* was not in the books at all, it would be perfectly easy to take *Nisbet's Trustees* as an absolute authority guiding this case. With *Monteith's* case in the books it is not so easy. In that state of doubts and difficulties I think the best plan is to take the case which is of the greatest authority on the matter, and I cannot have any doubt as to what that case is. The case of the greatest authority must, I think, be *Fisher* v. *Dixon* (2 Bell's App. 310), because not only was it the judgment of a strong Court here, but it went to the House of Lords and was affirmed, which was not the case with either *Nisbet* or *Monteith*, and the Judges in both *Nisbet* and *Monteith*, while disagreeing with each other, say they are going upon the authority of *Fisher* v. *Dixon*, so that the fountain, at least, seems to be acknowledged as pure, whatever you may say about the rills which descend from it. Now, when I come to *Fisher* v. *Dixon* I think the principles upon which the case must be founded are best expounded in the Court of Session by Lord Fullerton, and Lord Fullerton says this—"The general disposition carries the whole moveable succession to the general disponee; subject, of course, to the legal or testamentary burdens attaching to it. One of these is the claim of legitim, amounting to the half or the third of the free moveable succession, as the case may be. In this claim the general disponee, who holds the free residue of the succession, is directly and absolutely a debtor. On the other hand, the creditors in the claim are the children not forisfamiliated. But, although the legitim may be said in one sense and in relation to the general moveable succession to be a gross fund, it ceases from the father's death to hold the character of unity in relation to the children. From that moment each child has, not an indefinite claim in common with his brothers and sisters on the gross fund of legitim, but a vested interest in his particular and appropriate share—that share either liquidated or admitting of liquidation—which he can assign, transact, and deal with at his pleasure, and which, in so far as not dealt with by him, will go to his executors. This consideration is quite decisive of the material effect produced on the legal character of the fund by the father's death. For if that event were not held to resolve its previously existing unity into separate shares exigible as debts by each particular child, the only conceivable alternative would be that it remained *unum quid* until the actual division among, or at least the actual claim by, the whole children; a theory directly at variance with the admitted consequence that from the moment of the father's death each share, whether actually set apart or not, or claimed or not, becomes, like any other completely vested right, transmissible to the child's assignees or legal representatives." And that ground was taken perfectly clearly and in rather shorter words by Lord Cottenham in the House of Lords, because he says—"Upon the father's death the title of the children to legitim was complete, each to a proportion of the whole according to the number of children; and so was the title of the disponee to the general estate complete, but subject to the choice tendered to the other children of accepting the provision declared for them."

Now, if that is the true theory of the position of the legitim fund, it seems to me to go far to solve this question. I think that the argument upon the other side really depends, if you probe it to the bottom, on this, that the legitim fund is a thing entirely apart, instead of a debt which is exigible against the general disponee, who gets the dead man's estate. But taking the true theory as the one that has had the *imprimatur* of the highest authority put upon it in the House of Lords, it surely becomes very clear that when a father bargains with a son he does not bargain that a certain sum which he has given shall be a payment to account of a possible debt that becomes due after the father's death (for it is not due before); he bargains on account of his estate-general, and not on account of a particular debt against his estate, namely, the legitim fund; and if that is so, of course that solves the whole question.

Now one word as to *collatio bonorum*. *Collatio bonorum* seems to me a simple equity and nothing else, which does not really disturb the theory which I have read in the words of Lord Fullerton. I think Lord Fullerton had it in his mind when he says a "particular and appropriate share—that share either liquidated or admitting of liquidation." As against the general disponee of course the claim is each for a proportional share, according to the number of children. But then there may be an equity, and there is an equity in the case of *collatio bonorum*, which enables one child to say to another: Inasmuch as you have had advances during our father's life, in the division of the legitim fund between us these must be taken into account, and your share, as in a question with me, which would have been an equal fifth, now becomes not an equal fifth of what is still exigible from the trustees—it is still, of course, an equal fifth, if you take the advances *in computo*—but as proponed against the trustees, the child who has had the advances does not get as much as the other child who has had none. Consequently, I look upon the doctrine of *collatio bonorum* really as a rider which is put upon the claims of the children, and a rider depending upon an old-time equity,

introduced from the very earliest times in our practice, and recognised by Lord Stair and all the institutional writers since.

But if that is so, that really points the place of divergence between me and the Lord Ordinary. The Lord Ordinary really goes along with my argument up to this point. In his note he says that he sees no reason why a father should not bargain with a child, and I think for that he has high authority, because in another passage of Lord Cottenham's judgment he says this (of course I agree that he is talking of what shall become of the share not claimed by a child who has betaken himself to the settlement—the question whether it should go over to the general disponee or to the other children who shall claim the legitim fund)—"It has been said that this is not a *quœstio voluntatis*, and in one sense that is true, because the father had no power to deprive any child of its share of legitim; but consistently with that right in the child the father might well render to each child a price for its share and provide for the application of the share given up." Now I quite agree that he is speaking there of what the father does in the offer that he makes in his testament, but these words seem to me to be equally applicable to an *inter vivos* transaction. Now the Lord Ordinary agrees with me, for he says that he does not see any reason why a father should not bargain with his child. But then he says that, as he does not find it actually expressed this document for whose benefit the bargain is made, he supposes that it must take effect *secundum subjectam materiam*, and the *subjecta materia*, as I think he rather assumes than finds, is *collatio bonorum*, and therefore the other children must be the creditors in the obligation. It is there that I part company with him. I do not think there was anything stated about *collatio bonorum*. *Collatio bonorum*, as I have already tried to express, is a mere equitable right which only really exists in calculation, and only comes into being after the legitim has become vested, and after it is to be discovered how the vested shares shall be divided among the various children. Here, it seems to me, the father was bargaining with his son, and if I look at what the meaning of the bargain was, then I think, according to the ordinary rules of common sense, the father was bargaining that this payment which he was now making during his life should be held as part of the payment which might be exigible after his death. And therefore I think he was contracting for his general estate at large, upon which general estate he knew the legitim fund would be a creditor.

I do not think this view can be controverted by the fact, which nobody denies, that if a father in his lifetime chooses to take an absolute renunciation of a legitim, the effect of that is not to enlarge the dead's part, but simply to make fewer claimants upon the legitim fund. But there the form of bargaining is held to be putting away of a child altogether,—bargaining with him that he will not come in and claim against his brothers and sisters. Here I do not think that is so; on the contrary, I think this document shows that it meant to apply to a claim being made, and it provides that these payments shall be held to be to account.

Accordingly I am of opinion that here the Lord Ordinary's interlocutor ought to be recalled; and I rather think that the result of that will be absolvitor, because—although of course we are not going to absolve the defenders here from all liability to count and reckon—I think the conclusions of the summons are not for count and reckoning generally, but only for count and reckoning upon the basis of the declarator which has been asked; accordingly, if the declarator is not granted the defenders are not bound to count and reckon upon that basis, but that will not affect their liability to count and reckon in the ordinary way.

LORD KINNEAR—I agree in the opinion which your Lordship has delivered. I do not understand that there is any question now as to the pursuer's right to claim legitim. There is a statement upon record that he takes a legacy of, I think, £500 and a gold watch under the will, and there is a provision in the will that the bequests to children should be in full of legitim; and upon that I observe a plea that he is barred from insisting in the action because he has homologated the said trust-disposition and settlement. I do not think that view was pressed before us, and at all events I am of opinion that there is nothing in the circumstances set out to preclude the pursuer from still claiming legitim, although, of course, he cannot take anything under the will and take legitim also; he can take legitim only on condition of his giving up what he takes under the will.

If that be out of the way, then I think, on looking at the conclusions of the summons, the pursuer assumes that he has received advances from his father on conditions which may affect to some extent his right of legitim, and therefore the first question would seem to be, What are these conditions? and the answer to that must depend upon the terms of the document which is put forward as expressing them. It was maintained for the pursuer that the questions should be determined by certain general rules of law; but I agree with the Lord Ordinary that it is perfectly lawful for a father and son to make a bargain with reference to the son's contingent right to legitim; and that opinion has the sanction of Lord Cottenham's authority in the passage which your Lordship has read from the judgment in the case of *Fisher* v. *Dixon* (2 Bell's App. 63). I take it that it is perfectly lawful for the father to make advances to the son, and make such conditions as they shall agree upon as to the manner in which these advances are to be accounted for when the father's succession opens. If that be so, I am entirely with your Lordship on the construction of the document which ex-

presses the arrangement between the father and son. The son acknowledges that certain payments of money have been made to him on account of a share of legitim or bairn's part of gear "which may become due to me by and through your decease, and which share of legitim or bairn's part of gear is now discharged by me to that extent." That is not an agreement, according to the ordinary construction of language, that other children are hereafter to have the benefit of the advances made to the pursuer, but that these advances are to be set specifically against his share of legitim when he comes to call his father's executors or representatives to account for that share.

Now if that be the plain meaning of the language used, the question is whether there is any rule of law which will prevent it receiving effect. It was maintained, in the first place, that there is a general rule which is said to be established by *Hog* v. *Lashley* (3 Pat. App. 247) that the benefit of a transaction by which a child's right of legitim is affected during the father's life enures to the children and not to the general disponee. No such comprehensive doctrine was laid down, in my opinion, in *Hog* v. *Lashley*. It must depend upon the nature of the particular transaction in each case. In *Hog* v. *Lashley* all the children, except a son, who took the estate heritable and moveable under the will, and one daughter, had accepted the provisions and discharged the father. They had accepted the provisions as in full of legitim, and given a discharge of that claim against the father's estate. It was held that that transaction during the father's lifetime had extinguished the claim for legitim to exactly the same effect as if the children had died; and therefore when the legitim opened the total amount of the legitim fund must be fixed according to the rules of law, and the children still surviving must be allowed to share it among them. The principle is stated by Lord Cottenham in the case of *Fisher* v. *Dixon* (2 Bell's App. 73, 2 D. 1121). "In the first case"—that is the case of the renunciation by children in the lifetime of the father—"it is held that the effect is the same as if the child had died at the time of the renunciation, and therefore, of course, as if at the time of the father's death the child were not in existence, from which it necessarily follows that the whole legitim would be divisible among the other children." The same consideration is stated in a single sentence by Lord Moncreiff, who says, speaking of a total discharge during the father's life, that the discharge "operates merely by taking off a claimant and consequently leaving more for the claimants who remain."

But if that is the principle, it is altogether inapplicable to the pursuer's position in this transaction with his father. He did not renounce his claim to legitim, but on the contrary expressly reserved it by stipulating as to the condition on which it is to be enforced; and he is seeking to enforce it now. It seems to me impossible that the rule of *Hog* v. *Lashley* should be used to sustain a plea at the instance of a child who has received an advance in his father's lifetime and claims legitim on his father's death. That a child should claim a share of legitim and at the same time allege that his right is to be determined on the assumption that he, having accepted an advance from his father, is not an existing child, and therefore that the fund is to be divided among the other children as if he had died, seems to me to be a contradiction in terms.

Then if *Hog* v. *Lashley* has no such application as to exclude the true construction and effect of the contract between the father and son, the question what that contract really meant must be determined with express reference to the position of the legal rights which it is intended to modify, and that position appears to me to be finally settled by *Fisher* v. *Dixon*. It is stated with great clearness in the passage which your Lordship has already read from Lord Fullerton's opinion, and the result of it is certainly this, that the general disponee being in the position of direct debtor, and each child in the position of a direct creditor for the particular share that that child is entitled to take in the legitim from the moment of the father's death, each child according to the doctrine of that case has not an indefinite claim in common with his brothers and sisters on the gross fund of legitim, but a right in his particular and appropriate share which he can deal with as he pleases. He is the creditor as to that share, and the general disponee is the debtor. If that be the position, then the question is, upon an accounting on that footing between the creditor and debtor, whether the debtor is not entitled to insist that the creditor shall take into account a sum of money advanced to him on a previous occasion on condition that he should allow it to be set against his share of the legitim. It is clear enough that there could be no question if an advance were made by the general disponee himself, and that is a perfectly possible supposition, because it might well be that the general disponee might find it impossible to ascertain the exact share of legitim to which children might be entitled, or the exact amount of the legitim fund, because it might be necessary to await the realisation of investments, and yet he might be perfectly willing to make a payment to account. If he did make such a payment to account, nobody will dispute that he would be entitled to take credit for it on a final settlement. His right to do so on a contract between the father and son is just as clear.

It is argued, however—and I think this is the only remaining point requiring serious consideration when once the doctrine of *Hog* v. *Lashley* has been understood — that in the distribution of the legitim fund there can be no collation except among the children themselves. I entirely assent to that proposition. I think it is the result of all the authorities that

collation of legitim is an equitable claim competent only to the children competing on the legitim fund, who are entitled to draw in advances which another child may have received in circumstances which give rise to that equity. It does not apply to all advances by any means, and I have not considered the question whether it applies to all the advances made to the pursuer; but where it does apply the doctrine is that advances imputable to legitim must be brought into computation in order to equalise the rights of all the children in the legitim fund. I therefore accept the law stated by Lord Rutherfurd Clark in the case of *Monteith* v. *Monteith's Trustees*, 9 R. 982, as being perfectly sound. His Lordship says—"An examination of the authorities has satisfied me that on the death of the father one-third, or as the case may be one-half, of his moveable estate vests in his children in equal shares, or in other words, that a child has only a proportionate share of the legitim fund. Further, it is settled that the discharge by any child of its right to legitim after the death of the father does not enlarge the share of the other children, but enures to the benefit of the general disponee." From those two propositions it seems to me to follow that a child can claim no more than his equal share of the legitim fund. Then he goes on to say—"*Collatio inter liberos* has application only when more than one child claims legitim. Its purpose is to require a child who claims legitim to collate the advances which it has received during the lifetime of the father, and thus to make a nominal enlargement of the legitim fund in order to the more equitable distribution of the actual fund." That appears to me to be in accordance with all the authorities, and I do not think it inconsistent with anything that was decided in *Nisbet* v. *Mathieson*, 6 Macph. 567, although it may perhaps be questioned whether the term collation is used with exact precision in that case. However that may be, I am persuaded that a great part of the difficulty and confusion that was introduced into the argument in this case arose from the inexact use of the term "collation," inasmuch as the word was used at one time in its proper significance and at another time seemingly for taking into account, which is not its meaning. It is not a word of ordinary language, or at least when it is used in ordinary language it has a signification very remote from the question we are now discussing; it is a technical term which has a perfectly well fixed meaning in Scots law, and it means, I think, the right which belongs to persons interested in a succession to have the particular part of the estate in which one of them has acquired a separate right thrown into the common fund in order to provide an equal division of the whole. That is its meaning when it is applied to collation between heir and executor, and it has exactly the same meaning when it is applied to the collation among children for the equalisation of their shares of the legitim fund. It is obvious that the right which is described at full length as *collatio inter liberos* is a right competent to the competing children alone.

But that is not the principle to which the defenders in the present action appeal. They cannot maintain that they are entitled to collate as between children, and they have no occasion to collate. They do not need to found upon the equitable consideration for creating an equality among children at all, although they do not by their plea in any way dispute it. Their claim does not arise until after the division has been made. The true share to which the child is entitled must be ascertained first, before on accounting for that particular share the general disponee can claim credit for the advances. He has nothing to do with the ascertainment of the share. The share being fixed by law is definite, and the actual division as to payment is arrived at by an extremely simple calculation. The child comes forward and claims right to that particular sum, and the disponee stands upon the contract made by the father and says—"You are entitled to that sum, but only upon giving credit for the sum already received from your father."

It seems to me that the pursuer's position in the particular circumstances of the case is in the highest degree confirmative of the view I take of the application of the law to the construction of the document. The pursuer says that he is not to be required to take this money into account at all unless he has other children competing with him on the legitim fund. Thus it follows that if all the other children had renounced their claims or died during the father's life, this son would have been entitled to the whole legitim fund without giving his father's executors credit for the money advanced to him on condition that it should go against his claim for legitim. That would appear to me to be completely contrary to any possible construction of the bargain between him and his father. I am therefore of opinion with your Lordship that the Lord Ordinary's interlocutor must be recalled.

LORD JOHNSTON—I have come to the same conclusion as both your Lordships, though I believe on somewhat different grounds, or, I should rather say, by a different route, for I at once disclaim any intention of traversing the reasoning of either of your Lordships.

The question arises thus:—The testator had five children. To his sons Robert and James he made advances during his life. To his three daughters he made provisions by his settlement. In the case of Robert and James he took a writing acknowledging the advances, and (I read from Robert's letter) further acknowledging "that these various sums are all payments to me on account of the share of legitim or bairn's part of gear that may become due to me by or through your decease, and which share of legitim or bairn's part of gear is now discharged by me to that extent."

The writing granted by James was to the same effect, though not quite in the same words. In the case of the daughters their provisions were declared to be in full satisfaction of their legitim.

The legitim fund is ascertained to be £16,230, 19s. 7d., one-fifth of which, or each child's share, is £3246, 3s. 11d. Now it happens that the advances to Robert were £3900, or more than his apparent share of the legitim fund. Robert's contention put forward in this action is, that if all the children, including himself, claim legitim and he collates, the divisible fund is raised by addition of his advances to £20,130, 19s. 7d.,

	£	s.	d.
One-fifth of which is . .	£4,026	3	11
Deducting his advances .	3,900	0	0
leaves	£126	3	11

to come to him.

If one child discharges legitim the divisible fund is reduced by deduction of a fifth of the legitim fund to £17,292, 7s. 10d.,

	£	s.	d.
One fourth of which is . .	£4,323	2	0
Deducting his advances .	3,900	0	0
leaves	£423	2	0

to come to him, and so on, till if three children discharge legitim, which from the scheme of his summons he assumes that they will do, the divisible fund is reduced by deduction of three-fifths of the legitim fund to £10,392, 7s. 10d.,

	£	s.	d.
One-half of which is . .	£5,916	3	11
Deducting his advances .	3,900	0	0
leaves	£1,296	3	11

to come to him.

But carrying out his contention to the extreme, if all the other children were to discharge their legitim, the legitim fund would be reduced by deduction of four-fifth shares to £3246, 3s. 11d., the whole of which he would take without being required to bring into account his £3900 of advances, there being in that case no one with whom to collate, and he would then benefit to the extent, not of the £3246, 3s. 11d., nor of the £3900, but of £7146, 3s. 11d. And he must, I think, succeed, despite the document he granted to his father, unless the trustees or general disponees are, as in right of the children who accept provisions and discharge legitim, entitled to call on him to collate with them.

I am fully impressed with the fact that the success of Robert would be against the spirit of the transaction with his father. But I find difficulty in deciding against him on any other footing than that which I have indicated above, owing to what I understand to be the result of prior decisions. And I am equally unable to decide against him without weighing against one another the judgments in the two cases of *Nisbet* (6 Macph. 567) and *Monteith* (9 R. 982), and doing so I accept the authority of the former, which has the advantage, which the latter has not, of being directly in point.

The most received definition of legitim is perhaps Lord Fullarton's in *Fisher* v. *Dixon* (1840, 2 D. at p. 1139). It is now trite, but I state it as necessary for the sequence of my opinion. It is this—the legitim is at best, during the parent's life, a chance on the part of each child, if he survives the parent—a chance which the parent cannot disappoint by testamentary deed—of sharing a third or a half, according as the other parent survives or predeceases, of an indefinite fund with an indefinite number of brothers and sisters. During the parent's life there is no relation of debtor and creditor. There is no debt, either present, postponed, or contingent. But on the parent's death it becomes an absolute right to an aliquot part of a definite ascertained or ascertainable fund, which vests *ipso facto* on survivance, and is a claim of debt, not a right of succession. The relation of debtor and creditor at once arises between the parent's estate and the child. The succession remains a *unum quid*, but the general disponee takes it subject to this burden. During the parent's life there is nothing that can be called the legitim fund. On his death, at once there is, and in that fund the estate is debtor to the children.

As each child's share of this fund becomes on the parent's death a debt, it follows that the parent cannot disappoint a child by any deed *mortis causa*. Yet parent and child can transact regarding legitim, in different circumstances and with different results, and it is on that difference that the determination of the present question depends. Such transaction can take place (1) before the marriage of which the child is one of the fruits, and therefore before the birth of the child, but this only *fictione juris;* (2) during the joint lives of the parent and child; and (3) after the death of the parent. As thus, the legitim may be (1) excluded by antenuptial marriage contract; (2) satisfied and renounced by agreement during the joint lives of parent and child; and (3) satisfied and discharged by the offer and acceptance of a testamentary provision in lieu of it after the parent's death. I use the words exclusion, renunciation, and discharge merely as convenient distinctive expressions without claiming for them any accuracy of definition. In all these cases there is a transaction between parent and child, though the exclusion by marriage contract is only such a transaction *fictione juris*.

But the results of these transactions are different, and the difference is occasioned by the different relations which the child holds to the legitim at the time of the transaction. In the case of exclusion or renunciation there is no ascertained or ascertainable legitim fund. The child has no claim of debt. He has at best a protected *spes successionis* to an indefinite share of an indefinite fund. If he is excluded from or renounces that *spes*, while as yet nothing is due to him, his exclusion or renunciation has been held only to diminish the number of claimants on the legitim fund when it arises, and to give the parent no right over the child's ultimate share. Exclusion or renunciation have therefore the same effect as the child's natural death (*Lashley*

v. *Hog*, 1792, 3 Pat. 247). And this was deemed consistent with rough justice in the case. If the child is excluded in respect of a provision made by antenuptial marriage contract or accepts a provision in the parent's lifetime, these provisions are made out of the general funds of the parent, and thereby the fund is lessened out of which the legitim is to be paid to the children at the parent's death. It was therefore deemed only fair that the children who are not provided for in the father's lifetime should take the whole legitim fund when it comes to be ascertained at the parent's death. When, on the other hand, the discharge or satisfaction is granted after the father's death in respect of a testamentary provision, this provision in lieu is not made out of the general estate. It is made from the dead's part, and therefore the legitim fund is not in any degree lessened. It has been deemed therefore only fair that the share of legitim for which the provision is the substitute should go to that fund from which the provision is taken (Lord Campbell in *Fisher* v. *Dixon*, 1843, 2 Bell's App. at p. 76 *et seq*). In other words, the general estate pays, not the debt due to the child in name of legitim, but something in lieu of it. In the case of exclusion or renunciation the exclusion or renunciation enures to the remaining children; in the case of discharge, to the general disponee. This has been recognised since the case of *Henderson* (1728, M. 8187), and the doctrine was subsequently affirmed and its ratio elaborately explained in *Fisher* v. *Dixon* (1842, 2 D. 1121, and 1843, 2 Bell's App. 63).

As I read this decision the *ratio decidendi* was—that the parent's death converted the child's *spes* into a *jus crediti*, that after the parent's death the debtor in the legitim fund was the general disponee, and the creditors were the children not forisfamiliated, that is, who had not renounced; that it was open to the general disponee to satisfy his own debt on such terms as the creditor would accept; that if he did so in reference to any particular child he did so for his own behoof, and did not thereby purchase a disencumbrance of the gross legitim fund for the benefit of the remaining children; and that if such was the result of a transaction, extraneous to the settlement, between the general disponee and the individual child, no difference was introduced by the fact that the terms of the transaction were dictated *in gremio* of the settlement.

If this be the ratio of the judgment, and this the result, it appears to me to follow as a natural and necessary sequence that the general disponee, on such transaction, comes to stand in room and place of the child with whom he has, whether at the bidding of the parent or not, compounded. The discharge involves, in my opinion, an implied assignation, and I cannot see why the effect of that assignation should be limited. The general disponee is, in my opinion, entitled to the full effect of the principle *assignatus utitur jure auctoris*. It is objected that the estate as a whole vests in the general disponee as a right of succession, subject to the burden of debts, and that the assumed transaction with the child who elects not to claim and so renounces legitim merely relieves of a claim that which is already vested in the general disponee, and requires no assignation. As matter of title this is true. But the answer to the objection is, I think, that it is based on a one-sided view of what is really covered by the specially chosen phrase "elects not to claim and so renounces," and that the law recognises such a thing as double titles, and that there is a double title in the general disponee on such transaction—the general disposition and the implied assignation.

Now there is another principle established in the law of legitim which here comes into play. A child may have received advances from the parent during his life which have diminished the estate, and consequently the legitim fund, and yet may have granted no renunciation of legitim. Where these advances are neither shown to be donations nor proper debts, the law implies that the parent has intended them as advances to be imputed to legitim; and to secure equality among those having right to claim on the legitim fund requires the child who has received them to collate, if he claims his share of legitim. If he declines to collate he is treated as having renounced, and the number of claimants is reduced accordingly. It is not pretended that this is entirely logical, for the advances have really come off the whole estate, which the benefit of the collation enures to the children claiming legitim or to the legitim fund. But it follows the lines of the rough justice which is done when a child renounces on satisfaction during the parent's life and the benefit is held to enure to the remaining children.

Now the parent who has made the advances, and who offers by his settlement a provision in lieu of legitim to any particular child, is, in my opinion, through his general disponee entitled to require that child to communicate any right or power he has to increase his legitim, and in weighing the advantages of the offer the child necessarily considers his power so to increase it. He considers, not merely the value of his share of the proper legitim fund, but of his claim with its incidents, and the only important incident is his right to require collation of the advances the parent has made to other children. He cannot compel collation. But he can require collation when the child who has received advances is a claimant on the legitim fund.

The figures I gave at the outset will illustrate the result. The first child who is offered satisfaction knows that his share of the proper legitim fund is £3246, 3s. 11d., but of the divisible fund £4026, 3s. 11d., and it is the latter sum which regulates his acceptance of satisfaction, which he gives up, and which the parent, his estate, or his general disponee, whichever way you like to put it, has to satisfy. It is difficult to see why the difference between the £4026, 3s. 11d. and the £3246, 3s. 11d., for which the general disponee, in satisfying

the particular claimant, really pays, should go, not to him, but among the other children, including the child who has received the advances, collation of which creates the difference. In truth the divisible fund is not the proper legitim fund as calculated on the basis of the moveable estate still vested in the parent at his death, but that fund increased in the matter of accounting by the advances the parent has made. It is his claim on the divisible fund that the child considers, and it is in lieu of that claim that he accepts satisfaction and discharges, and it is that claim which he is entitled and, I think, bound to make good to the general disponee. The transaction may, as was pointed out in connection with the case of *Fisher* v. *Dixon*, be *ex proprio motu* between the general disponee and the child. The general disponee may say, Claim and take your legitim with all its incidents and I will give you what we agree on in exchange for it, and there is nothing of which the other children, including the child who has received advances and must collate, can complain. I see no reason for any difference in that the agreed-on payment is not *ex proprio motu* but is dictated to the general disponee *in gremio* of the settlement. This follows naturally, I think, on the principles whereon the cases of *Lashley* v. *Hog* and *Fisher* v. *Dixon* were decided. Otherwise an undue advantage would be gained by the child to whom advances have been made, contrary to the equitable principles which were the foundation of these decisions. If this be so in the case of advances which are only by equitable implication attributed to legitim, *a fortiori* must it be the case where the child has acknowledged by onerous writing that the advances are to account of his legitim, and discharged it to that extent.

There is a certain difficulty created by the use of the term discharge in Robert's letter of acknowledgment, in respect that discharge *in toto* during the parent's life, or renunciation, as I have termed it, enures, not to the parent, but to the remaining children, and it may be contended that partial discharge during the parent's life should do the same. But I do not think that the terms used in the letter are to be strictly interpreted. I think that they only infer an acknowledgment of advances to be collated—that is, an acknowledgment fixing the amount of the advances, and that they are advances of the class which fall to be collated.

I recognise that the conclusion to which I have come, though it is supported by the direct authority of *Nisbet* and by the opinions of the minority in the case of *Monteith*, is not in keeping with the opinions of the majority of the Court in the latter case, though it must be remembered that the question in *Monteith's* case is not the same as that in *Nisbet* and in the present. I have anxiously considered the opinions of the Judges in the majority in the case of *Monteith*, and, while I say it with the utmost respect, I am not persuaded by them. In particular, the late Lord Justice-Clerk Moncreiff, who delivered the leading opinion, appears to me to be carried away by the constantly repeated assertion that the child who accepts a provision in satisfaction of legitim does not claim but renounces without claiming. This is directly contradicted, and I think justly, by Lord Fullerton, whose opinion in *Fisher* v. *Dixon* has always been regarded as the most authoritative, and who repeatedly emphasises the contrary, as when he says (2 D. at p. 1139) "in law and in common sense the obligation is not renounced but extinguished by performance, or what the creditor accepts as performance." This is the basis of the judgment in *Fisher* v. *Nixon*, and I have endeavoured to make it mine in the present case.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, dated 16th July 1908, reclaimed against, assoilzied the defenders from the declaratory conclusions of the summons; *quoad ultra* dismissed the action and decerned.

Counsel for the Pursuer and Respondent (Robert Young)—Maclennan, K.C.—Chree. Agents—Auld & Macdonald, W.S.

Counsel for the Pursuer and Respondent (Mrs Stoddart)—Maclennan, K.C.—Chree. Agents—Morton, Stuart, Macdonald, & Prosser, W.S.

Counsel for the Defenders and Reclaimers—Craigie, K.C.—Watson. Agents—Pearson, Robertson, & Finlay, W.S.

Tuesday, January 18.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

WEBSTER *v.* PATERSON & SONS.

Reparation—Slander—Judicial Slander—Malice—Averments—Relevancy—Issue—Form of Issue—"Without Probable Cause."

A firm of coffee essence manufacturers raised an action of interdict and damages against a grocer, in which they averred, *inter alia*, that he had stated to customers that there was no difference between "Kit" coffee (the kind of coffee sold by him) and "Camp" coffee (the coffee made by the firm), that he thereby induced persons who came to ask for "Camp" coffee to buy "Kit" coffee, that the statements made by him were not only false, but were made fraudulently and maliciously, and with the intention of damaging the reputation of the firm's coffee and encouraging the sale of "Kit" coffee, and that in making such statements he had acted fraudulently and maliciously in collusion with W. P., a former partner of the firm who had been paid out, with the intention of forcing "Camp" coffee