destinations. I cannot apply these words to an asset which belonged to the testator in spite of the fact that he had taken the title in favour of a third party. The second question should be answered negatively as to the first and affirmatively as to the second alternative.

Group C—These two investments of 5 per cent. Registered War Stock were taken in the names of the testator and his wife without any clause of survivorship, and they were made in October 1920 and March 1921 respectively. What has been said about the investments in Group B equally applies to Group C. The Special Case contains a statement in regard to the practice of the Bank of England in regard to stock registered in the names of two or more persons. The attention of the parties was called to the irrelevancy of this statement and they were allowed an opportunity to add a statement in regard to the law of England applicable to such cases. They did not avail themselves of this opportunity but requested that the third question should be answered as if the effect of the titles fell to be determined according to the law of Scotland alone. Upon that assumption one-half of these investments belongs to the second party Mrs Drysdale, and the other half to the first parties Mr Drysdale's trustees (*Connell's Trustees* v. *Connell's Trustees, supra cit.* at p. 1184). It follows that alternative (*b*) of question 3 should be affirmed and the other alternatives should be negatived.

LORD PRESIDENT—I desire to reserve my opinion upon the question of the effect of a clause of revocation in a settlement such as there is in this case upon a special destination of prior date. It is not necessary to come to any conclusion upon it here, because the parties in whose interest the question might have been raised do not raise it, but, on the contrary, concede that the revocation in the present case was effective.

With regard to all the other questions in the case, I concur in the opinion which Lord Skerrington has delivered, and have nothing to add.

LORD CULLEN having been absent during part of the hearing gave no opinion.

The Court found, in answer to the first question in the case, that the investments referred to formed part of the testator's trust estate and fell to be disposed of in terms of his trust-disposition and settlement; in answer to the second question, that the investments therein referred to belonged to the third parties; and answered questions 3 (*a*) in the negative and (*b*) in the affirmative.

Counsel for the First Parties—Wallace. Agent—Henry Bower, S.S.C.

Counsel for the Second Party — Macmillan, K.C.—Scott. Agent—Henry Bower, S.S.C.

Counsel for the Third Parties—Solicitor-General (Watson, K.C.)—W. H. Stevenson. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for the Fourth Parties—Wark, K.C.—Douglas Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Thursday, July 20.

FIRST DIVISION.

GILMOUR'S TRUSTEES *v.* GILMOUR AND OTHERS.

Succession — Legitim — Collation inter hæredes—Heir not Collating—Effect upon Legitim Fund and Residuary Estate.

A testator was survived by three children, including the heir, entitled, if they so wished, to claim legitim. The heir, who took the heritage under the will and was also residuary legatee, refused to collate. In a question between the heir and the testamentary trustees on the one hand and the remaining children on the other, *held* that the heir was not to be counted as a *caput* in the division of the legitim fund to the effect of carrying a portion thereof to the residuary estate, and that the legitim fund fell to be divided among the remaining children subject to their respective rights of collation *inter se*. *Authorities examined.*

Parent and Child—Legitim—Collation inter liberos—Advances to Children—Collation or Set-off—Interest on Sums Advanced.

A testator during his life had made advances of considerable amount to two of his children. One of the advances, for which no receipt had been received, was referred to in his will as a "gift" and also as a "provision." The other advances were made on the footing that they were to be "imputed" towards legitim, and were acknowledged to be so by one child in receipts, and by the other in a marriage contract. There was no discharge *pro tanto* by the children of their rights as legitim creditors. *Held* (1) that the sum for which no receipt had been given fell to be collated in the event of the child claiming legitim; (2) (*diss.* Lord Mackenzie) that the other advances did not fall to be deducted from each child's share by way of set-off, so as to benefit the executry estate, but fell to be dealt with by way of collation *inter liberos;* (3) that interest on the advances did not fall to be collated.

Observed (*per* Lord Cullen) that when it is intended that the general rule of the common law making advances subject to collation should be superseded by a bargain for a set-off on behalf of the "estate general" of the father, the document setting forth the transaction must be clear and unambiguous.

Young v. *Young's Trustees*, 1910 S.C. 275, 47 S.L.R. 296, *distinguished*,

Henrietta, Lady Gilmour, Denbrae, Cupar, Fife, and others, the trustees acting under the trust-disposition and deed of settlement of the late Sir John Gilmour, Baronet, of Lundin and Montrave, in the county of Fife, and of South Walton, in the county of Renfrew, *first parties;* Lieutenant-Colonel Sir John Gilmour, Baronet, of Lundin and Montrave, *second party;* Captain Harry Gilmour, Denbrae, aforesaid,

third party; and the said Lieutenant-Colonel Gilmour and others, the trustees acting under the antenuptial contract of marriage between Lieutenant-Colonel James Younger, the Cottage, Blairlogie, Stirling, and Mrs Maud Gilmour or Younger, *fourth parties,* brought a Special Case for the opinion and judgment of the Court as to the manner of imputing and distributing the legitim fund payable out of Sir John Gilmour's estate.

The late Sir John Gilmour died on 20th July 1920, leaving a trust-disposition and deed of settlement dated 5th June 1911, by which he conveyed his whole means and estate to trustees for purposes therein set forth. He was survived by his widow and four children, viz., the second and third parties, the said Mrs Maud Gilmour or Younger, and Mrs Henrietta Walton Gilmour or Purvis, wife of Captain Robert Walter Purvis, of Gilmerton, Fife. His youngest son, Douglas Gilmour, predeceased him. By her antenuptial marriage contract Lady Gilmour had discharged her right to *jus relictæ,* and it was agreed by the parties that the division of the testator's moveable estate for the purposes of legitim was bipartite. The testator's daughter Mrs Purvis had similarly discharged her right to legitim by accepting in full satisfaction thereof provisions made by the testator in her favour by separate deed. Consequently the only children capable of claiming legitim were the second and third parties, and Mrs Maud Gilmour or Younger, who by antenuptial contract of marriage had assigned to the fourth parties her whole means and estate, heritable and moveable, which belonged to her or which she might acquire or succeed to during the subsisteuce of the marriage. By his trust-disposition and deed of settlement the testator directed his trustees to convey the whole lands belonging to him in Fife and Renfrew excepting a small entailed property to the second party. By the ninth purpose he bequeathed to the third party a legacy of £10,000 under a declaration that "the said legacy is intended by me to be and shall be in addition to the gift recently made by me to my said son of £26,442, 6s. 6d. sterling by transferring to him railway stocks representing that value, and I provide and declare further that the acceptance of the foresaid provisions in favour of my said son Harry Gilmour shall be deemed and taken to be in satisfaction to him of legitim and executry, and of all claims competent to him upon my decease." By the last purpose he directed the residue of his estate to be paid to the second party.

The trust-disposition and settlement contained the following statement:—"And I desire to place on record that I have not by these presents made any bequests to or provisions for two of my four younger children who have not discharged their right to legitim, viz. (*first*) my daughter Mrs Maud Gilmour or Younger, wife of James Younger junior, Valleyfield, New Mills, Fife, and (*second*) my son Douglas Gilmour, now or lately residing at Cirencester, in respect that in virtue of provisions which I have already made for them and those to which they may be legally entitled on my death I consider them to be amply provided for, and in respect also that I am desirous to make as ample provision as possible for my eldest son Captain John Gilmour, who will succeed to the baronetcy, and who in my opinion will require all that I can provide for him in order to maintain the position: And I further desire to place the following on record in reference to claims for legitim which will probably be advanced on the part of the said Mrs Maud Gilmour or Younger and Douglas Gilmour, viz.—(*first*) in the case of the said Mrs Maud Gilmour or Younger her claim will be subject to the declaration and provision contained in the antenuptial contract of marriage between the said James Younger on the first part, the said Mrs Maud Gilmour or Younger on the second part, and me on the third part, dated the 1st and 2nd, and recorded in the Books of Council and Session on the 21st, all days of February 1906, that the stocks thereby transferred by me to trustees for behoof of *inter alios* the said Mrs Maud Gilmour or Younger represented a net capital value of as near as might be Twelve thousand pounds sterling, and that it was thereby specially stipulated and agreed on that in the event of the said Mrs Maud Gilmour or Younger, or those in her right after my death, effectually claiming from my estate legitim or other legal rights the said sum of Twelve thousand pounds sterling thereby settled by me should be held to be and imputed as a payment to account of said legitim or other legal rights so effectually claimed; and (*second*) in the case of the said Douglas Gilmour his claim will be subject to the acknowledgment, declaration, and agreement contained in a deed of provision by me in favour of trustees for *inter alios* the said Douglas Gilmour to which he the said Douglas Gilmour was a party, dated the 3rd and 5th, both days of April in the year 1911, whereby the said Douglas Gilmour acknowledged that the sum of Ten thousand nine hundred pounds thereby settled was a payment to him or for his behoof on account of the share of legitim that might become due to him by and through my decease, and should be held as part of the payment which might be exigible after my death on account of his legitim; and in respect that by the said deed of provision the said Douglas Gilmour agreed and declared that it should be competent to me either by *inter vivos* or *mortis causa* deed to direct to be paid to the trustees under the said deed of provision to be administered by them along with and as part of the trust-estate thereby specially settled the whole or part of the residue of the share of legitim falling to him the said Douglas Gilmour, I do hereby provide and declare that any balance of legitim which may be effectually claimed after my death by or on behalf of the said Douglas Gilmour shall not be paid to him, but shall be paid to the trustees for the time being under the said deed of provision, to be administed by them along with and as part of the trust estate thereby specially settled, but subject to

this provision and declaration that the said trustees for the time being under the said deed of provision may, if they in their sole discretion think fit, advance and pay to the said Douglas Gilmour from time to time such sum or sums out of any balance of legitim effectually claimed by him as aforesaid as shall not exceed in all Five thousand pounds sterling."

The testator died possessed of heritable property of estimated value of £92,000 in addition to the small entailed estate. His free moveable estate was estimated at £308,800. During his lifetime the testator had made over various sums of money and investments to his children. The third party had besides smaller payments received the sum of £26,442, 6s. 6d., referred to in the trust-disposition and deed of settlement as "the gift recently made by me to my said son," but for which no recipt had been granted, and of a sum of £30,000 for which he granted a receipt acknowledging that it was paid to him "upon the footing that it is to be recognised as a sum to be imputed towards any legal rights that may be claimed by me out of my father's estate upon his death and which sum I hereby accept upon that footing." The fourth parties had received on behalf of Mrs Younger, *inter alia*, a sum of £12,000 in stocks transferred to them in her antenuptial marriage contract under a provision that in the event of Mrs Younger "or those in her right after the death of her father . . . effectually claiming from his estate legitim or other legal rights, the said sum of £12,000 shall be held to be and imputed as a payment to account of said legitim or other legal rights so effectually claimed," and the sum of £742, 10s., the receipt for which stated that the interest on this sum "will bring up the annual income on the funds held by us as trustees foresaid . . . to the sum of £500, it having been the purpose of the said Sir John Gilmour that the income on the said trust funds should be £500 per annum, which sum of £742, 10s. is to be held by us subject to the provisions and to be applied for the purposes of the said contract of marriage." The testator also made certain additions to the trust funds created by the deed of provisions in favour of his daughter Mrs Purves, and in addition to the sum provided for his son Douglas Gilmour by the deed of provision referred to in the trust-disposition and deed of settlement made certain further payments including a payment of £25,000 which was made on condition that it should be imputed towards any legal claim that it might be competent to advance on behalf of Mrs Douglas Gilmour and her family (if any) upon Sir John's estate, and was accepted by the said trustees upon that condition.

The Case further stated—"16. The second party has intimated to the first parties that he elects to accept the provisions of the trust-disposition and deed of settlement, and that he does not claim his share of legitim, but without prejudice to his or their right to found on his right to a share of legitim to the effect of limiting the amount of the shares of other claimants on the legitim fund. The third party has intimated to the first parties that before making his election between the provisions in his favour in the trust-disposition and deed of settlement and his legal claims he desires to have the legal questions affecting the division of the testator's estate decided by the Court. The fourth parties, as in right of the said Mrs Maud Gilmour or Younger, have intimated to the first parties that they claim her share of legitim. 17. In these circumstances, questions have arisen between the parties as to the manner of computing the legitim fund and ascertaining the shares thereof payable to the third and fourth parties. The first parties as the general disponees of the testator and the second party for the interest of the first parties contend—(1) That as neither the second or third party nor the said Mrs Younger have discharged their claims to legitim the legitim fund is divisible into three parts and not into two, and that the third and fourth parties are entitled—subject to any collation *inter se*—to only two of these parts. (2) That the second party, who is not claiming legitim, is not bound to collate either the heritage to which he is entitled under the testator's trust-disposition and deed of settlement and his interest in the entailed estate of West Walton or the payments made by the testator during his lifetime to him or for his behoof, as a condition of the tripartite division of the legitim fund. (3) That the legitim fund is one-half of the free moveable estate belonging to the testator as at the date of his death; and (4) That the payments of £30,000, £12,000, and £742, 10s., referred to fall to be deducted from the respective shares of legitim payable to the third and fourth parties, and that the general estate of the testator is only liable to these parties for their shares under deduction of these respective payments. The third party contends—(1) That the second party, although he has not discharged his claim to legitim, is excluded from making such a claim unless and until he collates the heritage to which he succeeded under the testator's trust-disposition and deed of settlement and his interest in the entailed estate of West Walton. (2) That the first parties as the testator's trustees and the general disponees of his estate cannot found on the second parties' right to legitim to the effect of dividing the legitim fund into three parts unless the second party has collated his heritage as aforesaid. (3) That neither the second party, who is not claiming legitim, nor the first parties as in his right, have any concern with the advances made by the testator to the third party or with the collation of these, such collation being exclusively the affair of children actually claiming legitim. (4) That the sum of £30,000 which was paid to the third party on the footing that it was to be imputed towards his legal rights falls to be dealt with only by collation with other children, if any, who actually claim legitim. (5) That the said sum of £30,000 not being *in bonis* of the testator at the time of his death does not fall to be deducted from the legitim fund,

which is one-half of the free moveable estate left by the testator, and for the whole of which amount his general estate is liable. That alternatively, and on the footing that the said sum of £30,000 and also the sums of £12,000 and £742, 10s. do fall to be deducted, the third party maintains that the said sums were *in bonis* of the deceased as at the date of his death and fall to be taken into account in fixing the legitim fund. (6) That as regards the sums £26,442, 6s. 6d., £5000, and £1500 given to the third party by the testator as afore mentioned, and the sums of £5000, £1100, and £400 given to the fourth parties and the said Mrs Younger by the testator as afore mentioned, these having been pure gifts and not having been imputed by the testator to the shares of legitim falling to the third and fourth parties respectively, they do not fall to be collated or taken into account as in a question between the third and fourth parties in ascertaining their respective shares of legitim. (7) That the sum of £742, 10s., which was paid to the fourth parties as an addition to the trust funds then held by them, and is expressly stated to be held by them subject to the provisions of the marriage contract, is equally with the £12,000 originally paid under the said marriage contract to be imputed as a payment to account of legitim, and therefore falls to be collated by the fourth parties in ascertaining their share of legitim. (8) That no interest is due on the advances which fall to be collated by the children claiming legitim. 19. The fourth parties contend—(1) That inasmuch as the second party is not claiming legitim he is not concerned with any provisions made by the testator to the fourth parties or Mrs Younger or with the collation of these, such collation being exclusively the affair of persons effectively claiming legitim. (2) That inasmuch as the second party is not claiming legitim it is not competent to the first parties to found on any right to legitim which might otherwise be competent to the second party to the effect of limiting the sum payable as legitim to the other children claiming legitim. But if it be held that it is competent for them to do so, that then (*a*) the heritage to which the second party is entitled under the testator's trust-disposition and settlement and also his interest in the entailed estate of West Walton, and (*b*) the payments made by the testator to or for behoof of the second party, fall to be collated. (3) That (*a*) the said sums of £26,442, 6s. 6d., £5000, and £1500, and also the said sum of £30,000, and (*b*) the said sums of £5000, £742, 10s., £1100, and £400, and also the said sum of £12,000, fall to be collated as in a question between the third and fourth parties so as to increase the amount divisible between them in name of legitim, but not to thereby diminish the legitim fund payable out of the testator's general estate. (4) That the said sums of £12,000 and £742, 10s. were not *in bonis* of the deceased at the date of his death, and do not fall to be deducted from the amount payable to these parties in name of legitim out of the general estate of the testator. Alternatively these parties contend that these sums, and also the said sum of £30,000, fall to be treated as part of the moveable estate of the testator and one-half thereof credited to the legitim fund. (5) That interest at the rate of 5 per centum per annum is due upon the advances which fall to be collated by the children claiming legitim."

The *questions of law* were—"1. Is it a condition of the first parties or the second party maintaining that the division of the legitim fund is tripartite that the second party must collate—(1) Both (*a*) the heritage to which he is entitled under the testator's trust-disposition and settlement and his interest in the entailed estate of West Walton, and (*b*) the payments made by the testator to or for behoof of the second party; or (2) either, and if so which, of (*a*) the said heritage and interest in the said entailed estate and (*b*) the said payments? 2. In ascertaining the amount of the legitim fund (*a*) is the amount one-half of the testator's free moveable estate after crediting the said estate with all or any, and if so which, of the said sums of £30,000, £12,000, and £742, 10s.? or (*b*) Is the said amount one-half of the testator's free moveable estate without crediting the said estate with all or any, and if so which, of the said sums? 3. In ascertaining the sums payable out of the legitim fund to the third and fourth parties respectively do there fall to be deducted (*a*) in the case of the third party the said payment of £30,000, and (*b*) in the case of Mrs Younger the said payments of £12,000 and £742, 10s., or either, and which of them. 4. Do (*a*) the sums of £26,442, 6s. 6d., £5000, £1500, and £30,000, (*b*) the sums of £5000, £742, 10s., £1100, £400, and £12,000 or any of them, and if so which of them, fall to be collated as in a question between the third and fourth parties? 5. In ascertaining the amount of the sums to be so collated does interest require to be added from the dates of payment, and if so at what rate?"

Argued for the first and second parties—1. Although the second party was the heir in heritage and was not collating, he was to be counted as a *caput* in the division of the legitim fund. The right of the heir to legitim was the same as that of the other children. It was original, depending not on collation but on his being one of the bairns. Collation had been introduced when primogeniture was established, but it did not affect the original right—*Justice* v. *His Father's Disponees*, 1737, M. 8166; *Trotter* v. *Rochead*, 1681, M. 2375; *Sinclair* v. *Moodie*, 1768, M. 8188; *Panmure* v. *Crokat*, 1856, 18 D. 703, *per* Lord Curriehill, p. 713; *Kintore* v. *Kintore*, 1884, 11 R. 1013, 21 S.L.R. 647, 1886, 13 R. (H.L.) 93, 23 S.L.R. 877; *Fisher* v. *Dixon*, 1840, 2 D. 1121, *per* Lord Fullerton at p. 1138, 1841, 3 D. 1181, 1843, 2 Bell's App. 63; M'Laren, Wills and Succession, pp. 162 to 164; Fraser, Husband and Wife, pp. 999, 1051, 1052. The legitim fund was therefore divisible into three parts. The part which the heir might have claimed on collation enured to the general disponees, on the same principle which applied in collation *inter liberos*—*Fisher* v. *Dixon*, 1840 (*cit.*).

This principle was based on equity—*Monteith* v. *Monteith's Trustees*, 1882, 9 R. 982, *per* Lord Justice-Clerk at pp. 988 and 992; Lord Young at p. 996, Lord Rutherfurd Clark at p. 1008, 19 S.L.R. 740; *Coats' Trustees* v. *Coats*, 1914 S.C. 744, 57 S.L.R. 690; *Collins* v. *Collins' Trustees*, 1898, 35 S.L.R. 641; *Cairns* v. *Cairns' Trustees*, 1916, 1 S.L.T. (O.H.) 42—and not on an implied assignation to the trustees as appeared from M'Laren, Wills and Succession, p. 161, and *Nisbet's Trustees* v. *Nisbet*, 1868, 6 Macph. 567, 5 S.L.R. 369. The equity applied as much in the case of collation *inter hæredes* as in collation *inter liberos*. There was no decision against this contention. The first question therefore fell to be answered in the negative. Branch (*b*) was ruled by the decisions in *Monteith* v. *Monteith's Trustees; Coats' Trustees* v. *Coats*. The advances to the second party had ceased to be part of the estate, and he could not be called upon to collate them when he was abiding by the will. The following cases were also referred to on the first question:—*Little Gilmour* v. *Little Gilmour*, 13th December 1809, F.C. at p. 454; *Johnston* v. *Johnston*, 1814; Hume's Decisions, 290; *Anstruther* v. *Anstruther*, 1833, 12 S. 140, 14 S. 272, 1836, 1 Shaw & Maclean, 463, 2 Shaw & Maclean, 369; *Breadalbane* v. *Chandos*, 1836, 2 Shaw & Maclean, 377; *Keith's Trustees* v. *Keith*, 1857, 19 D. 1040; *Newbigging's Trustees* v. *Steel's Trustees*, 1873, 11 Macph. 411; *Adam's Executrix* v. *Maxwell*, 1921 S.C. 418, 58 S.L.R. 254; *Dawson* v. *Dawson's Trustee*, 1913, 2 S.L.T. 210; *Gilmour* v. *Gilmour's Trustees*, 1920, 2 S.L.T. 369. 2. Question 2 (*a*) should be answered in the negative, 2 (*b*) in the affirmative, and 3 (*a*) and (*b*) in the affirmative. The advances formed no part of the deceased's estate at the date of his death, and could not be taken into account in estimatting the amount of the legitim fund. On a true construction of the documents they were advances in partial discharge of legitim, and could be set off by the general disponees against claims for legitim. They were the consideration of a bargain made by the father with a view to his testamentary freedom—*Young* v. *Young's Trustees*, 1910 S.C. 275, *per* Lord President and Lord Kinnear, 47 S.L.R. 296. To hold that a partial discharge of legitim during the parent's lifetime was not competent would put an unreasonable restriction on a father's power of making such payments. The question was not dealt with in the cases of *Panmure* v. *Crokat* and *Keith's Trustees* v. *Keith*, 1857, 19 D. 1040. If the documents did not make it plain that collation was intended, *Young* v. *Young's Trustees* applied. The first and second parties submitted no contention in regard to the fourth and fifth questions.

Argued for the third party—Question 1, or in any event question 1 (2) (*a*), should be answered in the affirmative. The heir in heritage had no right to legitim unless he collated. His right only emerged when he collated, and was properly a right to the mixed estate and not to legitim at all—Ersk. Inst., iii, 9, 3; Bell's Prin., secs. 1590, 1911; *Little Gilmour* v. *Little Gilmour* (*cit.*), *per* Lord Meadowbank at pp. 456, 459; *Law* v. *Law*, 1553, M. 2365; *Murray* v. *Murray*, M. 2373; *Newbigging's Trustees* v. *Steel's Trustees* (*cit.*), *per* Lord Ardmillan at p. 412; *Adam's Executrix* v. *Maxwell* (*cit.*), *per* Lord Dundas at p. 432. The cases of one child did not help the first and second parties' contention. There was no room then for collation. But where there were two children capable of taking legitim the heir could not take without collating although the other child accepted a provision—*Robertson* v. *M'Vean*, 1843, 2 Bell's App. 87. The division of the legitim should therefore be bipartite. Renunciation of legitim did not operate in favour of the father—*Hog* v. *Lashley*, 1804, 4 Paton 581. Even if the heir had an original right to legitim the trustees could not claim through him so as to have him counted in the division of the legitim fund. They might do so in the case of a child accepting a conventional provision, because they could be regarded as buying a claim on the moveable estate, but they could not be so regarded in the case of the heir. *Coats' Trustees* v. *Coats*, relied on by the first and second parties, did not apply to the case of trustees claiming through the heir—*Robertson* v. *M'Vean; Fisher* v. *Dixon; Dawson* v. *Dawson's Trustee; Breadalbane* v. *Chandos* (*cit.*), *per* Lord Chancellor at p. 401. The absence of such a claim from the cases of *Breadalbane* v. *Chandos* and *Fisher* v. *Dixon* supported the third parties' contention. 2. The sums referred to in question 2 were to be dealt with by collation, and question 2 (*a*) fell to be answered in the negative and question 2 (*b*) in the affirmative. It was a simple case of collation *inter liberos*—Ersk. Inst., iii, 9, 3; Stair, iii, 8, 45; Bell's Prin., sec. 1588; M'Laren, Wills and Succession, vol. i, p. 162. *Young* v. *Young's Trustees*, which was the only authority against collation, could be distinguished on the terms of the receipt. Alternatively if it was held that there was a bargain here, as in *Young* v. *Young's Trustees*, then it was in favour of the general estate, and question 2 (*a*) would be answered in the affirmative and 2 (*b*) in the negative. A father had no power to bargain in favour of the dead's part, his whole estate being until his death a *unum quid*. These sums were either *in bonis* or not. If *in bonis* it must be of the whole estate—*Panmure* v. *Crokat* (*cit.*), *per* Lord Ivory at p. 711; *Clark* v. *Burns*, 1835, 13 S. 326; *Keith's Trustees* v. *Keith* (*cit.*), *per* Lord Ardmillan at p. 1051, Lord President at p. 1057, and Lord Ivory at p. 1061; Fraser, Husband and Wife, vol. ii, p. 999. The contrary decision in *Nisbet* v. *Nisbet*, 1726, M. 8181, was unsupported. "Imputation" implied collation—*Coats' Trustees* v. *Coats* (*cit.*), *per* Lord Mackenzie at p. 752; *Breadalbane* v. *Chandos* (*cit.*), *per* Lord Chancellor at p. 400. In *Young* v. *Young's Trustees* the question as to whether the bargain was in favour of the general estate or not was precluded by the admission of the amount of legitim. 3. If it were held that the sums in question 2 were to be dealt with by collation the answer to question 3 must be in the negative. If it were held that there was

a bargain by the testator in favour of the whole estate the answer to question 3 must be in the affirmative. 4. Question 4 depended on the intention of the testator to be ascertained from the terms of the receipts and the surrounding circumstances. The smaller sums must in view of the size of the estate be regarded as presents. On the terms of the ninth purpose of the trust disposition and settlement it was apparent that the sum of £26,442, 6s. 6d. was in satisfaction of executry as opposed to legitim, and was therefore not to be dealt with by collation — M'Laren, Wills and Succession, vol. 1, p. 160; *Douglas* v. *Douglas*, 1876, 4 R. 105, 14 S.L.R. 54; *Duncan* v. *Crichton's Trustees*, 1917 S.C. 728, *per* Lord Cullen at p. 732, 54 S.L.R. 460—but to be treated as a gift. 5. The fifth question should be answered in the negative. It was contrary to practice to charge interest. The advances were in implement of the obligation to maintain— *Johnston* v. *Cochrane*, 7 S. 226. The only decision in favour of charging interest had not been followed — *Nisbet's Trustees* v. *Nisbet* (*cit.*), *per* Lord Neaves at p. 576; *Monteith's Trustees* v. *Monteith* (*cit.*), *per* Lord M'Laren at p. 985. Interest was not due here either *ex pacto*, *ex lege*, or *ex mora*— *Blair's Trustees* v. *Payne*, 1884, 12 R. 104, *per* Lord Fraser at p. 109, 22 S.L.R. 54.

Argued for the fourth parties — 1. The legitim fund should be divided into two parts in accordance with the contentions of the third party. This contention was further supported by *M'Call's Trustee* v. *M'Call's Curator Bonis*, 1901, 3 F. 1065, 38 S.L.R. 778. The only part of the moveable estate to which the heir had an original right were the heirship moveables—Mackenzie's Institutes, 8th ed., p. 217; Ersk. Prin. (Guthrie Smith) pp. 634, 635. There was a fundamental difference between collation *inter hæredes* and *inter liberos*. 2. The second and third questions should be answered in accordance with the contentions of the third party. If the effect of the decision in *Young's Trustees* v. *Young* (*cit.*) was that the father could bargain in favour of dead's part it was a bad decision, and should be reviewed. Such a bargain, which defeated the rights of other children to legitim, was illegal—*Henderson* v. *Henderson*, 1728, M. 8199; *Lashley* v. *Hog* (*cit.*) at p. 640. 3. All the sums referred to in question 4 fall to be collated. The presumption was that advances to children were to be collated, and there was nothing here to exclude it— Fraser, Parent and Child, p. 1035; Bell's Prins., sec. 1588; *Douglas* v. *Douglas* (*cit.*), *per* Lord Justice-Clerk at p. 127; *Duncan* v. *Crichton's Trustees* (*cit.*). On the other hand the terms of the settlement showed the testator's intention to be that all the advances to his younger children were to be in satisfaction of legitim. It would require a very clear expression of intention to justify the Court in holding that the £26,442, 6s. 6d, was a gift. 4. If the advances fell to be collated, then interest which was part of the advance also fell to be collated. Without interest there would be no proper equalisation of shares—Fraser, Parent and Child, p. 1037; *Johnston* v. *Cochran*, 1829, 7 S. 226. This case was still an authority although it had been doubted. In *Monteith* v. *Monteith's Trustees* (*cit.*) the question was related to liferent, and the opinions of Lord M'Laren and Lord Craighill could not be taken as overruling *Johnston* v. *Cochran*. *Skinner* v. *Skinner*, 1775, M. 8172, did not conflict with *Johnston* v. *Cochran*.

At advising—

LORD PRESIDENT—The primary question in the case is whether the heir is to be counted as one of the children entitled to participate in legitim in ascertaining the amount of the shares of his brother and sister in the event of them or either of them claiming legitim? The heir has made up his mind not to collate either his heritage or any of the payments received by him from his father during the lifetime of the latter.

It is plain that the exclusion of the heir succeeding to heritage from participation in any part of the moveable estate (including the part of it known as the legitim fund) is not a consequence of his being heir merely. For notwithstanding that he is heir and succeeds to heritage, he is one of the next-of-kin and a bairn—*Justice* v. *His Father's Disponees* ((1737) M. 8166); *Anstruther* v. *Anstruther* ((1836) 14 S. 272)—and accordingly if he is an only child, or if the other children have been forisfamiliated or do not claim legitim, he is entitled to it. Collation of the heritage *inter hæredes* is in that case no less out of place and indeed impossible than in that of the heir being the sole heir *in mobilibus*, and thus succeeding to the entire estate, heritable and moveable.

But when the heir succeeds to heritage, *and* there are other next-of-kin or heirs *in mobilibus* or other children besides himself, he is excluded from any participation in the moveable estate either as next-of-kin or in respect of his legitim fund as a bairn. This is the just condition of his primary right as heir to keep the heritable part of the succession to himself and to exclude the heirs *in mobilibus* and the other children from any participation in it. The rights in the heritable and moveable estates respectively are mutually exclusive, and therefore the heir succeeding to the heritage does not rank as one of the next-of-kin or a bairn as in a question with the other claimants on the moveable estate in either of those capacities — Balfour's Practicks, 233-4, commenting on *Law* v. *Law*, (1553) M. 2365; *Murray* v. *Murray*, (1678) M. 2372, see p. 2374; *Panmure* v. *Crokat*, (1856) 18 D. 703; *Newbigging's Trustees* v. *Steel's Trustees*, (1873) 11 Macph. 411. It is not in any way inconsistent with this position of matters that the privileges accorded by the law to the status of the heir in heritage should include a power to qualify his primary exclusion from participation in the moveable succession and in legitim by resort to collation *inter hæredes*. When he exercises that power he foregoes his primary and exclusive right to the heritable succession, breaches the exclusive right in the moveable succession primarily belonging to the next-of-kin or, in the case of legitim, to the

younger children, and establishes the conditions necessary for an equal participation between all concerned in a mixed estate or fund.

The argument was presented with reference to Lord Fullerton's classic definition in *Fisher* v. *Dixon*, ((1840) 2 D. 1121, at pp. 1138-9) of the unforisfamiliated child's *jus crediti* in the legitim fund, as a right to be ranked on the free executry estate along with the other unforisfamiliated children for an aliquot share of the one-half or one-third part, as the case may be, of that estate, forming what is known as the legitim fund. It was contended that since the heir is in certain circumstances entitled to legitim, that must be because he is in all circumstances entitled from the beginning to share in it, and entitled accordingly to be counted as a legitim creditor in the original ascertainment of the amount of the aliquot shares vesting in each child, including himself. But I think it follows from the primarily exclusive character of the rights of the heir and of the other children respectively, that the aliquot shares must be ascertained without counting him, and without regard to the possibility of his offering collation *inter hæredes*, although the effect of his so collating if he does will be to make the shares of the mixed fund less valuable to the other children than their shares of the legitim fund alone would have been.

If that be sound, it becomes unnecessary to deal with the further argument of the trustees that the original share of legitim which according to their contention had vested in the heir on his father's death, enured (on his declining to collate) to the benefit of the dead's part, to the effect of entitling the trustees *qua* assignees of the rejected share to call upon the other children claiming legitim to make collation (as *inter liberos*) of certain advances made to them by their father during his lifetime. If *Nisbet's Trustees* v. *Nisbet* (6 Macph 567) had neither been followed by the contrary decision of *Monteith* v. *Monteith's Trustees* ((1882) 9 R. 982) nor definitely disapproved of in *Coats' Trustees* v. *Coats* (1914 S.C. 744) this contention might have been maintainable on the assumption on which it is based. But the two last-mentioned cases settle that the rejected right and share are not assigned, but are simply renounced or extinguished, and that while the executry estate is relieved from liability to pay the amount of the rejected share, none of the rights of a legitim creditor in that share pass to the general disponee.

I think therefore that question 1 (1) (*a*) must be answered in the affirmative, and in that view it is unnecessary to inquire into the nature of the payments received by the heir from his father during the latter's lifetime in order to make a specific answer to question 1 (1) (*b*) or to questions 1 (2) (*a*) or (*b*).

The other questions in the case are concerned with a variety of payments made by the father during his lifetime to the heir's brother and sister, of which all but one are vouched by receipts or other writs of acknowledgment purporting to express the footing on which the payments were made and received.

It is clear that none of these payments were loans to the children who received them. Therefore none of them fall to be credited to the executry estate in order to ascertain the amount of the legitim fund. This leads to a negative answer being returned to question 2 (*a*), and an affirmative answer to question 2 (*b*).

But questions of considerable difficulty remain with regard to the effect of these payments and the relative documents on the rights of the heir's brother and sister as legitim creditors. The familiar cases are those of (1) advances made to a child by the father during the joint lives of both which fall under the rule of collation *inter liberos*, and (2) of payments similarly made in consideration of a complete discharge or renunciation by the child of its prospective rights as a legitim creditor.

In the former of these two cases the child's prospective rights as legitim creditor remain undischarged, but become subject to the obligation to collate in competition with other legitim creditors. The underlying idea is that the advance is made on condition that if the child lives to claim a ranking on the free executry (as legitim creditor) in competition with others the advance is to be regarded as having been made out of the legitim fund as the source defined and created by the law for the ascertainment and the supply of the children's legal provisions. It follows that the sum advanced must be credited to the legitim fund before division.

In the latter of the two cases the child becomes forisfamiliated by discharging out and out its prospective rights as legitim creditor. It renounces or extinguishes its birthright to participate in legitim. The effect is to relieve the father's succession in the same way as, but no further than, it would be relieved if the child had predeceased him without receiving any payment or granting any discharge. If the child were an only child the result would be to make the whole executry estate divisible between *jus relictæ* and dead's part. If the child is one of several, then when the father dies and the legitim fund is ascertained in the usual way, the other children rank as legitim creditors to the exclusion of the forisfamiliated child and divide the whole legitim fund among them. The benefit of the discharge or renunciation is in this event spoken of as enuring to the other children, and neither *jus relictæ* nor dead's part gain anything by it. The underlying idea here is that the child has got prepayment out and out of its prospective share of the legitim fund, or at anyrate of an equivalent contractually fixed as adequate. In consequence the free executry and that part of it known as the legitim fund are smaller than but for the prepayment they would have been, yet that fund, such as it is at the father's death, is necessarily appropriated wholly to the children who remain qualified as legitim creditors.

But, as was revealed by the case of *Young*

v. *Young's Trustees* (1910 S.C. 275), there may be a third kind of transaction between father and child in relation to the prospective rights of the latter as legitim creditor, which produces results differing from those produced by either of the kinds of transaction which have just been considered. The father may make a payment in consideration, not of the discharge by the child of its prospective rights as legitim creditor, but of the discharge by the child *pro tanto* of the share of legitim to which in virtue of those rights it is prospectively entitled on the father's death. Such a discharge has no effect as a renunciation of the child's prospective right to rank as a legitim creditor, and the child is not in any way forisfamiliated. Nor is the payment one which carries any obligation to collate. But if and when the child claims in its undiminished capacity as legitim creditor, the discharge operates by way of set-off in favour of the executry estate against the amount of the child's share of legitim ascertained in the ordinary way. The underlying idea in this case is that the father truly bargained with the child on behalf of what Lord Dunedin in *Young* v. *Young's Trustees* called his general estate, by which I understand to be meant the rest of the father's executry estate other than the legitim fund. The practical result is that the rest of the executry estate gains by the amount in the discharge at the expense of the legitim fund. That a transaction of this character is consistent with the institution of legitim in the law of Scotland, and is therefore one which can be validly and effectually made, was the opinion of all the Judges who took part in *Young* v. *Young's Trustees*. We were asked to reconsider that case. The matter is one full of difficulty, and while I readily concede that there is room for difference of opinion, I do not think sufficient grounds were submitted to justify us in re-opening it by sending the present case to Seven Judges.

But the point remains whether the payments referred to in question 3 were payments of the kind dealt with in *Young* v. *Young's Trustees*. The £30,000 was paid to the testator's second son on a receipt which acknowledged payment "upon the footing that it is to be recognised as a sum to be imputed towards any legal rights that may be claimed by me out of my father's estate upon his death." The £12,000 settled in the daughter's marriage contract was agreed to "be held to be and imputed as a payment to account of said legitim," *i.e.*, any legitim that might be effectually claimed by the daughter from the father's estate after his death; and the receipt for the £742, 10s. paid to her marriage-contract trustees was expressed to be subject to the same condition. The language employed is not identical in the case of the second son and of the marriage-contract trustees. But in neither case is there any express discharge of anything. The words used point to an intention that the sums are to be brought into account in ascertaining legal rights. If such be the true intention, the idea underlying the payments would be that which has been recognised as characteristic of a payment subject to collation. "Imputation" is the word regularly used in relation to legal rights in order to describe the accounting process which the rule of collation *inter liberos* prescribes. The child's advance is said to be "imputed in a part of the legitim" (Stair, Inst., iii, 8, 45), or "imputed in his part of the legitim" (Ersk., Inst., iii, 9, 24), or "imputed to legitim" (Bell's Prin. (10th ed.), sec. 1588), and when a claimant is taken bound to impute an advance or a payment on account of legitim, the effect in law is that the advance or payment is brought into the account of the legitim fund for the very purpose of ascertaining the shares of the payee and the other children. In *Keith's Trustees* v. *Keith* ((1857) 19 D. 1040) the words "imputation" and "collation" are used by Lord Ardmillan in his opinion as interchangeable (19 D. at p. 1051), and Lord President M'Neill says in so many words (*ibid.*, at p. 1057) that he knows of no meaning for the word imputation—in connection with legal rights—than collation. It will be observed that in the case of neither the second son nor the daughter was the payment made or acknowledged as in full of legitim so as to put the recipients to their election as between the provisions made for them and their legal rights. When that is not done the question whether a payment falls under the rule of collation *inter liberos* is often left to be determined on a consideration of its general character and amount and the circumstances in which it was made. But there is nothing to prevent the parties from stamping the advance as one of a kind which does infer collation. I think that is all that was done here. *Young* v. *Young's Trustees* (1910 S.C. 275) has therefore no application; and questions 3 (*a*) and (*b*) should be answered in the negative.

If I am right in the result just reached, it follows that question 4 must be answered in the affirmative as regards the sums of £30,000, £742, 10s., and £12,000 referred to therein. Then what of the other sum of £26,442, 6s. 6d.? Payment of so considerable an amount may be described as a gift (the testator so refers to it in his will) with the effect of excluding any idea of loan, but without taking it out of the category of an advance on account of legitim—*Douglas* v. *Doaglas*, (1876) 4 R. 105. The presumption, especially when regard is had to the amount, is favourable to the view that the payment belongs to this latter category, and the further description attached to it in the will as forming part of the provisions made by the testator for his second son endorses that view, which I think is the one that ought to be taken. It is unnecessary to arrive at any conclusion with regard to the two sums of £5000, or the other sums of £1500, £1100, and £400, referred to in question 4, inasmuch as these gifts were equally distributed between the second son and the daughter, so that their exclusion from or inclusion in the account of the legitim fund can, as between the only possible claimants for legitim, make no difference.

The last question is as to whether interest

on the advances (as well as on the advances themselves) has to be collated without stipulation to that effect made in connection with the advances? If it has to be collated the parties are agreed on the appropriate rate. The old case of *Johnston* v. *Cochran* ((1829) 7 S. 226) still stands on the books as an apparent authority for an affirmative answer to this question; and it is remarkable that Lord Fraser in his much more recent work on Husband on Wife (vol. ii, p. 1038) treats that case as ruling the point. But the rule has certainly not been consistently observed in practice. There is no later case in which it has been appealed to where it has been enforced; and I venture to add that I never knew of it being applied in my own experience at the bar. I think the reasons given by Lord Neaves in *Nisbet's Trustees* v. *Nisbet* (6 Macph. 567, at p. 576), and by Lord M'Laren in *Monteith* v. *Monteith's Trustees* (9 R. 982, at pp. 985-6), are conclusive against it; and I am not therefore disposed to revive the authority of a decision which, notwithstanding the loyalty to it of so distinguished a lawyer as Lord Fraser, has remained in non-observance for so long a time. I am accordingly for answering question 5 in the negative.

LORD MACKENZIE—The answer to the first question depends upon principles which are well settled. The heir must collate as a condition of claiming legitim or executry. The virtual discharge by the heir of the right to legitim by refusing to collate produces the same result as a discharge by a child in the father's lifetime. Both operate like the death of the child (Bell's Prin., secs. 1910 and 1590). The language used by Lord Curriehill in *Panmure* v. *Crokat* (18 D. 703, at p. 714) is that the heir in heritage availing himself of his right to take legitim must collate the heritage with the other children. This means that collation is a condition of the right to claim. The right of the heir to legitim is one of which he requires to avail himself. His right does not emerge on survivance, but only when he claims. Unless and until he collates he has no right to any legitim. The right of the heir is described by Lord Ardmillan in *Newbigging's Trustees* (11 Macph. 411, at p. 412) as "a primary right to heritage which he may extend by collation so as to obtain a share of the moveables"—(see *Adam's Executrix* v. *Maxwell*, 1921 S.C. 418, at p. 432, *per* Lord Dundas). If the heir does not come forward to claim, bringing the heritage, he drops out, and is treated as dead. Nothing was decided in the case of *Coats* (1914 S.C. 744) to the contrary of this view. The view taken there was that children cannot be brought in who are not competing. The heir cannot compete unless and until he brings in the heritage. If he does not bring in the heritage nothing vests in the heir that can enure to the benefit of the general disponee. If the heir takes nothing by mere survivance, there is nothing that can pass by assignation to the general disponee. Upon the question whether the trustees here can claim as assignees, I refer to the opinion of Lord Justice-Clerk Moncreiff in *Monteith's Trustees* (9 R. 982, at p. 992), where the view is expressed that the case of *Fisher* v. *Dixon* (2 D. 1121) did not decide or give any countenance to the proposition that the acceptance by a child of a conventional provision and the renunciation of his legal right "operates as an assignation of the legitim to the general disponee." The case of *Monteith's Trustees* (9 R. 982) was followed in that of *Coats*. Reference may also be made to the review of the authorities by Lord Stormonth-Darling in *Collins* v. *Collins' Trustees*, (1898) 35 S.L.R. 641. Question 1 (1) (*a*) ought therefore to be answered in the affirmative, in which case it is unnecessary to answer the remainder of this question.

The questions in the case dealing with the advances by the father to the third and fourth parties are of two classes—(1) these relating to the controversy between the trustees on the one hand and the third and fourth parties on the other; and (2) those relating to the controversy between the third and fourth parties *inter se*.

The first class of questions does not, in my opinion, raise any question of *collatio inter liberos*. They do raise the question of the nature of the bargain made between the father and the third and fourth parties. The receipt for the payment of £30,000 to Captain Harry Gilmour, the third party, bears that it was paid "upon the footing that it is to be recognised as a sum to be imputed towards any legal rights that may be claimed by me out of my father's estate upon his death, and which sum I hereby accept upon that footing." The marriage-contract (dated in 1906) of Mrs Yonnger, whose marriage-contract trustees are the fourth parties, bears that in the event of her effectually claiming legitim or other legal rights the sum of £12,000 "shall be held to be, and imputed as, a payment to account of said legitim or other legal rights so effectually claimed." Parties are agreed that in this case the payment of £742 (made in 1918) should be dealt with on the same footing as the £12,000. The settlement of Sir John Gilmour (made in 1911) places on record that he had not made any provision by it for Mrs Younger, in respect that, in virtue of provisions which he had already made for her and those to which she might be legally entitled on his death, he considered her to be amply provided for.

These payments of £30,000 to Captain Harry Gilmour and £12,000 and £742, 10s. to Mrs Younger's marriage-contract trustees were made on the footing expressed in the receipts, and there was thus a contract made between the father and his children. The bargain was made in favour of the debtors or prospective debtors in the obligation to pay legitim, namely, the trustees as holding the general estate, and not in favour of the creditors in the obligation, namely, the children claiming the legitim. This was the view taken of the effect of the receipts in *Young* v. *Young's Trustees*, 1910 S.C. 275. It was there held to be lawful for a father to make such a bargain with his child, and that the effect of the agree-

ment was not that other children were thereafter to have the benefit of the advances, but that the father was "contracting for his general estate at large, upon which general estate he knew the legitim fund would be a creditor"—*per* Lord President Dunedin, at p. 284. By the terms of the receipt in *Young's* case the son acknowledged that certain payments of money had been made to him on account of a share of legitim "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." As Lord Kinnear says (at p. 285)—"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." The passage in Lord Dunedin's opinion above quoted is not intended to mean anything different from what Lord Kinnear says. It does not mean that the payment is to go to the general estate with the result that it again suffers division, a portion becoming legitim. This appears from an earlier passage in Lord Dunedin's opinion (at p. 282)—"If we 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 as great as the advance, he would say, 'Well, this amount has already been paid.'"

The same view ought, in my opinion, to be taken of the receipts in the present case, as I am not able to hold that the use of the term "discharged" in *Young's* case is sufficient reason for drawing a distinction. What was said in *Keith's Trustees* (19 D. 1040) or in *Panmure* v. *Crokat* in regard to collation at common law has no application to the present case. This is not a question between children at all, but is a question between the child and the trustees. The theory upon which the case of *Young* proceeds is that the payment was made out of dead's part, differing from the theory in *Lashley* v. *Hog* ((1804) 4 Pat. App. 581), where it was assumed the payment was made out of the legitim fund.

The effect in the present case as regards the payment of the third and fourth parties of £30,000, £12,000, and £742, 10s. is that they form part of the testator's estate over which he had power to dispose, *i.e.*, dead's part. The result of this is that the *cumulo* amount of these three payments goes to increase the amount of the testator's estate which the second party takes as residuary legatee. This means that question 3 (*a*) and (*b*) should be answered in the affirmative. Question 2 (*a*) should be answered in the negative, and (*b*) in the affirmative.

Question 4 in the view already taken only raises a question of importance as regards the sum of £26,442, 6s. 6d. The sums of £30,000, £12,000, and £742, 10s. have already been dealt with. The sums of £5000 and £1500 on the one hand, and £5000, £1100, and £400 on the other cancel each other. For the payment of £26,442, 6s. 6d. there is no receipt. It is referred to in the ninth purpose of the settlement in terms which indicate that the testator regarded it as a provision. The case of *Douglas* (4 R. 105) and Fraser on Husband and Wife, vol. ii, p. 1035, support the view that there should be collation of this sum as between the third and fourth parties. Question 4 ought, therefore, as regards this sum to be answered in the affirmative.

As regards the claim for interest, which falls under the fifth question, I am of opinion that, looking to the terms of the receipts, which make no mention of interest, no interest can be claimed on the sums of £30,000, £12,000, and £742. As regards the sums of £26,442, £5000, and £1500 paid to the third parties, and to the sums of £5000, £1100, and £400 paid to the fourth parties, I am of opinion for the reasons stated by your Lordship that no interest is due.

The division of Sir John Gilmour's estate, according to the principles above stated, would give approximately the following results (the figures being those in the case and taken to illustrate the principles, not to fix the amounts):—[*His Lordship then calculated the shares falling to the second, third, and fourth parties*—(1) *if the third and fourth parties claimed legitim, and* (2) *if the third party accepted his conventional provisions and the fourth parties claimed legitim*].

The above carries out so far as possible the intention of the testator as expressed in the settlement—"I am desirous to make as ample provision as possible for my eldest son, Captain John Gilmour" (now Sir John Gilmour) "who will succeed to the baronetcy and who in my opinion will require all that I can provide for him in order to maintain the position."

LORD SKERRINGTON—The first question which we have to decide is one on the law of collation *inter hæredes*. It arises in this way. A testator was survived by three children who were entitled, if they so wished, to claim legitim upon his death. One of them, the testator's elder son and residuary legatee, does not claim legitim because he admittedly could not do so without offering to collate the family estates to which he succeeded under his father's trust-disposition and settlement. His younger brother and his sister accordingly maintain that if they elect to claim legitim each will be entitled to one-half of the legitim fund subject to any questions of collation which may arise between themselves. On the other hand, the elder son and the testamentary trustees maintain that although he makes no claim on the legitim fund he and they are nevertheless entitled "to found on his right to a share of legitim to the effect of limiting the amount of the shares" claimable by each of the younger children to one-

third instead of one-half. There is a familiar ring about this contention, and indeed it is just an echo of what was said by Lord Fullerton and approved by the whole Court in the second case of *Fisher* v. *Dixon* (3 D. 1181, at p. 1184) with regard to the position of the successful claimant William Dixon. It was decided that William, though he did not claim a share of legitim but was content with his position as one of his father's two general disponees, was entitled in a question with his sister Mrs Fisher, the only member of the family who claimed legitim, to assert his own right to a share of the legitim fund to the effect of "determining and limiting the amount of legitim due to his sister." Originally she claimed the whole legitim fund, but the decision in the first case (2 D. 1121), which was affirmed by the House of Lords (2 Bell's App. 63), precluded her from obtaining a larger share of it than one-third. The judgment in the second case reduced her share to one-fourth. It would have been still further reduced from one-fourth to one-fifth if William Dixon's very eminent legal advisers had been courageous enough to found for that purpose upon the share of legitim which would have fallen to William's elder brother John Dixon if the latter had offered to collate the heritable property which he took under his father's disposition and settlement. The litigation however proceeded from the beginning (2 D. at p. 1122) upon the footing that John Dixon, having taken up the heritable property without offering to collate, "could have no interest in the legitim." The attitude of William Dixon's advisers is not surprising when one keeps in view what has been laid down by the itstitutional writers in regard to collation *inter hæredes* and what was decided in such cases as *Robertson* v. *M'Vean*, (1813) 2 Bell's App. 87, note, and *Breadalbane* v. *Chandos*, (1836) 14 S. 309, *aff.* 2 Sh. & M'L. 377. The only reason which was urged in order to induce us to subvert what appears to have been recognised as undoubted law both before and since the decision in *Fisher* v. *Dixon* was the supposed "logical necessity" for bringing the law of collation *inter hæredes* into harmony with a recent decision of this Division of the Court upon the law of collation *inter liberos*—*Coats' Trustees* v. *Coats*, 1914 S.C. 744. It is a sufficient answer to this argument to point out that the two kinds of collation form separate and distinct chapters in the law of succession, and that although both are based upon similar principles of equity and have similar ends in view, their subject-matters are sufficiently diverse to justify different treatment and different results. There is in my opinion no substance in the contention that the shares of the legitim fund claimable by each of the younger children must be restricted to one-third.

The next matter which has to be decided refers to the construction and legal effect of a receipt which was given by the testator's younger son for a sum of £30,000 paid to him by his father "upon the footing that it is to be recognised as a sum to be imputed towards any legal rights that may be claimed by me out of my father's estate upon his death, and which sum I hereby accept upon that footing." There is a somewhat similar declaration in the marriage-contract of the testator's daughter with regard to a sum of £12,000 which was settled upon her by her father. The language of these documents is not merely capable of meaning, but ought in my opinion to be construed as meaning, that the sums there referred to were to be imputed to account of legitim according to the rules which have been familiar to Scottish lawyers from time immemorial, *i.e.*, by way of collation. Unless the use of the word "collation" is held to be a necessary solemnity, I do not think that the intention of the parties as I interpret it could have been more aptly expressed.

No satisfactory reason was stated why the third party should not collate a sum of £26,442, 6s. 6d. paid to him by his father and described as a "gift" and then as a "provision" in the ninth purpose of the trust-disposition and settlement.

As regards the propriety of charging interest on capital sums which fall to be collated, there may be circumstances in which it would be proper to attribute to a father an intention that advances made by him to his children as distinguished from loans should bear interest which on the father's death must be added to the original advances for the purpose of collation. In my practice I do not remember any case either in consultation or in Court where it was suggested that interest ought to be charged upon an advance made to account of legitim. In the absence of some specialty such a suggestion would, I think, be regarded by most fathers as unfair and also as prejudicial to their children. It seems to me fanciful to argue that it is necessary to charge interest in order to establish equality. The charge would have the opposite effect. A daughter who married young would be debited annually with the interest of funds settled upon her for the express purpose of enabling her to maintain herself out of the income. In the result her share of legitim might disappear if her father lived to a ripe age. On the other hand, her sisters who lived at home and were maintained by their father would receive their shares of legitim without deduction of the annual cost of their maintenance. The authorities cited at the debate confirm the opinion which I had reached independently to the effect that the case of *Johnston* v. *Cochran* ((1829) 7 S. 216) has not been regarded as a binding authority upon the general question. Interest ought not in my view to be charged in the present case.

LORD CULLEN—As regards branch 1 (*a*) of the first question, it is not disputed that in intestacy, where an heir succeeding to heritage refuses to collate it, the result is that he is not counted as a *caput* in the division of the legitim fund, and that the whole fund falls to the other child or children entitled to claim thereon. In the present case, which is one of testacy, I am unable to see that the result can be dif-

ferent. If it is, that must, I think, be because the testator had the power by his will to declare that his heir should be free to claim on the legitim fund without collating, and impliedly exercised the power. But it is not maintained that the testator had power so to alter the common law rule. The heir therefore cannot himself claim on the legitim fund seeing that he is not willing to collate. If that is so, I am unable to see how without collation he can fall to be counted as a *caput* in the division of the legitim fund at the instance of the trustees (or of himself as residuary legatee) because he has accepted conventional provisions, heritable and moveable, under the will, and because such an acceptance infers, *quoad* the general disponees, a renunciation of any right competent to him to claim on the legitim fund. For without collation there is no right competent to him so to claim. This result is said to be not logically consistent with the law regarding *collatio inter liberos* as laid down in the cases of *Monteith*, 9 R. 982, and *Coats*, 1914 S.C. 744. I am not satisfied that this is so. One part of the foundation of Lord Moncreiff's opinion in the case of *Monteith* consisted in showing that according to his view it was within the power of the father to declare by his will, expressly or impliedly, his intention that *inter vivos* advances to children, otherwise collateable, should not be collated; whereas if I am right in what I have said a father has no corresponding right to declare that his heir succeeding to heritage shall be free from the obligation to collate it as a condition of claiming on the legitim fund.

As regards the second question, I am quite unable to see how the sums of £30,000, £12,000, and £742, 10s. can be regarded as assets of the deceased going to swell the legitim fund. Their being brought into account in settling the shares of that fund falling to the respective children claiming thereon is another matter.

Question 3 brings under consideration the case of *Young* v. *Young's Trustees*, 1910 S.C. 275. There a son receiving advances from his father granted an explicit discharge *pro tanto* of his prospective claim of legitim, and it was held by the majority of the Court that there had been made a competent bargain for behoof of the father's "estate general," under which the amount of the advances fell not to be collated but to be directly set against the share of the legitim fund *in bonis* effeiring to the son. Here there is no discharge of legitim *pro tanto* in the case of any of the three advances in question. By the terms of the documents which passed, the £30,000 is to be imputed towards the third party's legal rights, and the other two sums are to be imputed as payments on account of the legitim or other legal rights of Mrs Younger. Now the general rule of law regarding advances is that they are the subject of collation and not of set-off for the benefit of the "estate general" of the father. I speak, of course, of advances which have not been given on such a footing as to make them unconditional gifts outside of the sphere of any accountability for them. Not uncommonly no document is taken. Where, however, a document is taken I think that if it is intended that the general rule of the common law shall not apply, but that there shall be substituted therefor a bargain for a set-off on behalf of the "estate-general" of the father, the document must be clear and unambiguous to that effect, and I do not think the documents in question here are so. It is a question of the meaning of language as used in Scottish legal practice. And it appears to me clear enough from the citations we have had, and to which reference has already been made, that in Scottish legal practice to speak of advances being "imputed" towards legitim means, or is consistent with, their being collated *inter liberos* in accordance with the general rule. I shall only add that I am unable to see how the contention of the first and second parties—for set-off—can be supported by anything in the will, which, being the act of the deceased alone, cannot affect the alleged bargain.

As regards the fourth question, the only one of the sums mentioned in it which gives rise to a real question is the £26,442, 6s. 6d. received by the third party. I am satisfied, for the reasons which your Lordships have stated, that this sum falls to be collated.

As regards the fifth question, I concur with your Lordships in the view that interest should not be added to advances falling to be collated. Apart from other considerations, I am influenced by the fact that in the cases here where collation or "imputing" is specially provided for, the provision is in its terms applicable only to the capital sums without mention of interest thereon.

I agree that the questions should be answered as the majority of your Lordships propose.

The Court answered question 1 (1) (*a*) in the affirmative, and found it unnecessary to answer question 1 (1) (*b*) and (2); question 2 (*a*) in the negative, and (*b*) in the affirmative; question 3 in the negative; question 4, as regards the sums of £30,000, £26,442, 6s. 6d., £12,000, and £742, 10s., in the affirmative, and as regards the other sums found it unnecessary to answer the question; and question 5 in the negative.

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