daughter's statement, and depones that Mr Dunbar said—"Well, he has taken away part of the gum, and also been using great force." Against these distinct statements I attach small weight to Mr Dunbar's evidence, which amounts to a mere *non memini.* He does not remember ever doing any extractions for the pursuer.

There seems, then, to be no doubt that bone and flesh were in fact torn away from the pursuer's upper jaw with serious and distressing consequences. No other cause is suggested than Mr Dalziel's operation, and it is plain upon the evidence that such an operation was a grossly careless one. If, then, the defenders held themselves and their operators out as competent to perform dentistry with ordinary care and success, as I think they did, they must be liable in damages to the pursuer unless they can escape upon a special ground, to which I must now refer.

This last ground of defence appears to me to be at best a very unhandsome one. It was urged that the defenders are not liable in damages because the pursuer had no business to subject herself to treatment by Mr Dalziel senior. The learned Sheriff has disposed of this point by saying that as matter of fact she did so under the directions and request of the defenders. I am not sure, though there is a balance of evidence, that the proof wholly bears out this view of the matter. But even assuming the contrary, it seems to me that the pursuer was quite entitled to go to the Coatbridge branch of the defenders' business, having been told by their canvasser Mr Scott that the Glasgow operator, Mr Mylie, whom she was going to consult, was away from home. She had never been warned by the defenders not to do so. The letter of 16th December 1907 implies nothing of the sort. She had been to that office before upon the defenders' instructions. The contract "order form" gives the Coatbridge address, inserted in manuscript, and she found there the sub-manager, Mr Dalziel senior, who as he says "had no hesitancy in the least in operating." This last argument for the defenders seems to me therefore absolutely to fail.

For the reasons stated I am of opinion that we ought to affirm the interlocutors appealed against.

LORD LOW was absent.

The Court dismissed the appeal.

Counsel for Pursuer—J. R. Christie—A. M. Stuart. Agents—Balfour & Manson, S.S.C.

Counsel for Defenders—Spens. Agent—James G. Bryson, Solicitor.

Tuesday, December 14.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

SMITH *v.* M'COLL'S TRUSTEES.

Process—Declarator ab ante—Declarator of Right to Immediate Payment—Declarator of Vesting Subject to Defeasance.

A residuary legatee under a will brought a declarator that he was entitled to immediate payment of the trust fund, or, alternatively, that he was entitled to have it found and declared that the fee had vested in him subject to defeasance only in the event of his having issue. The defenders pleaded that the action was premature. *Held* that *qua* the conclusion for immediate payment (*reversing* the opinion of the Lord Ordinary) the pursuer was entitled to a judgment on the merits, and defenders assoilzied, but that *qua* the conclusion for vesting subject to defeasance the action was premature, there being possible contradictors who were not represented, and should be dismissed.

Succession—Vesting—Liferent and Fee—Direction to Trustees to Hold and Retain—Repugnancy.

A testator directed his trustees to hold and retain the balance of his estate for behoof of the children of his deceased daughter, and to pay the annual proceeds to them in equal portions, and on the decease of the survivor to divide the balance among the grandchildren of his said deceased daughter, and their issue *per stirpes.* He then went on to declare that in the event of any of the children dying leaving issue, the issue prior to the time of division should take the share of annual proceeds payable to the parent, and in the event of any of the children dying without leaving issue, then the shares of said annual proceeds, or of the principal sum as the case might be, of such children, should be divided equally among the surviving children and the issue of any child who might have died. *Held* that the sole surviving son of testator's daughter, who was under a mutual settlement the universal legatory of the other children who had died, was not entitled to an immediate conveyance, not having a fee.

On 23rd February 1909 Adam Smith, residing at 17 Dunolly Gardens, Ibrox, Glasgow, brought an action against (1) James Burns Kidston and others, the testamentary trustees of the late Dugald M'Coll, acting under his trust-disposition and settlement, dated 22nd September 1881, and registered 23rd November 1882, and (2) Mrs Jessie M'Coll or Smith for any interest she might have as one of the next-of-kin and heirs *in mobilibus* of the testator. In it the pursuer, in his own right and as universal

legatee of his brothers, sought declarator that he had an indefeasible vested right in, and was entitled to payment or conveyance of, the whole residue of the testator's estate, or otherwise that he had acquired a vested right in and was entitled to immediate payment of two thirds of the said residue, and in right of a vested interest in and to the capital of the remaining third subject to defeasance in the event, but only in the event, of his having [leaving] issue; or alternatively that he had a vested right in the fee of the whole of the residue defeasible in the event of his having [leaving] issue, and in that event only ("having" was substituted for "leaving" by amendment in the Outer House). Supplementary conclusions as to divesting the trustees and payment being made to the pursuer followed, and there was also a conclusion for payment of the income to the pursuer, which, however, was not contested.

Dugald M'Coll, died on 8th November 1882. His trust-disposition and settlement, after providing for a liferent of his estate to his wife in the event of her surviving him, and making provisions for his daughter Mrs Jessie M'Coll or Smith and her children, and for his grandchild Jessie Smith, a daughter of Mrs Agnes M'Coll or Smith, directed his trustees "to hold and retain the balance of said residue and remainder for behoof of the children of the said Agnes M'Coll or Smith (other than the said Jessie Smith) and pay the annual proceeds thereof to them in equal portions, and upon the decease of the survivor of the said children (other than the said Jessie Smith) to divide the said balance among the grandchildren of the said Mrs Agnes M'Coll or Smith (not being children of the said Jessie Smith) equally and their issue *per stirpes* Declaring always that in the event of any of the children (other than the said Jessie Smith) of the said Agnes M'Coll or Smith dying leaving lawful issue, such issue shall prior to the time of division among them of their shares of the said balance be entitled to the shares of such annual proceeds as would have been payable to their, his or her parent if alive, and in the event of any of the children (other than the said Jessie Smith) of the said Agnes M'Coll or Smith dying without leaving lawful issue, then the shares of the said annual proceeds or of the principal sum, as the case may be, of such children shall be divided equally among the surviving children, and the lawful issue of any child or children who may have died, such issue taking their parent's share *per stirpes*, the said Jessie Smith and her issue being hereby expressly excluded from any share of the said balance of residue while any of the other children of the said Agnes M'Coll or Smith or their issue are in life."

The testator further provided—"All liferent provisions under these presents or any codicil thereto shall be purely alimentary and not assignable nor arrestable nor effectable by the debts or deeds of the liferenters."

The testator was survived by his wife, who died a few months after him, by his daughter Mrs Jessie M'Coll or Smith, who had issue, and by the children of his deceased daughter Mrs Agnes M'Coll or Smith, viz., her daughter the said Jessie Smith and three sons, David Smith, George Smith, and the pursuer Adam Smith. Jessie Smith, who was unmarried, disappeared in 1891, and had not since been heard of. Proceedings were taken before Lord Mackenzie under the Presumption of Life Limitation (Scotland) Act 1891 to have the date of her death presumed, and by decree dated 23rd October 1909 she was held to have died on 29th June 1898. George Smith died unmarried in 1905, and David Smith died, also unmarried, in 1908.

By mutual settlement dated 24th November 1894 the said David Smith, George Smith, and the pursuer assigned and disponed to and in favour of the survivors of them equally, and to the last survivor of them wholly, all the estate belonging to them respectively, or over which they, or the predeceasers of them, should have power of disposal by will or otherwise; and the survivors and last survivor of them were named to be the executors and executor and universal legatory and legatories of the predeceasors.

The pursuer pleaded, *inter alia*—"(1) The provisions of the said trust-disposition and settlement regarding the said residue being such as upon a sound construction thereof to confer a right of fee on the children of the said Mrs Agnes M'Coll or Smith (other than Jessie Smith) who survived the longer liver of the testator and his wife in an equal share each of said residue, and the direction to retain the capital and pay to such children the income only being a defeasible trust for administration, the pursuer as in right of all such surviving children is entitled to decree in terms of the first branch of the first declaratory and of the relative petitory conclusions. (2) The said David Smith and George Smith having, by survivance of the longer liver of the testator and his wife, acquired at least a right of fee each in one-third of the residue subject to defeasance only in the event of their leaving issue, the pursuer as their assignee became, upon their dying without issue, entitled to the fee of two-thirds of the residue, and is entitled to decree in terms of the second branch of the first declaratory and of the relative petitory conclusions. (3) Alternatively, the pursuer, as the surviving child of the said Mrs Agnes M'Coll or Smith, is, upon a sound construction of the said trust-disposition and settlement, in any case now entitled to the fee of the whole residue, subject to defeasance only in the event of his having issue, and to decree in terms of the alternative declaratory conclusion."

The compearing defenders, the trustees, pleaded, *inter alia*—"(1) In so far as the pursuer seeks declarator that the fee of the whole or part of said residue has vested in him either absolutely or subject to defeasance, the action is incompetent or otherwise is premature and unnecessary. (2) In so far as the pursuer seeks declarator that he

is entitled to the income of the said residue the action is unnecessary."

On 24th June 1909 the Lord Ordinary (MACKENZIE) pronounced this interlocutor:—"Sustains the first and second pleas-in-law for the defenders: Dismisses the action and decerns: Finds the defenders entitled to expenses," &c.

Opinion.—". . . [*After narrating circumstances*] . . . The pursuer presents in the conclusions of the summons three views of his rights under this residue clause—(1) that he now has an indefeasible vested right in, and is entitled to payment or conveyance to him of, the whole residue, or otherwise (2) that he has such a right to two-thirds of the residue, and is entitled to the income of the other one-third, and has a vested interest in the capital of this one-third, subject to defeasance in the event, but only in the event, of his having issue (the summons to be amended by substituting 'having' for 'leaving' issue), or otherwise (3) that he is entitled to receive the income of the whole of the residue, and that he has also a vested right in the fee of the whole of the residue defeasible only as aforesaid. There are also conclusions for payment.

"The preliminary plea having been stated—that the action is premature—the question is not at this stage whether the pursuer's view of his rights is well or ill founded on the merits. If it appears on a fair construction of the residue clause that there may be parties who are not in the process, but who, if in existence, would have *prima facie* an interest to dispute the pursuer's claim, then the action cannot be proceeded with.

"The different branches of the residue clause are not altogether consistent with each other. The view I take, however, is that *prima facie* the settlement is more like that in *Macgregor's Trustees*, 1909, S.C. 362, than that in *Greenlees' Trustees*, 22 R. 136. There is not an unqualified gift followed by directions which amount merely to a scheme of administration for the benefit of one who is truly the fiar. I am unable to construe the deed as plainly containing a direct provision of a gift to the pursuer. The trustees are to hold the residue for behoof of the children of Agnes M'Coll or Smith, but the provision as to what those children are to take may be said to show that it is only the annual proceeds, and that their children are to take the fee. It is quite true that a difficulty has been created by the part of the clause which provides for the event of a child dying without leaving lawful issue. On one construction it may be said to carry not only the annual proceeds of that child's share, but the principal sum, to the surviving children. In my opinion there is good ground for arguing that this is not what was meant, and that the ambiguity has arisen from the framer of the settlement attempting to do in one clause what required two, and that he meant the annual proceeds to go to the child and the principal sum to the grandchildren. The introduction of the words "annual proceeds" at this part of the clause seems to tell strongly against the pursuer's argument.

"I am of opinion that the possible issue of the pursuer would have such a beneficial interest under the deed that they would be entitled to oppose the claim he now makes to an unqualified fee. In these circumstances, on the authorities cited, of which *Barron*, 19 S.L.R. 275; *Fleming*, 6 R. 588; and *Burgh Smeaton*, 1907 S.C. 1009, are examples, the present proceedings, in so far as they seek to establish that there is an unqualified right of fee in the pursuer, are premature. The case of *Cairns' Trustees*, 1907 S.C. 117, was founded on by the pursuer, but I think it different. It was a special case, not a declarator, and three out of the four children had issue at the date of the case, so that the class was represented.

"It was said that the next-of-kin (the pursuer himself and his aunt Mrs Jessie M'Coll or Smith, one of the defenders) are both in the process. They, however, are not proper contradictors. Their interest could only emerge after that of the pursuer's issue. As weighing against the pursuer's view that he has a fee, the mention of Jessie Smith and her issue is referred to as indicating that a fee by implication was intended to be given to them on the failure of other children or issue.

"In the view above stated the mutual settlement by the brothers would not avail the pursuer's case.

"It was contended further by the pursuer that the interests of his issue could not be affected if declarator were pronounced in terms of one or other of the conclusions relating to vesting subject to defeasance. The case of *Harvey's Trustees*, 22 D. 1310, founded on by the defenders, seems to me in point, and negatives the idea that the pursuer can competently ask the Court to deal with such conclusions.

"I may also refer to Lord Kincairney's judgment in *Millar's Trustees*, 4 S.L.T. 122. The case of *Cairns*, founded on by the pursuer, appears to me, for the reasons already stated, not to entitle the pursuer to what he asks.

"No question was raised as to income. The first and second pleas-in-law for the defenders will be sustained and the action dismissed, with expenses."

The pursuer reclaimed, and argued—The action was not premature. So far as the pursuer sought to have an immediate conveyance of the estate, he was clearly entitled to have his right decided now. This covered both the first declarator and the declarator as to the two-thirds which passed to the pursuer as universal legatee of his two brothers. The fact, that parties might subsequently emerge who might put forward a claim to the estate, could not affect the right of the pursuer to have his present right decided now. If pursuer was entitled to an immediate judgment on this point, that judgment should be in his favour. The trust here was merely an administrative trust, and the pursuer was therefore entitled to decree of denuding—*Millar's Trustees* v. *Millar*, December 19

1890, 18 R. 301, 28 S.L.R. 236; *Greenlees Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106. The declaration as to all liferent provisions being purely alimentary applied to other provisions in the will, and not to this, and the declaration as to "shares of the principal sum" in the subsequent part of the clause showed that the testator meant those children to get the fee. The direction to "hold for behoof of" amounted to a gift of the fee, especially when, as here, there was no further disposition of the fee—*Anderson's Trustees* v. *Anderson*, December 7, 1904, 7 F. 224, 42 S.L.R. 167; *Collie* v. *Donald and Others*, July 20, 1895, 3 S.L.T. 95. On the declaratory conclusions as to vesting subject to defeasance the pursuer was also entitled to an immediate judgment. The only parties whom such a judgment could affect, and who were not represented in the present process, were the pursuer's possible issue, and the terms of the conclusion effectively safeguarded their interest. In the case of *Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, 44 S.L.R. 96, the Court had held that such a question could be competently determined before the period of division. It was true that was a Special Case, but the Court had stated that the questions raised there could have been competently determined in a declarator. The cases *contra* founded on by the defenders were not in point, as they were not declarators of vesting subject to defeasance, and all the parties who could be interested in the fund were not represented in the process.

Argued for the defenders and respondents—The Lord Ordinary was right in holding that the action was premature. The fact that the pursuer asked immediate conveyance did not necessarily imply that he was entitled to have that question decided now, if it could be shown that there were other parties not yet in existence and not represented in the process who could state a better claim to the estate than the pursuer—*Barron*, November 12, 1881, 19 S.L.R. 275; *Fleming*, January 28, 1878, 16 S.L.R. 316, 6 R. 588; *Burgh Smeaton* v. *Burgh Smeaton's Judicial Factor*, 1907 S.C. 1009, 44 S.L.R. 718. In any event, the pursuer was wrong here. The direction in the will could not possibly be construed as an administrative trust. The initial part of the clause undoubtedly conferred a liferent, and there was an express declaration further on that all liferent provisions should be purely alimentary. This took the case out of the class of *Millar's Trustees*. Trustees, further, could not denude of an alimentary liferent—*Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911, and *Greenlees' Trustees*, *cit. sup.* But further, there was not only a direction to hold but to hold and retain, and so far as pursuer knew there was no case where a direction to "hold and retain" had been construed as conferring a fee—*Peden's Trustees* v. *Peden*, June 27, 1903, 5 F. 1014, 40 S.L.R. 741. There was no repugnancy between the earlier and later parts of the clause, and "shares of the principal sum" referred to the contingency of all the liferenters being dead and the period of division arrived. The present case was more like the case of *Macgregor's Trustees* v. *Macgregor*, 1909 S.C. 362, 46 S.L.R. 296. There was further here no power to trustees to advance capital, no power of apportionment, no destination-over, and no power given to the children to dispose of shares by will. The really material question, however, was whether the declaratory conclusion of vesting subject to defeasance was premature, as there could be no doubt that on the conclusion for immediate payment the defenders on the merits were entitled to succeed. It was contrary to the policy of the Court to grant such a declarator, and in *Harveys* v. *Harvey's Trustees*, June 28, 1860, 22 D. 1310, where the declaratory conclusion asked was really a declarator of vesting subject to defeasance, though at that time the doctrine of vesting subject to defeasance had not been elaborated, the Court held that the action was premature; also *Fleming* v. *M'Lagan*, *cit. supra*, and *Millar* v. *Millar's Trustees*, October 29, 1896, 4 S.L.T. 122. The case of *Cairns' Trustees* v. *Cairns*, founded on by pursuer, was not in point, as it was a special case in which parties came into Court agreed to ask judgment on the merits; and further, all the parties who could have an interest in the fund were represented in the process, while here the proper contradictors, viz., possible issue of Jessie Smith and the next-of-kin, were not present.

LORD PRESIDENT — The pursuer comes here and makes certain demands in respect of his rights under the trust-disposition and settlement of the late Dugald M'Coll. The question arises with regard to the provisions as to residue. In the disposition of the residue we find the following direction to the trustees—"To hold and retain the balance of said residue and remainder for behoof of the children of the said Agnes M'Coll or Smith (other than the said Jessie Smith) and pay the annual proceeds thereof to them in equal portions, and upon the decease of the survivor of the said children (other than the said Jessie Smith) to divide the said balance among the grandchildren of the said Agnes M'Coll or Smith (not being children of the said Jessie Smith) equally and their issue *per stirpes*."

Agnes M'Coll or Smith was the testator's child, and therefore "the children of the said Agnes M'Coll or Smith" are the testator's grandchildren, and her grandchildren are the testator's great-grandchildren. Now supposing the provision which I have quoted had stood alone and there was nothing more, there could be no doubt whatever as to the construction of the settlement. It is simplicity itself. A liferent is given to the testator's grandchildren, the children of a particular daughter, and upon the death of the survivor of the liferenters the fee is to go to his great-grandchildren. Is there anything else, then, in the settlement that causes any difficulty in regard to that construction? The next provision is a declaration referring to the contingency of one of his grandchildren

dying leaving lawful issue, that is to say, great-grandchildren of the testator, prior to the time of division, and in that case the testator substitutes the children for the parent. That is entirely consistent with what has gone before. But then comes the clause which is the only one causing difficulty. The testator proceeds to deal with the event of a grandchild dying without leaving issue, that is to say, great-grandchildren of the testator, and as to that event he says—"Then the shares of the said annual proceeds" (I leave out for the moment the next words) "of such children shall be divided equally among the surviving children." Now I think that that provision was quite right and probably necessary, because the words in which the original liferents were given were such as to indicate severalty, and therefore, supposing a grandchild had died without issue, and by that means had freed of course the portion of the liferent which that grandchild was enjoying, there was nothing but for these words to carry over that freed portion of the liferent to the dying person's brothers and sisters. But then these words appear in the clause "or of the principal sum as the case may be of such children." Now the intention of the testator here, I think, is clear enough, but the words used are by no means clear. The intention was to deal with the proportion of the capital that effeired to the liferent enjoyed by the person who had died without leaving issue; but the words are in themselves inaccurate, because you cannot properly speak of the "principal sum of such children" when on the construction of the settlement such children never had a right to a principal sum but had only a liferent. Well, I think it would be an entire departure from the recognised principles of construction to hold that a slip of that kind in a subordinate clause has the effect of overruling the natural construction of the principal clause. Where the construction of a principal clause is ambiguous it is one of the commonest methods of interpretation to turn to subordinate clauses to see how their application will afford aid in the interpretation of the principal clause, but where the principal clause in itself is not ambiguous it would be a novel proceeding to go to a subordinate clause with the object of showing that its wording is consistent with a certain reading of the principal clause, and that that reading should be adopted although it is not the reading which would be given to the principal clause by itself. Accordingly I look upon the words "or of the principal sum as the case may be of such children" as a mere blunder. I think the intention is clear enough. Well, if this construction is correct, we begin with this, that this pursuer has not got a fee, and accordingly he cannot obtain the declarator which he seeks in his initial conclusion.

But the pursuer in addition to the initial conclusion for an immediate payment of the fee presents (as the Lord Ordinary puts it) certain other views of his rights, and the Lord Ordinary states these views quite correctly. The first is that the pursuer has an indefeasible right and is entitled to payment of the whole residue; the second, that he has a right to two-thirds of the residue, this claim resting upon the fact that he is suing as assignee of two deceased brothers; and then the third is that he has a vested right in the fee subject to defeasance in the event of his having issue. The Lord Ordinary has dealt with the case, taking the same view as I have taken in regard to the construction of the settlement. He has held also that in any case the action is premature, and therefore he has sustained the first and second pleas for the defenders and has dismissed the action. Now it appears to me that that judgment is not quite right in form, because so far as the pursuer comes here and says, "I am entitled upon the settlement to an immediate conveyance, grant it to me now," he is entitled, I think, to a judgment on the merits. He is either entitled to get the conveyance from the trustees or he is not so entitled. The trustees also are entitled to a judgment on the merits. They are either bound to grant a conveyance or they are not bound to do so. Now in my opinion they are not entitled to make over any part of the estate at present, and therefore I think the proper way to deal with this conclusion is to assoilzie the defenders and not merely to dismiss the action.

As to the other conclusions, I agree with the Lord Ordinary that the action is premature or unnecessary. Observe the position in which matters now stand. We have held that the pursuer is not entitled to an immediate conveyance, and there is to be no division of the trust estate until after the death of the last surviving liferenter. All that the pursuer can say therefore is—"I wish such a decree as will show that when that event occurs I will have right to a conveyance, and will in the meantime have the advantage of this decree." Now I do not think that your Lordships have ever been in the way of giving people decrees merely for the purpose of enabling them to have a marketable right unless it was certain that the proper contradictors were in Court. Here there are two possible contradictors who are not appearing in this process. First, there are the children of the excluded granddaughter Jessie, if such are alive at the time for the division of the estate; and secondly, the next-of-kin, who would be entitled to argue that there was intestacy. In view of this it seems to me that it would not be in accordance with our practice if we disposed of the matter now and compelled the trustees to argue a point in which they have no interest at this moment, because they are bound under the first part of the judgment to still go on holding the estate. That course could not be taken unless the proper contradictors were in Court, and that is not the case here. Accordingly I think we should recall the judgment of the Lord Ordinary as it stands, assoilzie the defenders from the first alternative of the first declaratory conclusion

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