No 9.

of each other. The renunciation of the wife's legal provision was made in favour of her husband; he therefore was at liberty to pass from it, and to put her in the same situation as if no such stipulation had been made; and, although the disposition mentions nothing with regard to impairing the legitim, or altering the wife's conventional provisions, it must be held as equivalent to an express discharge of her renunciation, as the greater certainly includes the less. Being a disposition of his whole effects, he must be understood to have given to his wife whatever was in his power to give; and that he could have restored her against any stipulation made in his own favour, cannot be disputed.

Answered for the pursuers, The legitim is a portion of goods over which the father has no power of disposal. It necessarily accrues to the children, *ipso facto*, upon his death; and as, where there is no relict, or where she has renounced her *jus relictæ*, the half of the father's moveables falls to them; so, from the nature of the thing, no testamentary deed, or *mortis causa* donation, which takes not effect till after death, can exclude or diminish their share. So indeed, it was solemnly determined in the case of Henderson, February 1728, § 6. *h. t.* Although, therefore, William Watt had expressly taken away or diminished his child's legitim by his deed, which was only to take place after his death, it could not have been effectual for that purpose; and far less can the legitim, in this case, be disappointed or impaired by an implied or presumed intention. The only will that can be presumed for him, is, that he meant to grant to his wife what was in his power to give her, viz. the dead's part; but that he had no intention to encroach upon the legitim, which was not under his power. The universal disposition cannot therefore be held as equivalent to a discharge of the wife's conventional rights, and as restoring her to her legal provisions.

"THE LORDS found, that the legitim was due, and that the pursuers were entitled to a bibartite division of William Watt's moveables." See Jervey against Watt, *voce* IMPLIED CONDITION, No 52. p. 6401.

Act. *Wal. Stewart.* Alt. *James Dundas.*

A. W. *Fol. Dic. v.* 3. *p.* 382. *Fac. Col. No* 73. *p.* 164.

No 10.

A son who had received a sum in his father's lifetime, found obliged to collate it.

1775. *December* 20. JAMES SKINNER *against* WILLIAM-ANN SKINNER.

IN an action brought at the instance of the younger son, against the elder, to account for his intromissions with the effects of their deceased father, who died intestate and a widower, and consequently his succession fell to be divided in two parts, legitim and dead's part, the pursuer *insisted*, That the defender is bound, before he can claim any share of legitim in this case, to collate the sum of L. 100 Sterling, advanced him by his father, as well as the sums which have

already been paid, or may hereafter be paid in virtue of a bond of annuity granted by the father to the defender's wife. No 10.

The first of these subjects of collation was vouched by a bond granted by the father, dated 4th October 1770, and proceeding upon the following narrative: 'Whereas Alexander Smith, late master of his Majesty's ship the Favourite, my son-in-law, has, at my request, advanced and lent to me the sum of L. 100 Sterling, presently requisite to be applied for extricating the affairs of William-Ann Skinner, my eldest lawful son, who intends to go soon abroad in the service of the East India Company; and as the said Alexander Smith has agreed not to demand either the said principal sum, or interest, till after my death, and to accept of my obligation underwritten, for payment of the same, in these terms: Therefore, &c.' Which bond appeared to have been paid and discharged since Mr Skinner's death.

The other subject of collation was a bond of annuity for L. 15 a-year, of the same date above-mentioned, executed by the deceased Mr Skinner, in favour of the wife of the defender, to subsist while he remains abroad, or, in case of his predecease, while she remains a widow: And it proceeds on the following narrative: 'Whereas William-Ann Skinner, my eldest lawful son, intends soon to go abroad, and enter into the service of the Honourable East India Company, whereby he will be obliged for some time to live separately from his wife and family; andthat I have resolved to contribute somewhat for their better subsistence and aliment during my said son's absence, or in the event of his decease,' &c.

THE LORD ORDINARY repelled the plea of collation insisted on by the pursuer, who reclaimed, premising, that to one now under the pressure of poverty, the question of collation becomes of considerable moment in adjusting the proportion which he is entitled to draw of the small remains of his father's succession; and, upon the point of law,

Pleaded; By the equitable rule of collation, every child claiming an interest in the legitim, is bound to bring in, and collate, whatever provisions may have been executed by the father in his favour during lifetime. In order to exclude collation, there must be a clear indication of the will of the deceased to that purpose; but it cannot, in this case, be pretended, that there is any express declaration of Mr Skinner's will, that the defender should have either of the above provisions, without their being subject to collation.

With respect to the L. 100, which, it has been urged by the defender, was a free gift from his father, for the purpose of enabling him to go out to India, and cannot therefore be considered as a proper subject of collation; in the *first* place, the situation of Mr Skinner's affairs when this L. 100 was borrowed by him from his son-in-law, and advanced to the defender, merits particular attention. It appears, that all that he had in the world, did not exceed a few hundred pounds, and the sum that was advanced to the defender must therefore be considered as large and exorbitant, compared with the funds of which his father was possessed.

No 10.

2*dly*, Let the situation in which the defender then was, be next considered. He was long past the period of education; nor was this sum advanced on his first outset in life; on the contrary, he had been for many years in the army, was married, and had a family; so that the sum advanced to him in these circumstances can never be considered in any other light than as an advance of money to him by way of provision, which he therefore was undoubtedly bound to collate with the pursuer in adjusting their respective proportions of the legitim. For it is laid down, that every advance of money by a father to a child, where there are not circumstances sufficient to show a contrary purpose in the father, must suffer collation; *vide* Erskine, B. 3. tit. 9. § 24.

2*do*, The bond of annuity of L. 15 a-year to the defender's wife, must be looked upon as equivalent to a provision in favour of the defender himself. It is a provision to his wife and family, for whom he was and is bound to provide; and he, therefore, clearly derives an annual benefit from it, being relieved to that extent of the expense he otherwise would be put to. It now appears, that this annuity does more than exhaust the annual produce of the free residue of Mr Skinner's effects, after paying his debts, and, among others, the L. 100 before mentioned. And it were extremely hard, that, when the funds are burdened in this manner, by means of provisions in favour of the defender and his family, the pursuer should not at least be entitled to insist for his collating the benefit which he has thence derived, or may hereafter derive.

Answered; Admitting the general rule of collation laid down by the pursuer, it will by no means follow, from thence, that there is any room for collation in the present case. The collation even of large provisions may be excluded by the father himself, if it appears to be his will to do so, and that, without distinguishing whether such will be clearly expressed, or is only to be gathered by implication; Erskine, B. 3. tit. 9. § 25.

But if, (as there laid down) in the case of a provision to children, which, in its own nature, implies the idea of forisfamiliation, and something set apart for them, as separate and distinct from the family of their father, it is allowable for the father to qualify that provision, so as to enable them to draw their share of the legitim over and above the provision actually made for them; and if even such qualification will be presumed, from facts and circumstances, distinct from the express will of the father, it follows, *a fortiori*, that, in the case of a sum gifted and delivered over for present use, abstracting from the idea of a provision, or of forisfamiliation, such sum can never be supposed to come *in computo* of the legitim; nor can the person receiving it be obliged to collate, so as to increase the amount of the funds from which the legitim is to be drawn.

Such, however, is the case with regard to the L. 100 in question.

The late Mr Skinner certainly had it not in view, when he advanced this L. 100 for the purposes of the defender, to diminish any right the defender his eldest son had to his executry upon his death; for, as the pursuer had not been heard of for several years, his father concluded that he was dead; and, as his

daughters were forisfamiliated at their marriages, he must have taken it for granted that the defender would enjoy every thing he should leave behind him at the time of his death. No 10.

And far less can the defender be bound to any such collation, on account of the annuity which was settled on his wife; for, how much soever a child may be obliged to account for provisions made directly to himself, it is impossible he can be made to account for provisions made to third parties, however nearly they may be connected with him, or however dependent they may be upon him. The defender's father was at liberty to dispose of his effects by deeds, *inter vivos*, as he should think proper. He might have granted bonds to the defender's children, to the full extent of what he was worth; nor could such bonds have been quarrelled by the pursuer, in order to let him into a legitim. And it was surely equally competent to Mr Skinner to do an act of kindness to the defender's wife, by settling a small annuity upon her during her husband's absence, or her widowhood. There are therefore here no *termini habiles* for collation.

Observed on the Bench; L. 100, in this instance, was a large sum, and which could not be considered as of the same nature with advances made by a father on account of his son's education, which are exempted from collation.

THE COURT found, "That the defender must collate the principal sum of L. 100 in question, but not the interests; and, as to the annuity, remitted to the Lord Ordinary to hear parties farther on that point."

Act. *J. Scott.* Alt. *Wight.* Clerk, *Pringle.*

Fol. Dic. v. 3. *p.* 383. *Fac. Col. No* 210. *p.* 158.

SECT. III.

Children have right to Legitim *proprio jure.*

1607. *February* 24. STEVENSON *against* FISHER. No 11.

STEVENSON pursued Fisher to divide to her the half of her defunct husband's goods. He *alleged*, That the pursuer had only interest to acclaim the third of the defunct's goods, because he is one of the defunct's debtors, who had bairns on life, and so his testament behoved to receive a tripartite division, whereof the wife could only fall a third. It was *answered*, That she behoved to have an