general rule is that a special subject precisely and definitively settled in a particular way, or in favour of a particular heir or substitute, is not affected by mere general words used by a testator in settling his whole means and estate. The subject specially settled is held not to have been in the testator's view unless the contrary can be shown, and in general a special provision should be specially revoked. There are very numerous instances of the application of this rule, the latest and most authoritative of which, trenching to some extent upon cases which preceded it, is the case of *Glendonwyn* v. *Gordon*, as decided in the House of Lords, 19th May 1873 (Law Rep. ii., Scotch Appeals 320). I do not think there is anything in the present case which, supposing the general trust-deed to have been lost, in date would have indicated the testator's intention thereby of cutting down the previous special destinations.

Now, I think the case actually before us is more favourable for Miss Webster, the special disponee or substitute, than it would have been had the general disposition been latest in date. *Posteriora derogant prioribus* applies emphatically in such cases as the present. The latest expression of the testator's will receives effect even though it be contrary to preceding indications, and the latest will in the present case is expressed in the special dispositions.

Mr Webster made his general settlement in 1864 containing various provisions in favour of his sister Miss Ann Webster, who was the only one of his sisters who resided with him. In 1874, having occasion to buy the villa in question for the occupation of himself and sister, he took the titles both of the villa and of the adjoining ground to himself and his assignees and disponees, whom failing to his sister Ann Webster, in the terms of the deeds before us, both of which he specially subscribes in token of the destination being the expression of his will. Now, I cannot help holding that by these deeds Mr Webster intended to give his sister Miss Ann Webster an additional benefit in his succession. He surely meant something by inserting her name as the disponee or substitute; and although undoubtedly he reserved full power of himself disposing of the subjects, I think he intended that failing any subsequent disposal thereof by himself it should go to his sister.

The contention for the trustees makes the special insertion of Miss Webster's name in the dispositions of 1874 absolutely meaningless, unless the testator be supposed to have intended to destroy his general settlement and die intestate; and this seems to me to be a most unlikely supposition. Miss Webster is only to take, the trustees' say, failing them the general testamentary trustees. I cannot think that this was Mr Webster's intention. I feel certain that had he so intended he would have expressed himself very differently. No doubt a difficulty arises from the expression in the special deeds after Mr Webster's own name, "and his assignees and disponees," for undoubtedly in one sense his testamentary trustees are his assignees and disponees; but I think this is not the true meaning of the words. His "assignees and disponees" mean, I think, special assignees or special disponees in the special subject conveyed by the deed, and not mere general assignees in his general settlement. The intention was, that notwithstanding the destination of the villa to his sister, Mr Webster might sell or convey to whom he pleased, but that failing such special sale or conveyance Miss Webster should inherit it. Mr Webster never altered this special destination, and he never sold and disposed of the villa and ground, and I think we should now give effect to his will and purpose by finding that Miss Webster is entitled to the villa and pertinents in addition to her provisions under the general settlements.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for First Parties—Crichton. Agents—Duncan & Black, W.S.

Counsel for Second Party—Mackay. Agents—G. & H. Cairns, W.S.

Wednesday, November 8.

SECOND DIVISION.

[Sheriff of Forfar.

DOUGLAS *v.* DOUGLAS.

Parent and Child—Legitim—Collatio inter liberos.

A father died leaving two sons and a will whereby he disponed and assigned to his younger son his whole means and estate. It was shewn by holograph entries in the father's ledger that he had made three large advances to this younger son during his life, marked respectively "By gift," "By allotted for his business, free gift," and "By given over as free gift." The elder son claimed the whole legitim fund, or (there being no widow) one-half of the personal estate.—*Held* that these advances to the younger son were to be regarded as advances to account of legitim, and that they fell to be imputed in a claim by the elder son for legitim.

This was an appeal against an interlocutor pronounced by the Sheriff of Forfar (Heriot) in an action at the instance of Andrew Douglas, merchant, Dundee, eldest son of the late Thomas Douglas, Rock Villa, Broughty Ferry, against his younger brother James Earl Douglas, the sole executor and universal disponee and assignee of his father under his will of 4th August 1869. The summons concluded for payment of legitim and production of all vouchers, &c., necessary to the determining thereof. Mr Thomas Douglas was twice married, the pursuer and defender respectively being the only issue of the first and second marriages. The father died on 13th March 1875, predeceased by both his wives, and leaving considerable personal estate besides the villa and heritable property in Dundee.

In the case of the first marriage there was a post-nuptial contract of marriage, dated 31st December 1834, by which, *inter alia*, the spouses assigned and disponed their whole estates and effects to the husband, should he survive his wife, and to the pursuer, provided he was twenty-one years of age at the predecease of his mother, in the proportion of two-third parts to

the husband and one-third to the pursuer; also, it was declared that in case the husband should within six months after his wife's death make payment to the pursuer, if he was then twenty-one years of age, or to the trustees therein named if he was under that age, of £800 in lieu of the pursuer's third part, then the whole of the subjects should belong to the husband solely and absolutely, and the same were thereby assigned and disponed to him, his heirs and assignees whomsoever, conditionally always on his paying the said sum as aforesaid. It was also declared that the provisions therein contained in favour of the pursuer should be accepted by him as in full of all bairn's part of gear, legitim, portion natural, executry, and everything which he could ask, claim, or demand by and through the death of the first deceaser of his father and mother. On the occasion of the second marriage a mutual deed of settlement was entered into, on 8th March 1851, and one of the purposes was to pay £800 to the pursuer under the said post-nuptial contract, if the same was not settled by him in his lifetime. Another purpose of the settlement was that at the expiry of the said Thomas Douglas' wife's liferent, or as soon thereafter as possible, his trustees should pay to the pursuer a legacy of £600 over and above the said sum of £800 before specified, and which sums were, and should be, in full of all claims of executry, legitim, or other legal claims whatsoever, competent to him by and through the decease of his said mother, or by or through Mr Douglas' decease.

The late Mr Douglas left two testamentary deeds, by the later of which, dated 4th August 1869, and recorded 20th March 1875, he disponed and conveyed to the defender his whole means and estate, and nominated and appointed him sole executor. This will revoked all previous wills; but the prior deed, dated 9th July 1860, was to the same effect, save that it was in favour of trustees until the defender should attain majority, which he had done before the date of the second deed. The latter will, *inter alia*, contained the following clause:—"From my affection for my son James Earl Douglas, afternamed, and having already made provision for my other son Andrew Douglas, do hereby give, grant, assign, and dispone," &c. And the prior deed contained the following clause to the same effect:—"*Fourthly*, In respect that I have already made provision for my other son Andrew Douglas, I direct my trustees," &c.

Soon after Mr Douglas's death the pursuer made a claim for legitim, and, raising the present action, used arrestments to the amount of £5000. The defender admitted legitim to the amount of £1662, 18s. 9d.

The pursuer's pleas were to the following effect—"(1) Right to legitim as a lawful child. (2) There being no widow and no other children, the pursuer's legitim is one-half of the estate, seeing that the whole legitim falls to him, the defender having been forisfamiliated, and received provisions in full satisfaction of his legitim. In any view, in order to participate, the defender must collate. (3) The defender being universal disponee is not entitled to share in legitim. (4) The amount of the pursuer's legitim cannot be diminished or prejudiced by any free gift or other gratuitous payment or conveyance made by his father to the defender, whether *inter vivos* or *mortis causa*. (5) The pursuer is entitled to the benefit of collation both in heritage and in moveables received by the defender from his father, whether by deed *inter vivos* or *mortis causa*."

The defender pleaded, *inter alia*—"(2) Legitim being in any case a personal claim, and only payable and ascertainable after all debts and funeral and executry expenses are satisfied, and the defender, as executor foresaid of his deceased father, being entitled by law to, and bound to, await a period of six months from the day of the deceased's death within which to settle all claims, and when all claims will be settled and the free estate known, the present action is incompetent. (4) The sum out of which legitim is payable is the personal estate as at the date of the deceased's death (irrespective of, and not including, free gifts and others bestowed on the defender by the deceased), and that being as shown by the state herewith produced, the pursuer is entitled to decree for the one-fourth shown in the state, and to no more. And the defender is entitled, *quoad ultra*, to be assoilzied, with expenses."

The Sheriff-Substitute (Cheyne) on 9th November 1875 granted a diligence for recovery of all documents tending "to instruct (1) advances of money or payments made by the deceased Thomas Douglas, pursuer's and defender's father, or on his behalf, to or on behalf of the defender; and (2) the particulars and value of the moveable estate belonging to the said Thomas Douglas at the date of his death." And to his interlocutor added the following note:—

"*Note.*—It will be gathered from my not having granted so wide a diligence as was moved for by the pursuer that I have found myself unable to adopt his contention that the defender is bound to collate provisions of heritage that he may have received from his father (see Ersk. iii. 9, 24; Stair, iii. 8, 46; and More's Notes, 353; *Buccleuch* v. *Tweeddale*, 1677, M. 2369; *Marshall*, 1829, 8 S. 110; M'Laren on Wills, i. 157, note). Upon the other questions raised it is, as it seems to me, impossible to give any opinion at present. The difficulty in cases like the present lies not so much in saying what is the law (for the law of collation appears to be tolerably plain) as in interpreting the facts, so as to say whether particular advances fall within the scope of the law. It is necessary, therefore, to ascertain *ante omnia* (*a*) what advances the defender got from his father in his lifetime, and (*b*) on what footing they were made."

A reference to Mr Douglas' books shewed certain entries alluded to and explained by the Sheriff in an interlocutor of 28th February 1876, finding the true nett value of the estate to have been £6740, whereof one-half, or £3370, is in the circumstances as stated, the legitim. The other findings were as follows:—"Finds that there is evidence in process to establish that the defender received from his father, the deceased, during his lifetime, sums of money exceeding in amount the whole legitim fund, which sums he is, in a question with the pursuer, the deceased's only other child, bound to collate or impute towards legitim: Finds therefore that his claim to legitim must be held to have been satisfied, and that the pursuer is entitled to the whole legitim funds."

The note to the interlocutor was in these terms:—

"*Note.*—Dismissing the unimportant objections stated by the defender to Mr Moody Stuart's audit of the executry accounts, with the remark, in regard to the first of them, that the action to which it refers was in my opinion an unnecessary and vexatious proceeding, the expenses of which the defender may justly be left to pay out of his own pocket, I pass at once to what are really the substantial questions in the case, viz., whether and to what extent the defender is bound to collate the large advances which he admittedly received from his father during his lifetime. It will, however, be unnecessary for me in the simple view which I take to deal with several of the points raised by the pursuer on this branch of the case, and I may confine my remarks to the cash advances, amounting to £6000, referred to at the top of p. 2 of Mr Moody Stuart's report. As to these, the question comes to be, whether the mode in which they are entered in the deceased Mr Douglas' ledger (for the defender offers no evidence upon the point except his own oath, which it need hardly be said is inadmissible) is sufficient to establish that it was the deceased's intention that they or any of them should be in addition to legitim, and so exempt from collation. Now, I think it might with some plausibility be argued that the way in which the advance second in date (viz., the £1000 credited to defender under date 31st December 1866) appears in the ledger suggests that so far from the deceased intending it as a *præcipuum* over and above legitim, he intended it to be an advance towards the defender's portion or share of legitim, for he describes it as a sum 'allotted for his (*i.e.* defender's) business;' but be that as it may, it seems to me that no higher inference can be drawn from the fact that the deceased speaks of one of the advances as 'a gift,' and of the other two as 'free gifts, than that he did not intend them to be treated as loans of which repayment could be demanded; and accordingly I hold that there is nothing to take any of the three advances out of the general rule, according to which advances made by a father to his son in his lifetime are in a question of legitim subject to collation. But if I am right in that, then, as the advances in question exceed the amount of the legitim fund, the legal result is that the whole of that fund falls to the pursuer, and as he cannot, in my opinion, ask or get more than this, it becomes unnecessary to consider the question raised as to the liability to collation of the value of the harbour shares, or the question whether in collating the advances interest is to be added? The pursuer's agent, indeed, put his case higher than this, and argued, that as the defender had chosen to claim legitim, he must throw into the legitim fund the whole of the provisions received by him in his father's lifetime, no matter what their amount; and that the pursuer was entitled to decree for one-half of the fund so formed (which half would, of course, exceed one-half of the free executry); but such a view seems to me untenable, and indeed extravagant. The legitim fund is a fixed quantity. It is one-third or one-half, according to circumstances, of the free executry, and no claimant can possibly get as legitim more than that. The doctrine of collation only operates to regulate the distribution of the legitim fund (which otherwise would be divided among those entitled to rank upon it in equal shares), and the result of its being found—as has happened here—that one of the claimants has received by anticipation provisions exceeding in amount the whole of the legitim fund, is simply to exclude him from any share of it, and to leave it to the other claimant or the other claimants, as the case may be. See *Kay* v. *Kay*, 12th July 1844, 16 Jur. 550, and *per* Lord Curriehill in *Keith's Trs.* v. *Keith*, 17th July 1857, 19 D. 1066."

The defender appealed against both these interlocutors, but on 15th April 1876 the Sheriff (Maitland Heriot) adhered, adding to his judgment this note:—

"Although the sums involved in this case are considerable in amount, the Sheriff thinks that there is not much difficulty as to its disposal.

"The defender, who is the younger brother, got some heritable property conveyed to him by his father. The question, whether the pursuer is entitled to have that heritable property taken into account in fixing the amount of his legitim must be answered in the negative. It may be that an heir in heritage cannot claim a share of the legitim fund without taking into account the heritage which he has got as heir; but the defender got no heritage as heir; and, as stated by Erskine, iii. 9, 25, 'where a land estate or an heritable right is provided to a younger child, he is not bound to collate it.'

"Then as to the moveable estate left by the deceased, it falls in this case to be divided into two parts—(1) the dead's part, and (2) the legitim. As to the first of these—the dead's part—there seems to be no room for any dispute. The defender is entitled to the whole of it, in respect of the testament (No. 17 of process) executed by his father. As to the second of these—the legitim—it is now admitted that the pursuer is entitled to a share of the legitim fund, notwithstanding the terms of the testament, No. 17. The question next arises, whether the defender be entitled to a share of this legitim fund? He admits that he got from his father during his life three sums at least, viz.—£3000, £1000, and £2000, making together the sum of £6000. In such circumstances the Sheriff considers that, looking to the amount of the legitim fund in this case, the defender is excluded in respect of such gifts from claiming any share of the fund, and that the pursuer is entitled to the whole of it.

"But, then, the pursuer contends that the above three sums must be reckoned as debts due by the defender to his father's estate, and that they must be included in the executry estate. But looking to the terms of the entries in the book (No. 20 of process) kept by the deceased, the Sheriff cannot take that view. The accountant reports that that book 'is all holograph of the deceased.' That statement is not contradicted or disputed by either pursuer or defender in either of their objections to the report, Nos. 69 or 79 of process. The Sheriff therefore assumes the statement to be correct in point of fact. Let us see the terms of the entries—'1865, Decr. 25. By gift to him (my son James, payable as he requires it) £3000, say Three thousand pounds. J.D.' Then at a part of the book kept under the name of 'James E. Douglas,' occur the

following entries—'1866, Dec. 31. By allotted for his business, 'free gift £1000;' '1868, Decr. 31. By given over as free gift, £2000.' The Sheriff cannot in such circumstances regard these sums as debts due by the defender to his father, to be accounted for. The deceased evidently intended them not as loans but as gifts.

"With reference to the Dundee Harbour assignments for £1000, it seems to the Sheriff that, in the meantime at least, it cannot be included among the assets of the deceased. It is a question whether or not it be reducible. It appears to be regularly executed, and the assignment belongs to the marriage-contract trustees of the defender and his wife. The Sheriff is inclined to think that the deceased transferred the same as a marriage present to his son and his wife, but be that as it may, it stands as a good transfer, and must receive effect until reduced."

The defender appealed to the Second Division.

Authorities cited—Domat, ii. 4, 3; Stair, iii. 8, 26; *Skinner* v. *Skinner*, Dec. 20, 1775, M. 1872; *Webster* v. *Rettie*, June 4, 1859, 21 D. 915 (and Lord Neaves, Ordinary, there); *Nisbet's Trustees* v. *Nisbet*, March 10, 1868, 6 Macph. 567; *Johnston* v. *Cochran*, Jan. 13, 1829, 7 S. 226; *Keith's Trustees* v. *Keith*, July 17, 1857, 19 D. 1066.

At advising—

Lord Justice-Clerk—I am of opinion that this case has been very properly disposed of in the Court below, on grounds which are satisfactorily and clearly explained by the Sheriff and Sheriff-Substitute—[*His Lordship stated the facts*]. I have no doubt that these sums were intended as gifts and not as debts; and the learned Sheriffs have come to the same conclusion. The entries made by the father in his books show this very clearly; nor does it signify whether the gift was made by the father paying the money down or allowing his son to draw on him as occasion required. These sums are carried to the credit of the son's account in the father's ledger, and there is no reason to think that they were ever considered as debts he was bound to repay. I am therefore of opinion that to this extent the judgment of the Sheriff is right.

But the question remains, Was this "free gift" a *præcipuum* over and above the legitim, or must the appellant collate it before he can claim a share of the legitim fund?

This question belongs to a class which has been the subject of much discussion among all jurists who follow the civil law, whence we have derived the doctrine. I think it is well settled with us that a donation by a father to his son during his life, to set him up in the world (as these advances certainly were), is subject to collation, unless the father has, either expressly or by some clear implication, declared his intention to the contrary. The law is so stated by Mr Bell in his Principles, and is entirely borne out by the authorities quoted by him—from the case of *Skinner*, in 1775, to the recent case of *Nisbet*, in 1865. Domat's Treatise on the Civil Law was referred to by the appellant; but unless I misread what that author says (l. iii. t. 3, § 3), entirely confirms the view I have stated.

No doubt it is contended that the father has sufficiently indicated his intention that this should be a *præcipuum*, and that the intention of the father to this effect may be gathered from any clear indications of intention, although it be not directly expressed. Now, first, as regards the express words—the words "as a free gift," although certainly material, are at the best ambiguous. They might be satisfied by being referred to a gift as distinguished from a debt, although they may also bear the interpretation that the advance was not only a gift, but was also free of any other legal result or liability. Between these constructions I think the balance must be cast by the circumstances. If the sum had been inconsiderable compared to the father's means, these words would have given great weight to the appellant's contention. But when I see that they amounted to two-thirds of the father's estate, I think we must look for some more direct and unambiguous evidence of intention before we can assume that the father meant to effect so great an inequality between his sons.

There is a passage in Voet's Commentaries on the Pandects which seems apposite. The author leans to the opinion that pure gifts are not subject to collation except in two specified cases. But he says (37, 6, 14)—"Diversum est si quid non simpliciter ad donationem, sed ad instructionem tabernæ, vel officinæ, vel generalius ad mercaturam exercendam, aliasque similes causas, liberis a parente datum esset; id enim collationi subesse placuit."

Lord Neaves—I have come to the same result, and upon precisely the same grounds. Legitim was an introduction made at some very early period, either in deference to public feeling, or by jurists, to act as a check upon any extreme partiality of a parent to his children. How far this check is to go becomes a question, and that leads us into the difficulties which arise in such matters. I quite agree with your Lordships that, in cases like the present, "gift" is a word of extreme ambiguity. Legitim is a check upon the father's administration of his own funds, against his giving them away beyond a certain amount just before his death, or by bequest, so as to favour one child above another. When ultimately accounts come to be settled, advances thus made must be imputed as to share of legitim. These appear to me to be wise and equitable considerations, and the presumption of law requires a clear and distinct evidence of counter-intention, which the words used here do not give.

Lord Ormidale—I concur with your Lordships in thinking that the Sheriff has decided rightly in this case.

The advances which form the subject of dispute were not, and could not, be said to be in any correct sense such as a father is always understood to make to or for his children, irrespective altogether of any question of legitim. They were certainly not made for the purposes of education or aliment; and are not of a small or inconsiderable amount. On the contrary, they were advances large in amount, and made to a younger son, who was forisfamiliated and engaged in business on his own account, for the purpose of assisting him in his business. In ordinary circumstances such allowances would clearly fall to be taken into computation in adjusting the division of legitim, or, to put it

differently, would require to be collated as in a question with the other children. It is true, however, that the father might, if he pleased, have made the advances on the footing, either express or implied, that they were not to be dealt with, but to be held as a *præcipuum.* There is certainly nothing expressed to that effect in this case, and, in my opinion, there is nothing in the circumstances sufficient to imply it. The expression "free gifts" must, I think, be held as intended merely to denote that the advances were not debts, payment of which could be enforced by the father from his son.

Lord Gifford—I concur. The question involved is a very wide one. It has not been made out here that the gift was a *præcipuum,* and as such not imputable to legitim. It is not enough to prove that the money was a "free gift." It must be shown that it was given over and above legitim. This test appears to me conclusive. Suppose the father had changed his mind and come to favour the eldest son, would he not have had to impute? The position really is the same. Advances to a child may be of three kinds—first, loans; secondly, gifts not to be repaid, but still imputable to share of legitim; and lastly, *præcipua,* which must be perfectly clearly intended.

The Court dismissed the appeal, adhered to the judgment of the Sheriff, and found the respondent entitled to expenses.

Counsel for Appellant — Fraser — Thoms. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Respondent — Lord Advocate (Watson)—M'Laren. Agent—William Archibald, S.S.C.

Wednesday, November 8.

SECOND DIVISION.

[Sheriff-Substitute of Fifeshire.

MILLAR *v.* BIRRELL.

*Succession—Mutual Deed—Deed produced in Judgment—Testing Clause—Agreement—*Jus mariti*—Executor.*

A husband and wife made a mutual disposition and settlement, of which the testing clause was not filled up, nor was the signature of the wife attested. After the husband's death his widow and children agreed to deal with his estate as intestate, and entered into a deed of agreement regulating its division. The effect of the mutual settlement was to give a daughter one-third of her father's estate exclusive of the *jus mariti* of her husband, who at the time of the said agreement was abroad and living separate from his wife, and was not a consenter thereto. He subsequently came home, but never claimed his wife's share of the estate as falling under his *jus mariti.* After his death his son, as his executor-dative, claimed his mother's share of the deceased's estate, on the ground that the agreement was invalid and had not been acted on, and that his father had acquired right to her share *jure mariti.* In the Sheriff Court process the mutual deed was produced by him as an incomplete deed.—*Held* (1) That the mutual disposition and settlement had not been produced in judgment to the effect of preventing its subsequent completion; (2) (*diss.* Lord Ormidale)—that the testing clause having been filled up, the deed was effectual as a settlement of the husband's (the testator's) estate; and (3) that in the provisions to the daughter, the *jus mariti* of her husband having been excluded, the said husband's son and executor could not repudiate the will, and the conventional provisions made therein in favour of his mother, and claim her legitim free from the exclusion of the *jus mariti.*

This was an appeal from the Sheriff Court of Fifeshire against an interlocutor of the Sheriff-Substitute. The appellant was Thomas Millar, corn merchant, Kirkcaldy, executor-dative to his father, the deceased James Millar, farmer, residing at Annfield, in the parish of Auchterderran; and the respondent was Alexander Birrell, trustee on the sequestrated estate of William Martin, farmer, Kirkshotts, in the parish of Auchterderran.

The case came before the Sheriff on a note of appeal from a deliverance of the respondent as trustee aforesaid, rejecting a claim of the appellant to be ranked as a creditor on the estate of the bankrupt to the extent of £193, 4s. 10d. The circumstances in which the claim was made were as follows:—The bankrupt was executor-dative on the estate of his father, the deceased William Martin senior, formerly farmer, Kirkshotts, who died there on 5th February 1869. He was survived by his widow Mrs Janet Greig or Martin, and three children, Thomas Martin, Mrs Janet Martin or Millar, the appellant's mother, wife of the said deceased James Millar, and William Martin, the bankrupt. At the time of the death of William Martin senior, the said James Millar, the appellant's father, was absent from this country in Australia or elsewhere abroad, where he resided for many years apart from his wife (who remained in this country), and never remitted any funds for her maintenance. After the death of the said William Martin senior there was found a mutual disposition and settlement of his affairs, bearing to be granted by him and his wife, which however had not been completed by the filling up of the testing clause, nor was the wife's signature attested by witnesses. His widow and children, including the bankrupt and Mrs Millar, thereafter entered into an agreement by which they agreed to deal with the deceased's estate as intestate, and regulated the manner in which it should be divided by the bankrupt, who undertook to get himself appointed executor. To this deed the said deceased James Millar, the appellant's father, was not a consenting party. Questions arose between the parties as to whether this deed was being duly carried out, and on proof it appeared that it had not been strictly adhered to, but no challenge of the agreement was ever made by any of the parties thereto on the ground that the appellant's father was not a consenter thereto. About three years before his death the appel-