Lordship also explained to the jury the function which they had to discharge and the questions they had to answer, so far as the facts and the questions of probable cause and malice were concerned; and when the rule under which we are now considering the matter was moved for, Mr Scott explained that in the event of the verdict being set aside it was the defender's purpose to ask under the statute I have referred to that instead of a new trial being granted judgment should be entered in favour of the defender so as to avoid any further procedure. Therefore the pursuer was well certiorated that in the event of our coming to the conclusion unanimously that the verdict could not stand, the motion which the Solicitor-General has now made would be advanced.

Mr Blackburn has said that there were some witnesses who had been cited at the trial but who were not examined, but he has not said anything foreshadowing evidence which would have any effect upon the question we are now considering—the only question we have had to consider in the discussion before us to-day—namely, the question of malice, or indeed foreshadowing in any way the nature of the evidence which these witnesses are expected to give. I am, therefore, of opinion that we ought to come to the conclusion that we have before us all the evidence that can be reasonably expected to be obtained relevant to the cause, and that we ought to grant the Solicitor-General's motion. On the best consideration I have been able to give to the statute I think that in such cases it is not enough merely to be able to state that there are other witnesses who might be examined at the new trial; they must be witnesses who are able to give evidence on the particular point in controversy, and who for some reason were not examined at the previous trial. I find no explanation or averment made on behalf of the pursuer which really touches on the only question we have had to consider, and therefore I am of opinion that we ought to assoilzie the defender instead of granting a new trial,

LORD DUNDAS—I entirely agree. The pursuer had full and fair warning that in a certain event this motion would be made. She is not able to state in any definite or categorical manner what evidence she thinks it reasonable or possible to adduce to elucidate the matter upon the points involved in the judgment which has just been delivered.

LORD SALVESEN — I am of the same opinion. I think this is a typical case for applying the recent Act of Parliament.

LORD GUTHRIE—I agree.

LORD ORMIDALE—I concur.

The Court pronounced this interlocutor—

". . . Make the rule absolute, set aside the verdict, and being unanimously of opinion that the verdict is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, assoilzie the defender from the conclusions of the action. . . ."

Counsel for the Pursuer—Blackburn, K.C. —Hamilton. Agent—J. Gibson Strachan, Solicitor.

Counsel for the Defender—The Solicitor-General (Morison, K.C.)—Scott. Agent—Alexander Ross, S.S.C.

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*Wednesday, May 30.*

## FIRST DIVISION.

[Lord Cullen, Ordinary.

## DUNCAN *v.* CRICHTON'S TRUSTEES AND OTHERS.

*Succession — Legitim — Collation inter liberos — Daughter to whom Testator Made Donations during his Life Claiming under a Settlement which Provided for Payment to her of her Claim of Legitim.*

A testator by his settlement conveyed his estate to trustees, *inter alia*, "for payment to each of [his] two daughters or the survivor of them of their or her respective claims or claim of legitim from [his] estate." He had made gifts during his life to one of his two daughters who made a claim under the above-quoted clause. *Held* (*sus.* Lord Cullen, Ordinary) that the daughter's claim was a claim for legitim, not for a bequest under the will, and as such was subject to collation unless it could be shown that the gifts were of such a nature that they did not fall within the classes of gifts that were subject to collation. *Proof* before answer allowed as to the making and value of the gifts and (*alt.* Lord Cullen) of averments to the effect that the gifts were by way of recompense for services rendered.

Mrs Annie Crichton or Duncan, *pursuer*, brought an action against (1) Thomas Smith and others, the testamentary trustees and executors of the deceased James Crichton, watchmaker and jeweller, Glasgow, father of the pursuer, and (2) for any interest they might have, against Mrs Margaret Russell Crichton or Bissett and others, *defenders*, concluding, *inter alia*, for decree that "the defender the said Mrs Margaret Russell Crichton or Bissett is bound to collate, as a condition of sharing in the said legitim fund, the following payments and gifts made and given to her by her father the said James Crichton during his life, or the value thereof, viz., (*first*) three thousand shares of one pound each fully paid of James Crichton, Limited; (*second*) the furniture and plenishing of the villa at Wemyss Bay which was owned by the said deceased James Crichton; (*third*) the furniture and plenishing of the house fifteen Belmont Crescent, Glasgow; and (*fourth*) the sum of seven hundred and fifty pounds sterling, being a payment of two hundred and fifty pounds per annum during each of the three years between

the date of the marriage of the said Mrs Margaret Russell Crichton or Bissett and the date of the death of the said James Crichton."

The pursuer pleaded, *inter alia*—"3. On an accounting the defender Mrs Bissett is bound to collate all gifts received by her from her father as condescended on."

The defenders Mr and Mrs Bissett pleaded —"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. On a sound construction of the trust-disposition and settlement of the late James Crichton, the defender Mrs Bissett not being bound to collate the gifts received by her, decree of absolvitor should be pronounced. 3. The gifts by the late James Crichton to the defender Mrs Bissett not having been intended to be imputed as advances towards the provisions in her favour under his trust-disposition and settlement do not fall to be collated by her, and decree of absolvitor should be pronounced."

The *facts* of the case appear in the opinion of the Lord Ordinary (CULLEN), who on 17th April 1917 repelled the pleas-in-law for the defenders Mr and Mrs Bissett and allowed "the pursuer and the defenders Mr and Mrs Bissett a proof of their respective averments (1) *quoad* the fact of the making of the gifts by the deceased James Crichton to the defender Mrs Bissett mentioned in the declaratory conclusion of the summons so far as the making of these gifts is not admitted by the defenders Mr and Mrs Bissett, and (2) *quoad* the values for purposes of collation of the said gifts mentioned in the declaratory conclusion of the summons," and granted leave to reclaim.

*Opinion.* — "The late James Crichton, watchmaker and jeweller in Glasgow, died in September 1915, survived by his second wife and by two daughters of his first marriage. The pursuer Mrs Duncan is one of the daughters, and the defender Mrs Bissett is the other. The other defenders are the deceased's testamentary trustees under his trust-disposition and settlement, dated 28th February 1912.

"The third purpose of the settlement was — 'For payment and satisfaction to my wife of her legal claims and *jus relictæ* from my estate; and also for payment to each of my two daughters, or the survivor of them, of their or her respective claims or claim of legitim from my estate.'

"The deceased by his settlement made several conventional provisions in favour of his wife, including a liferent of the residue of his estate. As regards the defender Mrs Bissett, he gave her (1) an annuity of £250 per annum, and (2) a liferent of the residue in the event of her surviving her stepmother from and after the latter's death. He gave no conventional provision to the pursuer Mrs Duncan. The fee of his estate he bequeathed to his grandchildren or their issue. *De facto* the grandchildren are, as I was informed, the children of Mrs Duncan.

"Mrs Duncan claims her legitim from her father's moveable estate. Mrs Bissett is also entitled to legitim. Under the terms of the settlement, and in particular the *third* purpose thereof, she is entitled to legitim in addition to her conventional provisions in the same way as the widow is entitled to *jus relictæ* in addition to her conventional provisions.

"In the first conclusion of the present action Mrs Duncan demands an accounting from her father's trustees for her legitim. There is so far no question to be considered in relation to the trustees. The question now calling for consideration is raised by the declaratory conclusion of the (amended) summons, which is directed against Mrs Bissett, and under which Mrs Duncan seeks to have it declared that Mrs Bissett is not entitled to claim and receive legitim from the deceased's moveable estate except on the footing of collating the values of certain gifts made or alleged to have been made to her by the deceased during his lifetime.

"These gifts, as alleged by the pursuer, are specified in the declaratory conclusion of the summons and in the condescendence. They are as follows: — (1) 3000 shares of £1 each, fully paid, of 'James Crichton, Limited,' a company formed on 1st March 1912 to take over the deceased's business; (2) the furniture and plenishing of a villa at Wemyss Bay which belonged to the deceased, alleged by the pursuer to be worth £500; (3) the furniture and plenishing of a house at 15 Belmont Crescent, Glasgow, alleged by the pursuer to be worth £400 to £500; and (4) the sum of £750, made up of three sums of £250 each, paid by the deceased to Mrs Bissett during the period between the date of her marriage in June 1912 and his death in September 1915.

"As regards the fact of these gifts having been made, Mrs Bissett admits the gift of the 3000 shares of James Crichton, Limited, and also the gift of the furniture and plenishing of the villa at Wemyss Bay. She does not admit having received the other gifts alleged by the pursuer. She further challenges the values put by the pursuer on the various gifts admitted or denied by her.

"On the questions of fact proof would be necessary (1) *quoad* the gifts which Mrs Bissett denies the receipt of, and (2) *quoad* the values of the gifts which she admits, or which may be proved to have been made to her.

"Mrs Bissett, however, has in the first plea a preliminary plea which, she contends, displaces the pursuer's case altogether as regards the gifts either admitted or alleged to have been made to her. This plea is founded on the terms of the third purpose of the deceased's settlement. She says that in claiming legitim she is not claiming it *ex lege* so as to be bound by the legal rule as to *collatio inter liberos*, but is claiming, under said third purpose, a conventional provision, the amount of which is intended to be the amount of her share of the legitim fund on the basis of no collation taking place. I am unable to sustain this view. The deceased could not test on the legitim fund. The claims of his daughters to legitim were vested in them *ex lege*. He could not deprive them of their legal claims, and he

could not bequeath to them such claims. All that the deceased in the third purpose of his settlement directs his trustees to do is to satisfy (1) his widow's legal claims and (2) his daughters' claims of legitim. While it is to be gathered from the settlement that the testator intended that his widow should have her *jus relictæ* and that Mrs Bissett should have her legitim in addition to the conventional provisions made in their favour respectively, I am unable to see in the settlement any expression of intention by the deceased to the effect that in settling the legitim claims of the daughters these claims were to be measured otherwise than in accordance with the common law rules relating to legitim. It is their common law claims to legitim, and nothing different, that he directs his trustees to pay and satisfy under the third purpose.

"At the date of the settlement the deceased had not made to Mrs Bissett any of the gifts now in question.

"A further question at this stage arises out of the averments made by Mrs Bissett. *Esto* the gifts admitted by Mrs Bissett were made, she advances averments of fact regarding the quality of these gifts which, if substantiated by proof, are sufficient, she maintains, to infer that the gifts do not belong to the class of gifts or advances by a father to a child which fall to be collated *inter liberos*. Mrs Bissett explains that she lived in family with her father and her mother, who was an invalid, until the death of her mother, and thereafter with her father until her marriage in June 1912, prior to which date her father had, in September 1911, married again. She further explains that, so living in family with her parents, she had acted a filial part in attending to the requirements of the household, and in particular in attending to the villa at Wemyss Bay, where her father latterly spent a good deal of his leisure time. She sums up her case as to the quality of the gifts in statement 5 of her statement of facts, where she says—'The said gifts to the defender Mrs Bissett were made by the said James Crichton as a recompense for her trouble in keeping house for him for a long period of years, and as a mark of appreciation of the way she had looked after his wants and comforts.' To this she adds—'The defender Mrs Bissett so understood at the time the gifts were made, and the deceased so informed his wife the defender Mrs Agnes M'Callum Fraser or Crichton, telling her at the same time that he had made a new will under which the pursuer would get nothing but her legal rights.' It would thus appear that when the gifts in question were made to Mrs Bissett they were not accompanied by any announcement to her of the reason why they were given. Mrs Bissett only "so understood." It is difficult to see how the uncorroborated testimony of Mrs Crichton as to what the deceased told her—which is all Mrs Bissett offers—could substantiate her case as to the motive which influenced the deceased in making the gifts. And while the deceased is said to have told his wife that he had made a will under which the pursuer would get 'nothing but her legal rights,' the whole question here is as to the measure of the pursuer's legal rights in the circumstances. Assuming it proved, however, that the deceased made the gifts in question to Mrs Bissett for the reasons averred by her, the pursuer maintains that the gifts are none the less such as fall to be collated according to law.

"This raises a general question as to *collatio inter liberos*. The citation of authorities with which I was favoured was somewhat meagre, but probably it represents all that is available. On a consideration of the authorities cited it appears to me (1) that where a father, *inter vivos*, makes payment or transfer of substantial portions of his moveable estate to one of his children, the value thereof falls, *prima facie*, to be collated by the favoured child in claiming legitim after his death, (2) that the father may exclude collation by a sufficient expression of his intention that the payments or transfers are to be *præcipua*, and that it is not necessary that his intention should be declared *unico contextu* with the making of them; (3) that in the absence of such an expression of intention by the father, so that the question is whether collation is excluded by the nature of and reasons for the payments or transfers, the most satisfactory statement of the law on the whole is that made by Lord M'Laren in 'Wills and Successions,' chapter viii, sec. 2. In section 329 (pp. 168-9 of third edition) Lord M'Laren says—'Collation does not extend to testamentary or deathbed provisions, for these are chargeable against the executry or dead's part and do not tend to diminish the legitim fund; nor to funds given by the father in his lifetime as a donation in addition to legitim or with the equivalent explanation that the grantee is not to collate or that he should have an equal proportion of his goods at his death or is to be considered a bairn in the house. Some other exceptions have been recognised by the decisions which may be reduced to the following heads—(1) Advances intended as a recompense for services rendered; (2) advances for maintenance and education in minority or prior to emancipation, and which are due *ex debito naturali;* and (3) advances made in loan and for which the grantee was liable in repayment to the father and his executors. In short, collation applies to provisions as distinguished from payment under obediential obligations, or which are made on the footing of contract.'

"As regards this statement of the law, I only desire to point out as regards the case of a child to whom grants of moveable estate had been made being declared by the father to be 'a bairn of the house,' *Beg* v. *Lapraik*, 1737, M. 2379, that (as the footnote to section 329 mentions) this case was doubted by Erskine, iii, ix, 25, for the natural reason that to style the child a 'bairn of the house' did not import a ruling by the father as to the proportion of the legitim fund which the child was to be entitled to take as a 'bairn' admitted to participation in it. Lord M'Laren, it will

be observed, in his ultimate observation in section 329, states the exceptional cases not calling for collation to be those of grants made (1) under obediential obligations, or (2) on the footing of contract, and that the contrast is with 'provisions.' No clear definition of what is a 'provision' is to be found in the authorities so far as the authorities cited to me go, beyond this, that it excludes casual gifts of inconsiderable amount —such as, for example, birthday presents, or gifts intended for immediate consumption.

"I do not think, however, that here we are in this rather indeterminate region. The gifts made or alleged to have been made by the deceased to his daughter Mrs Bissett were all of very substantial portions of his moveable estate, and on the averments appear to have been made for the purpose of endowing or enriching her in the world. Such gifts I take to be 'provisions' in the sense of that word as used by Lord M'Laren. They do not fall under his two exceptional categories of payment made (1) under obediential obligations, or (2) on the footing of contract. The defender Mrs Bissett, it is true, argues that, on her averments, they fall under the first of these exceptional categories. I am unable to adopt this view. Her averments do not seem to me to disclose an 'obediential' obligation on the part of the father. All she says amounts to no more than this, that her filial conduct while a member of her father's household—involving nothing very remarkable—inspired him with a partiality for her, inducing him to endow her, *inter vivos*, with a considerable part of his moveable wealth. I am unable to see that this makes an exceptional case avoiding collation. When a father *inter vivos* voluntarily strips himself of substantial portions of his moveable estate by making them over to a particular child or to particular children, he usually does so in favour of children whose conduct has commended them to him.

"I am unable to discern in the averments made by the defender Mrs Bissett any case to the effect that she had performed services to her father in respect of which she had any legal claim against him. Her counsel agreed as to this. Nor do they seem to me to raise a case of an obediential obligation. She seems on her averments simply to have acted a filial part in her father's home until she left it on her marriage. Thus it results on her averments that the gifts admitted to have been made to her were gifts made merely from a sentiment of partiality induced in the mind of her father owing to her having followed a due course of filial conduct. On this footing I am of opinion that the said gifts fall to be collated, and that the averments made by Mrs Bissett as to the deceased's motives in making them are irrelevant, if proved, to avoid collation.

"I should perhaps mention, as regards the three alleged payments of £250 made by the deceased to Mrs Bissett during the period between the date of her marriage in June 1912 and his death in September 1915, that her counsel argued that these payments should be regarded as annual alimentary allowances made by the deceased to her 'from income,' and should, so viewed, be held excluded from collation. Mrs Bissett, however, does not admit the fact of these alleged payments having been made and has no averments about them. On the pursuer's averments they figure simply as three gifts of £250 each."

The *statement* of facts for the defender, referred to by the Lord Ordinary, was in the following terms:—"(Stat. 5) At the time when he executed his said trust-disposition and settlement the said James Crichton had arranged for his business being converted into a limited liability company, and for an allotment of shares to the defender Mrs Bissett. The memorandum and articles of the said company were signed on 29th February 1912 and the said company was registered on 1st March 1912. Immediately on the company being formed 3000 shares were allotted to the defender Mrs Agnes M'Callum Fraser or Crichton and 3000 shares to the defender Mrs Bissett as gifts from the said James Crichton. By disposition dated 11th October 1912, and recorded 26th February 1913, the said James Crichton gifted to the defender Mrs Bissett his villa at Wemyss Bay. He also gifted to her the furniture therein. The said gifts to the defender Mrs Bissett were made by the said James Crichton as a recompense for her trouble in keeping house for him for a long period of years, and as a mark of appreciation of the way in which she had looked after his wants and comforts. The defender Mrs Bissett so understood at the time the gifts were made, and the deceased so informed his wife the defender Mrs Agnes M'Callum Fraser or Crichton, telling her at the same time that he had made a new will under which the pursuer would get nothing but her legal rights. Said gifts were not intended as payments in advance out of the share of the legitim fund bequeathed to the defender Mrs Bissett, and accordingly do not fall to be collated by her."

The defenders Mr and Mrs Bissett reclaimed, and argued—Mrs Bissett was not bound to collate the gifts to her. The third purpose of the settlement contained a legacy to her of her legitim. The word legitim was used solely to indicate the *quantum* of the gift and not to indicate in what capacity her claim was to be held to be made. Thus the use of "legitim" fixed the *quantum* of the gift at one half of one third of the free executry, for that was the amount of the legitim—Fraser, H. & W., 2nd ed. ii. 1033-54. But Mrs Bissett claimed that *quantum* not as a child but as a beneficiary under the will taking a legacy left to her. If she had been an illegitimate child she would still have been entitled to that amount of the estate. If she claimed *qua* beneficiary under the will, then there was no room for collation, for collation assumed a competition between *children* claiming legitim; no such competition existed if Mrs Bissett's claim was *qua* beneficiary—*Coats' Trustees* v. *Coats*, 1914 S.C. 744, *per* Lord President Strathclyde at p. 748 and Lord Mackenzie at p. 751, 51

S.L.R. 690; *Monteith* v. *Monteith's Trustees*, 1882, 9 R. 982, *per* Lord Rutherfurd Clark at p. 1008, 19 S.L.R. 740; Justinian's Inst. ii, 18, pr., was referred to as showing the origin of the doctrine of legitim. But if there was room for collation the circumstances were not such as to admit of the claim, for the terms of the will indicated that the testator's intention was that each child should receive her legitim intact, and further the advances in question were not of a kind which required to be collated, being of a remuneratory nature—*Minto* v. *Kirkpatrick*, 1833, 11 S. 632—or being intended as a recompense for services rendered—M'Laren, Wills and Succession, 3rd ed., sec. 329. In any event proof that the advances were for services rendered should be allowed.

Argued for the pursuer (respondent)—Mrs Bissett was not claiming any conventional provision under the settlement; the testator did not bequeath her legitim to her, but merely directed his trustees to settle her claim for legitim. That was exactly on the same footing as a direction to pay deathbed and funeral expenses. It assumed that a claim for legitim was made apart from the settlement and directed payment thereof. Such a claim was an ordinary common law claim for legitim by a child as such, and consequently it was subject to collation—*Coats'* case (*cit.*). Assuming the claim was subject to collation, the averments relating to the nature of the gifts were not relevant to instruct that they did not fall within the category of gifts requiring to be collated. The general rule was, all advances must be—Ersk. iii, 9-24. Clear and unambiguous averments and proof were necessary to show that an advance did not fall under the general rule—*Douglas* v. *Douglas*, 1876, 4 R. 105, 14 S.L.R. 54. Here the averments were too vague to go to proof. Mrs Bissett merely understood the gifts were for services rendered. The averments showed the gifts were for a settlement in the world or were the return for the performance of mere filial duty, and that did not bring them amongst the excepted cases—*Nisbet's Trustees* v. *Nisbet*, 1868, 6 Macph. 567, 5 S.L.R. 369; *Malcolm* v. *Campbell*, 1889, 17 R. 255, 27 S.L.R. 207. Further, there was not here, as there was in *Minto's* case, (*cit.*) any legal right in Mrs Bissett to the advances in question.

LORD PRESIDENT—I am, on the whole, well satisfied with the result which the Lord Ordinary has reached in this case, and with the reasoning in his opinion.

The terms of the bequest here involved in the trust-disposition and settlement of the late Mr Crichton are unusual, but by no means unintelligible or difficult to construe. He intended to say to his trustees—and I think has said—that they ought to acknowledge and admit his wife and his daughters' claims for their legal rights, upon the assumption that they make these claims. If the daughters make their claims, they must make them according to the rules and subject to the conditions laid down in the common law of Scotland; and that is sufficient, I think, to warrant us in repelling the second plea-in-law for the defender Mrs Bissett, and in affirming the Lord Ordinary's judgment in so far as his interlocutor deals with that plea, and further, allow a proof.

On the question of whether or no the averments in the fifth article of the statement of facts for the defender Mrs Bissett are relevant or irrelevant, my present impression is that they are not relevant, but inasmuch as proof is to be allowed of the fact that these gifts were made, and of the amount of these gifts, I am not averse to expanding that allowance of proof so as to embrace the averments of the fifth article. For it may be that, contrary to my impression, it will be shown that they are of the nature of a recompense for services rendered (I adopt the phrase from the passage in Lord M'Laren's work which has been quoted to us), and, if so, it may be that they are not subject to collation.

I propose to your Lordships that we should recal the interlocutor of the Lord Ordinary, repel the second plea-in-law for the defender, and allow a proof, as his Lordship has done in the interlocutor under review, adding an allowance of proof of the averments made in the fifth article of the statement of facts for Mrs Bissett—of course, proof before answer.

LORD JOHNSTON—I agree with your Lordship in the result which you have arrived at. I do not think that we can treat the third head of the settlement as in a proper sense a bequest. I think it is a direction to trustees to pay a debt. The testator was aware that his wife and his children by his former marriage had not renounced in any way their legal claims. And just as much as he says that he gives his estate to his trustees for the payment of his just debts, so I think he goes on to say "I give my estate to my trustees, *inter alia*, for payment and satisfaction of my wife's *jus relictæ*." I think there is a great deal in the words "and satisfaction," because he shows that he was contemplating the satisfaction of a legal claim. He then proceeds —"And also for payment"—I admit that he does not repeat the word "satisfaction," but I think it must be inferred that he meant the same thing—"and also for payment to each of my two daughters, or the survivor of them, of their or her respective claims or claim of legitim from my estate," and then he goes on to give bequests which are really his disposal of the dead's part. All that his settlement does therefore is to leave his trustees to satisfy the legal claims of his wife and daughters. The amount of these have, of course, to be ascertained. But the adjustment of the legitim fund determines only the debt of the estate. It does not in any way settle the legal claims which the children respectively may have on the fund, because *inter se* these legal claims may be affected by the demand for collation. I can find nothing in this settlement to exclude any one of these daughters from demanding that when there comes to

be a division of the legitim fund any right which she may have to demand collation be given effect to.

Other questions in the case cannot be determined without proof.

LORD MACKENZIE—I entirely agree with the passage in the Lord Ordinary's opinion in which he says—"It is their common law claims to legitim, and nothing different, that he directs his trustees to pay and satisfy under the third purpose;" and that is sufficient for the disposal of the second plea-in-law stated for Mr and Mrs Bissett.

In regard to the point raised by the third plea-in-law, I think that, looking to the fact that there is to be a proof in any event, it is desirable to extend it as suggested by your Lordship in the chair.

LORD SKERRINGTON—I agree with your Lordships. I do not wish to express any disagreement with the Lord Ordinary's view of the law, but I think that it would be safer to know the precise circumstances before giving judgment.

The Court pronounced this interlocutor—

"Recal said interlocutor [17th April 1917]: Repel the second plea-in-law for said defenders: Of new allow the pursuer and the said defenders a proof of their respective averments (1) *quoad* the fact of the making of the gifts by the deceased James Crichton to the defender Mrs Bissett mentioned in the declaratory conclusion of the summons so far as the making of these gifts is not admitted by the defenders Mr and Mrs Bissett; and (2) *quoad* the values for purposes of collation of the said gifts mentioned in the declaratory conclusion of the summons: Further, before answer, allow the said defenders and the pursuer a proof of their averments contained in statement 5, and the answer thereto of the statement of facts for said defenders and the answers thereto for pursuer, and remit the cause to the Lord Ordinary to proceed as accords."

Counsel for Pursuers (Respondents)—Mitchell. Agents—W. B. Rankin & Nimmo, W.S.

Counsel for Defenders (Reclaimers) Mr and Mrs Bissett—The Lord Advocate (Clyde, K.C.)—MacRobert. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders (Respondents) Crichton's Trustees—Maclaren. Agents—Webster, Will, & Company, W.S.

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*Wednesday, May 30.*

## SECOND DIVISION.

[Sheriff Court at Falkirk.

## JAMES NIMMO & COMPANY, LIMITED *v.* MYLES.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1, *First Schedule—Partial Incapacity—Employers Refusing to Pay Full Compensation for One Week during which the Workman's Earnings together with his Compensation Exceeded his Average Weekly Wage before the Accident.*

A workman who was receiving compensation as for partial incapacity earned during one week wages which together with his compensation would have amounted to more than his average weekly wage prior to the accident. His employers offered him only so much of his compensation as would with his earnings equal his former weekly wage. He refused that offer and charged his employers on the recorded memorandum. The employers made no application for review of the weekly payments. *Held*, in a suspension of the charge by the employers, that as the workman's earnings in one week were no criterion of his average weekly earnings the workman was entitled to charge the employers, and the suspension *refused*.

*Opinion reserved* as to the competency of the suspension.

James Nimmo & Company, Limited, coal masters, Redding, Polmont, *pursuers*, presented a note of suspension in the Sheriff Court at Falkirk in which they sought to suspend a charge at the instance of Matthew Myles, miner, Reddingmuir, Polmont, *defender*, upon a recorded memorandum under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), for payment of fifteen shillings, being compensation for one week.

The *facts* of the case were as follows:—"(Cond. 2) It is explained and averred that defender's average weekly earnings prior to his accident were 36s.; that he was paid compensation to 3rd February 1917, the payment for the week ending on that date being 15s.; that for the week ending on 10th February 1917 defender earned 23s. 4d. and was offered but refused 12s. 8d. as compensation for that week; that in charging pursuers to pay him 15s. as compensation for the week ending 10th February 1917 defender has charged for 2s. 4d. more than the full difference between his earnings for that week and his average weekly earnings prior to his accident, and that said charge is therefore inept and incompetent. (*Ans.* 2) With reference to the amended statement No. 2 for pursuers, it is admitted that defender's average weekly earnings prior to the accident were 36s., and that he was paid compensation to 3rd February 1917, the payment for the week ending on that date being 15s. It is further admitted that for the single week ending on 10th