the Crown, and against the proprietor, if the Crown be not proprietor, only in this sense, that it is the exercise of rights with which the property, whether in the Crown or proprietor, is necessarily burdened in favour of the public. There is no doubt some evidence going further, showing that persons were in the habit of taking reeds and sand from the shore, but I think that was generally done surreptitiously. It was generally stopped, and the extent to which it was carried was so trifling that it cannot be regarded as of any real weight in a question with a proprietor who was defending his right, both in the case of Mr Buchanan and his predecessors, and Mr Geils and his predecessors. That being so, it appears to me that the interlocutor of the Lord Ordinary should be plainly affirmed. In the case of Lord Blantyre the rights of the Clyde Trustees as well as of the public were reserved; but if I am not mistaken the Clyde Trustees were parties to that litigation, and requested that their rights should be so reserved. They are not parties here, and I think the Lord Ordinary has adopted the proper form of interlocutor, the interlocutor being precisely as in Lord Blantyre's case, omitting all reference to the Clyde Trustees.

Lord President—I entirely agree with the view Lord Mure has taken both of the titles and the evidence of possession in these cases, and I should not have thought it necessary to add even a single word had it not been that this is the first occasion upon which we have been called upon to consider and apply the 34th section of the Conveyancing Act of 1874. That section provides among other things that "possession following on a recorded title, "for the space of twenty years continually and together, and that peaceably without any lawful interruption made during the said space of twenty years, shall for all the purposes of the Act of the Parliament of Scotland, 1617, cap. 12, anent prescription of heritable rights, be equivalent to possession for forty years by virtue of heritable infeftments for which charters and instruments of sasine or other sufficient titles are shown and produced, according to the provisions of the said Act." Now, the only doubt that could be suggested about the application of that section, I think, to the present cases arises from the use of these words, "shall for the purposes of the Act of Parliament 1617, cap. 12," because that statute does not in precise words apply to this case. The strict letter of the Act of 1617 would make it only applicable to cases where the property in dispute was expressly mentioned in the charter of sasine or in the other titles. But while that is undoubtedly the literal and most strict interpretation of the Act of 1617, it is quite apparent that that was not the intention of the Act of Parliament in passing that statute—I mean the intention was not to confine it strictly to such cases; and accordingly from a very early period that statute received a somewhat extensive interpretation, as a great many of our ancient Scottish statutes have done. The extensive interpretation of which I speak, is stated perhaps better by Mr Erskine than by any other author in a passage of his 3d book, 7th title and 4th section, where he says—"A right or subject may be carried by prescription, though it be not expressed in the prescriber's charter, if he shall have possessed it for forty years as part and pertinent of another subject specially mentioned in it. This obtains though his competitor shall have been specially infeft in the subject in dispute, unless he has also taken care to preserve his right either by acts of possession or of interruption within the years of prescription;" and he cites two cases, one in 1677 and the other in the year 1711; and he then adds —"But if the subject cannot by its nature be counted a pertinent of the lands in which he who claims prescription is infeft, prescription cannot be admitted, an instance of which has been already given in the case of a bounding charter." And I have no doubt your Lordships all recollect the application of that construction of the Act of 1617 to the very remarkable case which occurred regarding the Sleepless Island in the Tay between *The Magistrates of Perth* and *Lord Wemyss*, November 19, 1829, 8 S. 82.

I have no doubt, therefore, that this 34th section in using the words "shall for all purposes of the Act of 1617 be equivalent to possession of forty years," intended that it should be for all the purposes of that Act as interpreted in the decisions of the Court. Therefore I entirely agree in holding that in a case like this, which is a case of prescribing a part and pertinent, twenty years' prescription and not forty years' is now applicable. We shall simply adhere to the interlocutors in the two cases.

The Lords adhered.

Counsel for Pursuers—J. P. B. Robertson—Darling—Forbes. Agents—Skene, Edwards, & Bilton, W.S.

Counsel for Lord Advocate—Guthrie. Agent—Donald Beith, W.S.

Thursday, July 20.

FIRST DIVISION.

(Before the Whole Court.)

[Lord Curriehill, Ordinary.

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

Succession—Parent and Child—Legitim—Election—Equitable Compensation—Forfeiture—Approbate and Reprobate.

A testator directed the whole residue of his estate to be divided equally between his two children, a son and a daughter, and provided that the half of the residue falling to each should be given to him and her in liferent allenarly, and to his and her children in fee. Both the son and daughter were married and had issue. The daughter claimed and received legitim, and the liferent of her half of the residue was applied in compensating the other liferenter and the fiars, in proportion to the injury done to their respective interests by the withdrawal of the daughter's legitim, until such time as these interests were entirely compensated. The daughter then claimed that from the date of full compensation being

made the liferent of half the residue ought to be paid to her. *Held*, by a majority of the whole Court (*aff.* judgment of Lord Curriehill, Ordinary), that the principle of law applicable to such circumstances was that of equitable compensation, and not of forfeiture, and that the daughter was therefore, according to the intention of the testator, entitled, to the liferent of the half of residue—*diss.* Lord Justice-Clerk, Lords Deas, Craighill, Lee, and Fraser, who held that the daughter having repudiated the provision made for her by her father, could not thereafter, without approbating and reprobating the same deed, take any part of the benefit conferred upon her by his settlement.

Where a testator disposes of his estate by universal settlement, and leaves provisions to his widow and children, there is an implied condition that his widow and children shall not take both their legal rights and their provisions under the settlement, but such implied condition does not extend further than to prevent the other beneficiaries from being disappointed by the widow or children taking both.

Mr George Macfarlane senior, of 65 West Regent Street, Glasgow, died on 12th February 1872. He was survived by his wife and his two children, George Macfarlane and Margaret Higgins Macfarlane or Oliver, hereinafter called Mrs Oliver. He left a trust-disposition and settlement whereby he conveyed to his son George Macfarlane and others, as trustees, his whole estate and effects. By this trust-deed he directed his trustees, *inter alia*, to pay to his widow a certain annuity, and otherwise to fulfil the obligations of his marriage-contract. In the fifth place, he directed the trustees "to hold and apply the whole residue and remainder of my means and estate," including any sums set apart to meet the widow's annuity, "into two equal parts or shares, one part or share of which they shall set aside and hold for behoof of my said son George Macfarlane junior in liferent, for his liferent alimentary use and behoof allenarly, not assignable by him, nor affectable by or for his debts or deeds or the diligence of his creditors; and upon his death I direct my trustees to divide the fee thereof equally among his children, and the survivors or survivor of them, and the issue of any of them who may decease leaving issue (such issue succeeding always equally to the share to which their parent would have succeeded if in life), payable the share of each child and vesting, after the death of my said son, upon majority in the case of sons, and in the case of daughters upon majority or being married, whichever of these events shall first happen; and the other part or share of the said residue I direct my trustees to set aside and hold for behoof of my daughter Margaret Higgins Macfarlane or Oliver, wife of Andrew Oliver, draper in Kilmarnock, in liferent, for her liferent alimentary use and behoof allenarly, exclusively always of the *jus mariti* of her said husband, or of any future husband whom she may marry, and not assignable by her, nor affectable by or for her own or such husband's debts or deeds, or by the diligence of creditors; and upon her death I direct my trustees to divide the fee thereof equally among her children, and the survivors or survivor of them, and the issue of any of them who may decease leaving issue (such issue succeeding always equally to the share to which their parent would have succeeded if in life), payable the share of each child and vesting, after the death of my said daughter, upon majority in the case of sons, and in the case of daughters upon majority or being married, whichever of these events shall first happen; declaring that in the event of the children of my said son and daughter, or any of them, being under age or unmarried on their parents' death, I hereby direct my trustees to pay and expend the interest and annual proceeds of the presumptive shares of my estate falling to such children, or part thereof, in such way as they may think best, in and towards the maintenance and education of such children until their shares shall have vested and become payable to them." By a subsequent codicil executed in 1870 the testator made this direction—"In the event of the failure of the whole children of my said son George Macfarlane junior, or issue thereof, when the fee of the one-half of the residue of my estate opens to them, as provided by the within trust-disposition and settlement, I direct my trustees to hold the fee of such half for behoof of the said Margaret Higgins Macfarlane or Oliver in liferent, for her liferent alimentary use and behoof allenarly, exclusive always of the *jus mariti* of her present husband, or of any husband she may marry, and not assignable by her, nor affectable by or for her own or such husband's debts or deeds, or by the diligence of creditors, and for her children, and the survivors or survivor of them, and the issue of any of them who may decease leaving issue, in fee, payable said portion of residue and vesting in the manner provided by the within trust-disposition and settlement in reference to the fee of the one-half of residue destined to them: And in the event of the failure of the whole children of my said daughter Margaret Higgins Macfarlane or Oliver, or issue thereof, when the fee of the other half of the residue of my estate opens to them, as provided by the within trust-disposition and settlement, I direct my trustees to hold the fee of such half for behoof of the said George Macfarlane junior, in liferent for his liferent alimentary use and behoof allenarly, not assignable by him, or affectable by or for his debts or deeds, or the diligence of creditors, and for his children, and the survivors or survivor of them, and the issue of any of them who may decease leaving issue, in fee, payable said portion of residue and vesting in the manner provided by the within trust-disposition and settlement in reference to the fee of the one-half of residue destined to them."

The trustees named accepted the trust, and entered on the management of the estate sometime after the death of Mr Macfarlane. Mrs Oliver and her husband raised an action of count and reckoning against the trustees concluding for ascertainment and payment of her legitim, but reserving the right to elect between Mrs Oliver's legitim and the provisions in her favour contained in her father's trust-deed. In the course of this action Mr and Mrs Oliver lodged a minute, in which, on the narrative that, as they "had been well and fully advised" of their respective rights in the truster's succession, they "have repudiated, as we do hereby repudiate, the provisions left under the said settlement and codicil to me the said

Margaret Higgins Macfarlane or Oliver, and in lieu thereof we do hereby choose and elect the legitim and provisions to which by law we or either of us may be entitled in or under the succession of the said George Macfarlane senior: Declaring, however, that this repudiation shall in no way affect or injure the rights of our children in the succession of the said George Macfarlane senior."

Thereafter, on 15th April 1876, Mrs Oliver and her husband received and granted to the trustees a discharge for her legitim, which by interlocutor of the Lord Ordinary (SHAND) had been fixed to amount to £2175 of principal, with £231, 15s. 8d. of interest, as at July 1874, when the minute repudiating the settlement and claiming legitim was lodged, from her father's death in 1872. The total amount of legitim and interest paid to her was (under deduction of a sum for expenses) £2500, 3s. 1d. Mrs Oliver was still entitled to a share of legitim out of the sum provided for the widow's annuity, and out of the value of the widow's furniture, but these two items not having raised any dispute need not be again mentioned.

George Macfarlane, who accepted the provisions made for him by the settlement, had from the time of his father's death in 1872 received one-half the income of the residue of the estate. When therefore Mrs Oliver finally claimed and received her legitim, one-half the interest paid her on the principal sum of £2175 was repaid by him to the trustees, and by them to her.

After Mrs Oliver had received her legitim the trustees continued to pay to George Macfarlane one-half the annual income of the trust-estate still in their hands. The other half remained, and was accumulated in their hands. In consequence of Mrs Oliver, who according to the trust-deed would have received this half of the annual income, having taken her legitim, the trustees were without directions as to its disposal, and on 10th June 1876 they raised the present action of multiplepoinding for determining to whom ought to belong the sums thus accrued and annually accruing. The accumulations at Whitsunday previous to that date amounted to £1214, 8s. 1d. Claims were then lodged for (1) the trustees themselves, and (2) George Macfarlane.

The trustees claimed that "the said fund *in medio* should be apportioned among the said George Macfarlane in the first place, his said children in the second place, and the children of Mrs Margaret Higgins Macfarlane or Oliver in the third place, rateably and in proportion to the extent to which the provisions in favour of the said parties respectively contained in the trust-disposition and settlement of the said George Macfarlane senior have been diminished by the payment of £2175, 4s. 6d. and interest to the said Mrs Margaret Higgins Macfarlane or Oliver in satisfaction of her claim for legitim, and that the claimants shall hold the said fund, under deduction of the share thereof to which the said George Macfarlane shall be found entitled, to the extent of one-half thereof for behoof of the children of the said George Macfarlane in fee, and to the extent of the other half for behoof of the children of the said Mrs Margaret Higgins Macfarlane or Oliver, all in terms of the said trust-disposition and settlement and codicil, or otherwise for behoof of the said beneficiaries, in such proportions and subject to such conditions as the Court may direct."

George Macfarlane claimed "that the fund *in medio* should be apportioned between him and his children and the children of Mrs Oliver in such proportions that the share falling to him from said fund should, along with the share of the revenue of the trust-estate already paid to him, amount to the revenue derived from one-half of the whole estate of the truster, including in said estate the sum paid to Mrs Oliver in satisfaction of her legitim; or otherwise, that the said fund *in medio* should be apportioned between him and his said children and the children of Mrs Oliver rateably and in proportion to the extent to which the provisions in favour of the said parties respectively contained in the trust-disposition and settlement of the truster have been diminished by the payment made to Mrs Oliver in satisfaction of her legitim."

He pleaded that the share of income set free by Mrs Oliver's repudiation of her provisions fell to be applied *primo loco* in compensating him for the diminution consequent on that repudiation of the income falling to him under the trust-deed; or, in any view, that the income fell to be applied in compensating him, his children, and Mrs Oliver's children rateably for the diminution of their respective interests caused by the repudiation. This latter plea embodies the contention of the trustees.

On 16th November 1876 the Lord Ordinary (CURRIEHILL) pronounced this interlocutor and note:—"Finds that in consequence of Margaret Higgins Macfarlane or Oliver, the daughter of the deceased George Macfarlane senior, the truster, having claimed her legitim, she has forfeited the provision of the liferent of one-half of the residue of her father's trust-estate which was made in her favour by his trust-disposition and settlement dated 16th April 1868: Finds that the sum of £2175, 4s. 6d., with interest from 12th February 1872, the date of the truster's death, has been paid to the said Mrs Oliver to account of her legitim: Finds that by Mrs Oliver having claimed her legitim the liferent of the other half of the residue provided to the claimant George Macfarlane under his father's said trust-disposition and settlement has been diminished by the loss of one-half of the interest accruing upon the said sum of £2175, 4s. 6d. from and after the truster's death; and the fee or capital of the residue appointed by said trust-disposition and settlement to be held by the trustees of the truster for behoof of the children of the said George Macfarlane and Mrs Oliver, in the manner and subject to the conditions set forth in the said trust-disposition and settlement and codicils thereto, dated 13th May 1870, has been diminished by the loss of the sum of £2175, 4s. 6d.: Finds that the liferent of the half of the residue forfeited by Mrs Oliver is to be applied in compensating the liferenters and fiars rateably and in proportion to the extent to which their respective provisions have been diminished by the payment to Mrs Oliver of the sum of £2175, 4s. 6d. and interest to account of the claim for legitim, and that the claimant George Macfarlane is not entitled to have the said forfeited liferent applied *primo loco* in compensating his loss as liferenter: Therefore repels the first plea-in-law for the said George Macfarlane, and refuses the first branch of his claim: And before further answer appoints the raisers to lodge a minute within eight days, stat-

ing the age of the said George Macfarlane and Mrs Oliver respectively at the date of their father's death, the total amount of the free residue, and the average rate of interest or annual return which has been derived from the said residue since the truster's death, and which may reasonably be expected to be realised in future," &c.

"*Note.*—The findings in the foregoing interlocutor so fully explain the grounds of judgment that it is unnecessary to do more than simply to say that the present is clearly a case for the application of the doctrine of equitable compensation. The late George Macfarlane by his trust-settlement directed his trustees to hold the residue of his estate, including the sums required or set aside to meet his wife's marriage-contract provisions, and divide the same into two equal parts, one of which was to be set aside and held for behoof of his son, the claimant George Macfarlane, in liferent allenarly, and on his death was to be divided equally among his children and the survivors at majority or marriage, until which events no vesting should take place, and the other was provided in similar terms to the truster's daughter Margaret Higgins Macfarlane or Oliver, in liferent allenarly, and exclusive of the *jus mariti* of her husband, and to her children in fee; and by a codicil dated 13th May 1870 provision was made for the case of George Macfarlane and Margaret Higgins Macfarlane or Oliver dying without leaving issue—who should take a vested interest in the fee. Mr Macfarlane died on 12th February 1872, survived by his widow, who still lives, and by his son George Macfarlane and by his daughter Mrs Oliver. The trust-estate appears to be of considerable amount. The requisite sum has been set aside to meet the widow's annuity of £100 sterling, and she enjoys the liferent of the furniture under the marriage-contract. Mrs Oliver repudiated the liferent of half of the residue provided for her by her father's settlement, and has claimed her legitim, which (exclusive of her prospective share of the capital reserved for payment of the widow's annuity, and the value of the furniture liferented by her) amounted as at the date of her father's death to £2175, 4s. 6d., which sum, with interest amounting to £324, 18s. 7d., has been paid to Mrs Oliver. Mrs Oliver has thereby forfeited the liferent of the half of the residue provided to her by her father's settlement.

"Mrs Oliver's claim for legitim does not seem to have been adjusted for some years after her father's death, and in the meantime the trustees had paid to the claimant George Macfarlane, who stands by his father's settlement, one-half of the annual income of the free available residue. But in order to meet Mrs Oliver's claim for interest upon her share of the legitim, George Macfarlane was obliged to repay to the trustees a sum equal to one-half of the interest upon the said sum of £2175, 4s. 6d. from the date of his father's death. He as liferenter has thus suffered ever since his father's death, and will continue to suffer, a diminution of his liferent equal to half the interest of the said sum of £2175, 4s. 6d. But the fiars also have sustained a diminution of their capital to the extent of the whole of said sum of £2175, 4s. 6d. Both parties, *i.e.*, both the liferenter and the fiars, are entitled to be compensated for their respective losses out of the forfeited liferent.

"The question then is, in what proportions must the forfeited liferent be divided between George Macfarlane as liferenter of one-half of the residue, and the trustees as guardians of the fee of the whole residue, in order equitably to compensate both parties. George Macfarlane maintains that as his loss is immediate, and that of the fiars only prospective, he is entitled to have the forfeited liferent applied *primo loco* in making up annually the deficiency of his liferent caused by the loss of half the interest of £2175, 4s. 6d. This, however, would plainly be inequitable, because while the loss of the fiars is known to amount to £2175, 4s. 6d., the loss of George Macfarlane cannot be at present known, and can at best be approximately estimated by an actuarial calculation of the value of the annual income which he has lost. But at present there are not in process sufficient materials for making such a calculation. His age and his sister Mrs Oliver's age at their father's death, the total amount of the residue, the average amount returned therefrom since the truster's death, and the return which may be reasonably expected in future, are all material elements in the calculation, but no information on these points can be obtained from the record or from any of the documents in process. The raisers will therefore now give the required information in a minute, and after that is lodged a remit will be made to an actuary to make the necessary calculations. When the minute is lodged the parties will enrol the cause in order that the remit may be made, with or without further instructions to the actuary as to the principles on which the forfeited liferent is to be apportioned between liferenter and fiars so as to deal equitably with both parties."

His Lordship thereafter, of consent, remitted to Mr Wyllie Guild, C.A., to report on the matters referred to in the foregoing interlocutor, and on 23d January 1877 a condescendence and claim was lodged for Mrs Oliver, in which she stated that from the report given in by Mr Guild it appeared that after making full compensation to all parties whose interests were injuriously affected by the withdrawal of her legitim there would remain a surplus, the amount of which would depend on her life. She claimed for herself in liferent the surplus which might arise and remain from the liferent destined to her after the other liferenter and the fiars had received compensation for the loss they sustained through her withdrawal of legitim, and pleaded that notwithstanding her having taken legitim she was entitled to so much of the liferent provision in her favour contained in her father's settlement as should not be required for such compensation.

The Lord Ordinary on 26th February 1877, after hearing counsel on Mr Guild's report (the nature of which will sufficiently appear from his Lordship's interlocutor, *infra*) and on Mrs Oliver's claim, pronounced this interlocutor—"Finds that the loss of income sustained prior to 23d December 1876 by the claimant George Macfarlane, as liferenter of one-half of the residue of the trust-estate, in consequence of Mrs Oliver having claimed her legitim, and received payment thereof to the extent of £2175, 4s. 6d., with interest thereon from her father's death, amounted as at said date to the sum of £195, 16s. 7d., and that from and after said date, and during the joint lives of himself and Mrs Oliver, farther loss of

income has been sustained and will be sustained by the said George Macfarlane to the extent of the interest upon half of said legitim, calculated at the average rate of interest realised upon the general trust-estate: (2) Finds that the loss of capital sustained by the fiars of the residue of the said trust-estate amounts to the said sum of £2175, 4s. 6d., and that one-half thereof, amounting to the sum of £1087, 12s, 3d., falls upon the share of the residue destined to the children of George Macfarlane, and that the other half, amounting to the like sum of £1087, 12s. 3d., falls upon the share destined to the children of Mrs Oliver: (3) Finds that the liferent of the half of the residue forfeited by Mrs Oliver, and received by the pursuers and real raisers, and accumulated in their hands as at 23d December 1876, amounts to the sum of £1288, 3s. 4d., including therein the interest allowed by the bank on said accumulations, and that the same forms part of the fund *in medio* available for immediate distribution, and should now be applied in compensating *pro tanto* the liferenter and fiars rateably and in proportion to the amounts of their respective losses as aforesaid: (4th) Finds that the proportion of said sum of £1288, 3s. 4d. falling to the said George Macfarlane amounts to the sum of £115, 19s. 4d. sterling, and ranks and prefers him upon the fund *in medio* for payment of said sum, and decerns *ad interim:* (5th) Finds that the proportions of said sum of £1288, 3s. 4d. effeiring to the shares of the residue directed to be set aside and held by the pursuers and real raisers for behoof of the children of the said George Macfarlane, and the children of Mrs Oliver respectively, amount each to the sum of £586, 2s. sterling, and appoints the pursuers and real raisers to add the said sum of £586, 2s. to each of said shares of the residue: (6th) Finds that the liferent forfeited by Mrs Oliver, now accruing and hereafter to accrue, shall, until the foresaid losses are fully compensated, be apportioned and distributed half-yearly at the terms of Whitsunday and Martinmas, commencing with the term of Whitsunday 1877, rateably and in proportion to the sum which at each of such terms shall be ascertained to be the actual amount of loss sustained by the said George Macfarlane (or his executors in the event of his predeceasing Mrs Oliver) and the fiars respectively, and not previously compensated: Supersedes consideration of the claim now lodged for Mrs Oliver, and of the claims by the other claimants upon the fund *in medio*, in so far as the same shall consist of any surplus of said forfeited liferent which may remain after the other claimants have been fully compensated, until it shall be ascertained whether any such surplus exists."

His Lordship then discussed the proportion in which a division of the £1288 then accumulated in the trustees' hands ought to be made between George Macfarlane on the one hand and the fiars on the other, and in which the liferent thereafter to accrue should be divided, until full compensation should be made to George Macfarlane and the fiars, and then referred to the claim for Mrs Oliver as follows—"Since Mr Guild's report was lodged, Mrs Oliver has lodged a claim in support of which she maintains that notwithstanding her having claimed legitim she is entitled, after equitable compensation shall have been made to her brother George Macfarlane and the fiars of the residue, to resume her position under her father's trust as liferenter of one-half of the residue. If it had been necessary to dispose of that claim at present, I should have had great difficulty in giving effect to it, because in the interlocutor of 16th November 1876 there is an express finding that Mrs Oliver by having claimed her legitim has thereby forfeited the liferent provision in her favour contained in her father's trust-disposition and settlement, and although Mrs Oliver had not then appeared in the process, that finding, unless and until recalled on a reclaiming note, or of consent of parties, or otherwise opened up, must be regarded by me as final and conclusive. But it is unnecessary *in hoc statu* to consider that claim at all, because at present the parties who have been injured by Mrs Oliver having taken her legitim have not in point of fact been compensated, and it is certain that they cannot be compensated for some years. Mrs Oliver may die while compensation is yet incomplete, and if so the claim now made for her would admittedly be of no avail. Whether in the event of her surviving the time when full compensation is made, she may be entitled to claim the liferent for the future on the grounds set forth in her claim, or whether she or any other parties may be entitled to claim the liferent on any other ground, are matters which in my opinion it is premature to decide, and I have therefore superseded in *hoc statu* consideration of the claim of Mrs Oliver and of the other claimants to the income of the half of the residue destined to her until it shall be seen whether any surplus exists after full compensation shall have been made."

The case then stood over for some time until in the end of the year 1880 it became apparent that the liferent of Mrs Oliver having been applied as had been previously decided by his Lordship, would shortly make full compensation both to George Macfarlane and the fiars for the prejudice done to their interests by Mrs Oliver having taken her legitim, and full compensation was afterwards in fact made as at Whitsunday 1881. In view of these circumstances the Lord Ordinary on 16th November 1880 made a new order for claims, when renewed claims were lodged (1) by Mrs Oliver and her husband, (2) by the trustees, (3) by George Macfarlane and by two of his sons who had now reached majority, and (4) by three of Mrs Oliver's four children.

Mrs Oliver in her claim averred that she had never intended to claim her legitim, and that the minute repudiating the settlement and taking legitim had been obtained from her on false pretences by her former agent to serve a purpose of his own. This contention was, however, afterwards abandoned, and was not finally brought before the Court.

On the assumption that she was to be dealt with as having taken legitim she maintained that the payment of legitim should be regarded as being a payment to account, and in lieu of the settlement provisions in her favour for the period from her father's death to the date when full compensation was made to all parties whose interests were prejudiced by the withdrawal of her share of legitim from the estate, and that she was entitled, from and after that date, in virtue of the provisions made in her favour by the settlement, to one-half the free income of the estate, and she claimed accordingly. Alternatively, in the event of her not being found entitled to a share of the fund *in*

medio (*i.e.*, her liferent), in virtue of the provisions of the settlement, she maintained that it had become intestate succession, and that she and her brother were therefore entitled to divide it equally as her father's next-of-kin.

Her plea-in-law on the former contention was—"(2) *Separatim*—Even upon the footing of legitim having been claimed by and paid to Mrs Oliver, she is entitled to the surplus of the settlement provisions in her favour after the payments made to her with interest have been restored to the trust-estate, her rights under the settlement not being affected except in so far as necessary to indemnify those whose interests were prejudiced by her claim of legitim."

The trustees claimed to uplift the income derived from the fund *in medio* (Mrs Oliver's liferent) and apply it in half-yearly payments to George Macfarlane, and in half-yearly additions to the children of George Macfarlane and Mrs Oliver, and that rateably and in proportion to the respective interests which they would have had in the amount paid to Mrs Oliver as legitim had that sum not been so paid, and that during the lives of Mr Macfarlane and of Mrs Oliver said sums so to be added to the capital, to be held by the trustees subject to the directions of the trust-disposition and settlement in reference to the fee of the residue of the truster's estate, or otherwise as the Court should direct.

George Macfarlane and his sons made a claim to the same effect as the claim made for them by the trustees. Mrs Oliver's children explained that they had been obliged to leave their mother's house in consequence of her habits, and that they were in distressed circumstances, being only able to earn portion of their subsistence, and being in part dependant on the liberality of their uncle George Macfarlane. They claimed (Mrs Oliver's children being, as above stated, four in number) "one-fourth each of the revenue derived from the one-half of the trust-estate which would have been liferented by their mother, the said Mrs Oliver, if she had not elected to take legitim," *i.e.*, they claimed to have the fund *in medio* treated as if their mother had died instead of repudiating the settlement and taking legitim. They therefore, as well as the trustees and George Macfarlane and his sons, pleaded that Mrs Oliver by repudiating her provisions contained in the settlement and taking legitim had forfeited all right to the provisions of the settlement.

The whole claimants lodged a joint-minute whereby they consented that consideration of the claim for Mrs Oliver, consideration of which had been superseded by that interlocutor, should not be held to be precluded by the finding in the interlocutor of 16th November 1876, before Mrs Oliver had lodged any claim, to the effect that she had forfeited the provision of liferent of one-half her father's trust-estate.

The Lord Ordinary having resumed consideration of the cause on 27th June 1881, pronounced this interlocutor:—"Finds that full compensation has been made to all the residuary legatees for all loss which they have hitherto sustained in consequence of Mrs Oliver having claimed and received payment of her legitim, and that from the state it appears that the pursuers and real raisers are in possession of funds derived from the liferent destined to Mrs Oliver up to the term of Whitsunday last, 1881, to the amount of £467, 4s. 6d., which the real raisers state is sufficient to meet Mrs Oliver's further claims to account of legitim on the death of her mother, Mrs Macfarlane, the widow of the truster, and which they state they are to hold and retain to meet these claims: Finds that by the joint-minute the parties have all consented that the claim of Mrs Oliver, consideration of which was superseded by the interlocutor of 26th February 1877, shall not be held to be precluded by the finding in the interlocutor of 16th November 1876, pronounced before Mr and Mrs Oliver had lodged their claim in the process, to the effect that Mrs Oliver had forfeited the portion of the liferent in her favour therein mentioned: Finds that in respect full compensation and provision has now been made out of the liferent destined to Mrs Oliver for all loss sustained or to be sustained by the residuary legatees in consequence of Mrs Oliver having claimed her legitim, she is now entitled to payment of that liferent from and after the date when such full compensation was made—that is to say, from the term of Whitsunday 1881—but always on the footing that in the event of any loss being sustained by the residuary legatees, or any of them, by and through Mrs Oliver having claimed and received payment of her legitim beyond the amount hitherto ascertained, the same shall be compensated to them by Mr and Mrs Oliver, or out of Mrs Oliver's liferent; and with these findings appoints the cause to be enrolled, reserving all questions of expenses: Grants leave to all parties to reclaim, if so advised."

He added this note:—"The time has now arrived for deciding the question which has been repeatedly raised during the progress of the present multiplepoinding, but which it has hitherto been premature to decide, viz., the question, How far the doctrine of equitable compensation is to be applied in a case like the present?—Whether the liferent is forfeited absolutely by the child to whom it was bequeathed having claimed and taken her legitim? or Whether, after full compensation has been made out of the liferent to the sufferers—that is to say, to the residuary legatees—the liferent is to cease to be paid to them, and is to be paid to the child who had elected to take her legitim?

"The doctrine of election and of equitable compensation is now well established in the law both of Scotland and of England. I understand it to be this, viz., that where a testator leaves a universal settlement of his whole estate, in which he bequeaths to a legatee a subject or a provision under the implied condition that if he takes that legacy or provision he is to surrender other rights or interests in the subjects included in the settlement to which he might otherwise have been legally entitled, he is put to his election between his legal rights and his conventional provision. He cannot take both. And if he prefers to stand by his legal rights, the subject or provision specially bequeathed to him must be applied in compensation to the person or persons (usually the residuary legatees) who have been injured by the displacement of the testator's settlement.

"The first Scottish case in which the doctrine appears to have been mooted was the case of *Kers* v. *Wauchope*, 1 Bligh 25, where Lord Eldon said—'In our Courts we have engrafted upon this primary doctrine of election the equity, as it may be termed, of compensation. Suppose

a testator gives his estate to A, and directs that the estate of A, or any part of it, should be given to B. If the devisee will not comply with the provisions of the will, the Courts of Equity will hold that another condition is to be implied as arising out of the will and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate, which he gives A in consideration of his giving his estate to B, if A refuses to comply with the will B shall be compensated by taking the property, or the value of the property, which the testator meant for him out of the estate devised, though he cannot have it out of the estate intended for him.' And Mr Bell in his Commentaries, i. 145, in dealing with this question, and referring to Lord Eldon's remarks, says—'In the case which gave rise to these observations this point had not been decided in the Court of Session. It was therefore remitted for judgment by that Court, with certain observations from the Lord Chancellor, which plainly indicated his opinion that the doctrine of compensation would apply to the case. But it was not decided on that remit. It will, however, require great consideration before this doctrine in its full extent be judicially admitted in Scotland.' Since Professor Bell wrote these words half-a-century has elapsed, and during that time there have been many cases decided in which effect has been given to the doctrine of equitable compensation. Of these examples will be found in the case of *Peat*, 1 D. 508; *Fisher* v. *Dickson*, 2 D. 1121, *affirmed* 2 Bell's App. 63; *Breadalbane's Trustees*, 3 D. 507, and *Davidson's Trustees*, 9 Macph. 995. Many other cases might be referred to, but in none of them has the question—Whether a legatee who repudiates is to forfeit his legacy *in toto*, or only to the extent necessary to secure compensation?—arisen purely for decision, as it does in the present case.

"In England the law seems to have been more matured. In Williams on Executors the law is thus stated (p. 1455)—'Another subject of much doubt with respect to the doctrine of election has been, whether the election to take against the will induces the necessity of relinquishing the benefit taken by it *in toto*, or only imposes an obligation to indemnify the claimants whom it disappoints—that is, as it is sometimes expressed, whether the principle on which the doctrine of election proceeds is forfeiture or compensation? The more recent authorities are said to establish that compensation only is to be made.' In Jarman on Wills, vol. i., 4th ed., pp. 1456 and 1457; Story on Equity, vol. ii. sec. 1083; Snell's Equity, 5th ed. p. 213, the recent application of the doctrine to its fullest extent is distinctly affirmed by all these writers. The earlier cases in support of the doctrine are all collected in a note to the case of *Gretton* v. *Haward*, 1 Swanston, 433. I think that nowhere are the doctrine and the grounds of it better stated than in the judgment of Sir William Grant in the case of *Welby* v. *Welby*, 2 Vesey and Beames, 190 and 191—'If the will is in other respects so framed as to create a case of election, then not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will, but in contemplation of equity the testator means, in case the condition shall not be complied with, to give the disappointed devisees, out of the estate over which he had a power, a benefit correspondent to that which they are deprived of by such non-compliance. So that the devise is read as if it were to the heir absolutely if he confirm the will, if not, then in trust for the disappointed devisees, as to so much of the estate given to him as shall be equal in value to the estate intended for them.'

"It appears to me that as the doctrine of election which gives rise to the claim of compensation is based on equity only, it is inconsistent with absolute forfeiture. No doubt in most cases absolute forfeiture does not take place, because the subject provided by the will is of less value than that to which the legatee is otherwise entitled; and so the question of total forfeiture rarely occurs. But I can see no ground in equity for holding that the 'disappointed devisees,' to whom full compensation has been made, are nevertheless entitled to claim that the benefit intended for the repudiating legatee shall be absolutely forfeited by him, and shall accrue to them to the effect of conferring upon them a benefit which the testator never intended for them. Equity appears to me to demand in such cases compensation—full compensation, but nothing more—out of the bequest to the repudiating legatee, leaving him to benefit by the surplus.

"It was suggested that the forfeited liferent should be dealt with as intestate succession, but in a universal settlement of the testator's whole estate, such as the present, I can see no necessity, and indeed no good reason, for holding that the testator died intestate as to any part of his estate. In the present case the result of holding the forfeited liferent to be intestate succession would lead to this strange result, that Mrs Oliver as one of her father's next-of-kin would take one-half of the liferent absolutely and unrestrictedly, whereas her father in his settlement intended her to have it only as an alimentary inalienable fund, and free from her husband's *jus mariti*.

"On the whole, I am of opinion that the safest as well as the most equitable mode of dealing with the present question is to hold that Mrs Oliver having made complete compensation to everybody who has suffered, or who can suffer, in consequence of her having betaken herself to her legitim, she, and not those fully compensated sufferers, is now to enjoy the liferent originally destined for her by her father. It is true that she will thus have got into her hands, and perhaps spent, a capital sum of money which her father never intended her to have; but nobody is now any the worse for that, and henceforth she will receive her liferent during the remainder of her life, subject to all the conditions of the will."

The trustees reclaimed, and the Lords of the First Division after hearing counsel, in respect of the importance and novelty of the questions involved, appointed mutual minutes of debate to be boxed to the Judges of both Divisions and to the Lords Ordinary, in order that the opinions of the whole Judges might be obtained on the questions raised by the record.

The trustees in their minute of debate argued —I. The claim of Mrs Oliver was barred by her minute of election, by which she took legitim and repudiated the will. That minute was a binding act, and when acted on constituted a completed contract. At all events, she had an option of one of two things, either to take her legal rights or con-

form to her father's will. The provision of the latter was tendered to her by him in exchange for her legal right, and when tendered it was rejected. Legitim was a debt vesting in the child at the father's death, and giving the child a claim of debt against the person representing him—*Fisher* v. *Dixon*, June 16, 1840, 2 D. 1121, *aff.* April 6, 1843, 2 Bell's App. 63. So firmly was this fixed that it had been held that the amount of the claim of legitim cannot be altered by the increase or diminution of the father's estate after his death—*M'Murray* v. *M'Murray's Trustees*, July 17, 1852, 14 D. 1408. Notwithstanding this, universal settlements were common and their effects fixed. In some, *e.g.*, *Nisbet's Trustees* v. *Nisbet*, December 6, 1851, 14 D. 141, the father declared that any child interfering with the settlement should forfeit the testamentary provision, such as *Fisher* v. *Dickson* (*supra*); in some he declared that that provision should be in full of the legal rights; in some he simply made a general settlement of his whole estate. In the last one the conventional provision was not so correctly said to be forfeited by the child electing against the deed as to be given subject to an implied condition which the child declined to fulfil, with the result that he could not take the provision made for him. That was just such a case as occurred in the second class of universal settlements mentioned above, where the father made it an express condition of taking benefit under the will that the legal rights should be given up. Indeed, a claim for legitim is really incompatible with an universal settlement— *Young* v. *Buchanan*, December 20, 1664, M. 6447; *Riddell* v. *Dalton*, November 28, 1781, M. 6457; *Henderson* v. *Henderson*, July 26, 1782, M. 8191, where the Court expressly held that "the settlement being a total is incompatible with the claim of legitim." So also in *Collier* v. *Collier*, July 6, 1833, 11 S. D. 912; *Stevenson and Others* (*Mackintosh's Trustees*) v. *Hamilton*, December 7, 1838, 1 D. 181; *Peat* v. *Peat*, February 14, 1839, 1 D. 508; *Breadalbane's Trustees* v. *Buckingham*, January 20, 1836, 14 S. 309, and March 5, 1840, 2 D. 731. The reasoning in *Fisher* v. *Dixon* was quite to the same effect, while the case of *Minto* v. *Kilpatrick*, May 20, 1842, 4 D. 12,224, went the length of applying to a claim made under a settlement, when the person through whom the complaint was made had taken legitim, the principle of forfeiture; in *Panmure* v. *Crockat*, February 29, 1856, 18 D. 703, a child taking legitim instead of a testamentary provision is put in the position of a creditor of the disponee discharging a debt. The reasoning applied to the claim of a daughter (Miss Villiers) of the testator in *Keith's Trustees* v. *Keith*, July 17, 1857, 19 D. 1040, by which the principle of approbate and reprobate was distinctly applied to a claim similar to that of Mrs Oliver, and indeed one founded on a plea very similar to Mrs Oliver's, was directly in point. In *Davidson's Trustees* v. *Davidson*, July 15, 1871, 9 Macph. 995, there were, no doubt, some observations by Lord Cowan which seemed favourable to Mrs Oliver's claim, but they were not necessary to the decision of the case, and the judgment pronounced was in accordance with the argument of the trustees here. *Gillies* v. *Gillies' Trustees*, Feb. 23, 1881, 8 R. 505, was also in point. The result of all these cases was that a general settlement was construed as putting a child to his election in the same manner as he is put when a provision declared to be in satisfaction of legitim is given him. See also Bell's Comm. i. 141–145 (7th ed.), Approbate and Reprobate; Fraser on Domestic Relations, i. 564; Fraser on Husb. and Wife, ii. 1030; M'Laren on Wills, i. 482; *Johnston*, July 20, 1875, 2 R. 986. Mr Bell seemed to doubt whether the principle of equitable compensation is admitted into our law, but the trustees quite accepted the existence of that principle in Scotch law. This was a question of the manner and time of its application. They maintained that it came into play to compensate those whose interests Mrs Oliver had injured after she was finally out of the field, and that she could not plead. The practice as to election under universal settlements certainly was that the choice of legitim infers abandonment of testamentary provisions, and that once made election could not be revoked. Indeed, it was the duty of trustees to insist on election, and they might compel it—*Lowden*, 1811, Hume's Decisions, 23; *Keith's Trustees;* and Fraser on Husb. and Wife, *ut supra.* But if Mrs Oliver succeeded here, the result would be that an election against the deed would never be final, and could be revoked, and the testamentary provision taken if only the child so acting paid up the uncompensated balance of the amount withdrawn. With regard to the intention of the testator, the only possible theory of his intention must be that he made the gift conditional on legal rights not being claimed. That distinguished the case from some cases in which the doctrine of equitable compensation had been discussed in consequence of a testator having conveyed a heritable subject in ineffectual language, or on deathbed, or made a *legatum rei alienæ*, and in which it had been held that a person could not both take the benefit of such a deed and also reduce it so far as ineffectual. But in these cases there could be found no application of the doctrine of equitable compensation inconsistent with the trustees' contention here—*Kers* v. *Wauchope*, 1815, Hume's Decisions, 25, and (1819) 1 Bligh's App. 1; *Strathmore* v. *Clydesdale*, February 20, 1829, M. 8377; *Dundas* v. *Dundas*, January 14, 1829, 7 S. 241, *aff.* 4 W. & S. 460; and *Bennet* v. *Bennet*, July 1, 1829, 7 S. 817 (cases of Scotch deeds inept to convey English property). Besides, Mrs Oliver, who had done all in her power to defeat the testator's intention, could hardly found upon it now. With regard to English authorities, the proposition of the Lord Ordinary that a person electing against a will relinquishes not the whole benefit of it but only so much as will compensate the disappointed devisees, or otherwise relinquishes those benefits only until such compensation has been made, was by no means clearly deducible from the English cases. There was as much authority against as for it. The argument in favour of his view would be found in 1 Swanston 359, *et seq.*, in which passage it was noteworthy that it was observed by the author that the civil law knew no medium between accepting and renouncing the legacy, and that simple forfeiture was the rule there applied to an election against the will. See also Theodosian Code, l. 2, t. 19, l. 7. Mr Jacob, Appendix to Bright's Law of Husband and Wife, ii. 486, came to quite an opposite opinion from Swanston as to the result of the English cases. Indeed, about a question of legitim English

authority was surely a little dangerous. But assuming it to apply, there was a series of cases with regard to the custom of orphanage in London in which it had been held that a person could not take both by the custom and by the will—*Morris*, November 30, 1739, 1 Atk. 398 and 404; *Pugh*, 2 Atk. 43; *Couper*, 3 Peere Williams, 123. See also other analogous cases—*Doe* v. *Cavendish*, 4 L.R. 743 (Lord Mansfield); *Green* v. *Green*, 2 Merivale 86 (Lord Eldon); *Greenwood*, 12 Beavan 403 (Lord Langdale). While Jarman, i. 445, Story (Equity) ii. sec. 1085, and Snell's Equity, 213, seemed to favour equitable compensation as the Lord Ordinary understood it. Sugden on Powers, p. 576, was against it, and Roper on Legacies, ii. 1631, *et seq.*, and Williams on Executors, 1455–6, were neutral on the point.

II. Mrs Oliver was not entitled to maintain that there was resulting partial intestacy and to take part of the fund *in medio* as one of the next-of-kin. The case of *Kers* (*supra*), where the alternative claim of the Ladies Ker, that if they could not both reduce the will in so far and adopt it in so far, they could at least come in as next-of-kin, was rejected, would have been conclusive against Mrs Oliver's claim here if she had maintained intestacy as regarded the whole provision rejected by her, and so were the cases of *Nisbet*, *Davidson*, and *Gillies* (*supra*). But Mrs Oliver further contended that there might be partial intestacy, *i.e.* as to what remained after full compensation was made. Now, that was contrary to the residuary clause and to the whole doctrine already established by the trustees' argument that the election made was a binding bargain which did not introduce any uncertainty as to the claim on the estate. The case resolved itself into the withdrawal of a claimant on residue.

III. With regard to Mrs Oliver's children, they claimed that the effect of their mother's election was to disburden the fee destined to them. They ought to be in no more favourable position than this, that Mrs Oliver repudiated for herself only, and that they were not involved in her act. They therefore shared equally with the other beneficiaries in the loss caused by their mother's act, and ought to share no more than equally in the benefit which arose to the persons entitled to profit by the fact that there was a surplus after full compensation was made. The doctrine of equitable compensation was opposed to such an inequitable claim as theirs—*M'Innes* v. *M'Alister*, June 29, 1827, 5 S. 862; *Peat* (*supra*).

IV. The liferent interest of Mrs Macfarlane therefore fell to be apportioned among (1) George Macfarlane, (2) his children, and (3) Mrs Oliver's children, in proportion to their interests in the residue, or, what was the same thing, in the fund which Mrs Oliver had withdrawn from it.

Mrs Oliver in her minute of debate argued—Full compensation having been made, as at Whitsunday 1881, to all the beneficiaries prejudiced by her having taken legitim, she was entitled to draw her liferent after that date. That was certainly more in accordance with the intention of the testator than any other destination of the fund that could be conceived. The claimant was making no double claim, and was asking no greater benefit from the estate than the will directed she should receive. In order to effect the implied condition which the trustees contend to exist in every universal settlement "the intention to make a condition of the acceptance" of the testamentary provision must be clear beyond all doubt—Bell's Prin., sec. 1939. In the cases of *Henderson, Collier, Breadalbane's Trustees, Minto, Strathmore, Kers* (*supra*), and *Turnbull*, 5 Br. Sup. 380, relied on by the trustees, nothing was decided save this, which was not now disputed, that a person cannot approbate and reprobate the same deed. These cases would have excluded the claimant from taking both her liferent from her father's death and her legitim also, but did not decide that by taking legitim she forfeited all right to her testamentary provision or any surplus of it after replacing what she had received as legitim and so compensating those who suffered by her election. The only condition that could be implied in her father's gift to her was that she should not claim both his gift and her legal rights, because the gift was meant to include them, and she was not doing so. The trustees' contention really was, that it was equitable compensation to give the disappointed legatees, as a *surrogatum* for the legitim carried off by the child, that child's whole provision. That was against principle, and there was no authority for it. When actual loss was compensated, there could surely be no further compensation. There ought to be no total forfeiture where total forfeiture is not necessary (as it almost always has been in reputed cases, from which circumstance a loose use of the term "forfeiture" has arisen) to make full compensation. Lord Eldon within a year of the decision of *Kers* v. *Wauchope* (*supra*) decided an analogous case of *Ranclyffe* v. *Perkyns* (6 Dow 149), in which that was the doctrine applied—see also *Dashwood* v. *Peyton*, 18 Vesey 49. A Scotch authority to the same effect was the case of *Davidson* (*supra*), where Lord Justice-Clerk Moncreiff and Lord Cowan clearly were of that opinion, and with the approval apparently of the other Judges. The claimant was not contending for leave to revoke her election, nor that she could have been entitled after taking her legitim to have the trust maintained till it should be seen whether the course she had taken were the more profitable. It was not such a case as *Annandale* v. *Macniven*, 9 D. 1201, or *Scott*, *ib.* 1275. In *Keith's Trustees*, so relied on by the trustees, Mrs Villiers was trying to get both legitim and testamentary provisions at one and the same time. The English rule was compensation not total forfeiture—1 Jarman (4th ed.) 443; Snell's Equity (5th ed.) 213; Williams on Executors (8th ed.) 1445, *et seq.*; Story's Equity (9th ed.) secs. 1083–5. The illustration these authors employed was no doubt often that of a *legatum rei alienæ*, but it was of no moment to the principle that our law on that matter differed from theirs. The leading English cases on the doctrine of compensation are *Streatfield*, 1 Swanston, 491, and 1 White and Tudor, 369; *Noys* v. *Mordaunt*, 1 White and Tudor, 367; *Blake*, 1 Vesey jr., 522; *Thelusson*, 13 Vesey, 209; *Welby*, quoted by Lord Ordinary, and cases collected by Swanston, i. 433, note; *Schroder*, Kay's Rep. 578. *Greenwood* v. *Penny* (*supra*), though sometimes cited as an authority in favour of forfeiture, was truly an example of compensation. The same doctrine was found in *Anderson*, Feb. 28, 1857, 23 Beavan, 457; *Willoughby*, 1862, 2 Johnson & Hemming, 344; *Codrington* v. *Lindsay*, L.R., 8 Ch. App. 578,

aff. July 12, 1875, L.R., 7 E. and I. App. 854. The English doctrine of election to which these cases were applied is the same as the Scotch approbate and reprobate—*Birmingham* v. *Kirwan*, 2 Sch. & Lef. 449, and *Codrington (supra)*. See also *Rogers* v. *Jones*, August 3, 1876, L.R., 3 Ch. Div. 688 ; *Pickersgill*, Nov. 27, 1876, L.R., 5 Ch. Div. 163 ; *Smith* v. *Lucas*, May 30, 1881, L.R., 18 Ch. Div. 531. The cases cited by the trustees on the orphanage custom of London did not bear out the view for which they were cited. In England election, and in Scotland approbate and reprobate, were both founded on intention, and there was no evidence of implied intention of forfeiture. There was no authority that it must be implied.

II. As an alternative, if after full compensation has been made, that which remains cannot go to the claimant in respect of the truster's intention, it must go to her in equal shares with her brother, the other next-of-kin, as a fund which has fallen into intestacy. The two liferents of half the residue each were separate estates, and a surplus which had arisen on one could not well be said to belong to the other or to the fiars of either. It must therefore have fallen into intestacy as being unnecessary to the fulfilment of any purpose of the testator—*Torrie*, May 31, 1832, 10 S. 597 ; *Leeke*, 1817, 2 Merivale, 363, 1 Jarman (4th ed.) 764 ; *Scrymsher*, 1 Swanston, 566 ; *Alves* v. *Alves*, March 8, 1861, 23 D. 712 ; *Sturgis* v. *Campbell*, 23 D. 1128, *aff.* 3 Macph. (H.L.) 70.

Mrs Oliver's children in their minute of debate adopted the argument of the trustees as against Mrs Oliver's claim to participate in the liferent given her under the will, even after compensation had been made by her, maintaining with the trustees that her election to take legitim barred her from founding on her provisions in the deed. But in addition thereto they argued that Mrs Oliver's liferent having been intended, as was seen from the terms of the deed, to benefit her family as well as herself, they had been losers by her election of legitim, which she had dissipated as soon as she received it.

II. On the assumption that Mrs Oliver was to be excluded from taking under the deed, they argued against the Macfarlanes to the effect that they could have no share in the half of the residue destined to the Oliver family so long at least as that family survived, and that in respect of the provision of the deed that if Mrs Oliver died before the vesting of the fee in her children the annual proceeds were to be applied for their maintenance, the inference was that the liferent having come to an end, not indeed by Mrs Oliver's death as the testator expected, but by her election against the deed, the income should be applied as he directed it to be applied on her death, *i.e.*, in alimenting and educating the claimants, who were, they alleged, in poor circumstances. In support of this view they referred to *Annandale* v. *Macniven*, June 9, 1847, 9 D. 1201 ; *Special Case—Alexander's Trs.*, Jan. 15, 1870, 8 Macph. 414. Again, where the fee is destined to a family or an individual, and there is no provision for the application of the income prior to vesting and payment, that family or individual will receive the income, or at least a reasonable maintenance out of it—*Special Case—Duncan's Trs.*, July 17, 1877, 4 R. 1093 ; *Ogilvie* v. *Cumming & Boswell*, Jan. 27, 1852, 14 D. 363, *aff.* July 15, 1856, 28 Scot. Jur. 646 ; *Campbell* v. *Reid*, June 12, 1840, 2 D. 1084. This contention could never prejudice the Macfarlanes, whose fee had been restored to its proper amount, while the liferent of George Macfarlane had also been fully compensated. There could be no intestacy where "the whole residue and remainder were bequeathed"—*Sturgis (supra)*.

The following opinions were returned by the consulted Judges :—

Lord Young—The testator had two children, and by his will he divided his fortune equally between them as the law of moveable succession would have done had he died intestate, with this difference, that he settled the share of each child on him in liferent and his issue in fee, and in the case of one of them (Mrs Oliver) protected her liferent by declaring it alimentary and excluding the *jus mariti* of her husband. The will says nothing of legitim, and probably the testator never thought of it. Mr Oliver, to whom the testator gave nothing, was dissatisfied, and claimed his wife's legitim as belonging to him *jure mariti*. I called it his wife's legitim only for identification, because it belonged in property to him. His right, created by law on his marriage, was indefeasible by the will of his wife's father, or by any act or deed of hers, and vested in him as a right of property in whatever it attached to instantly on the father's death. He chose to join his wife with him in an action which he raised for payment ; but this was superfluous, and cannot be allowed to prejudice her. He was entitled to sue in his own name, and his wife could do nothing to frustrate his suit. Then he seems to have been called upon to elect between the legitim and the will. But the will gave him nothing ; and, on the contrary, expressly excluded all right or interest which but for the exclusion he might, *stante matrimonio*, have had in the liferent bequeathed to his wife. Now, election implies at least two benefits between which the party put to his election may choose, and here there was only one ; for *ultra* the legitim, to which he had an undoubted legal right, Mr Oliver had no claim whatever on the testator's succession. It seems to have been supposed that the alimentary annuity bequeathed to his wife, exclusive of his *jus mariti*, barred his claim for what the law gave him *jure mariti* unless he renounced that bequest, which it was assumed he had power to do. I am unable to think this right. I think he had no power to renounce for his wife, and to her prejudice, the bequest in her favour, and that its existence was no bar to his claim. It is the fact, nevertheless, that he and his wife joined in subscribing the minute of June 1874 repudiating the bequest and electing to take legitim. This minute did not prejudice or affect Mr Oliver, and it is for consideration whether it should be allowed to prejudice his wife, whose alimentary liferent, exclusive of her husband, is thereby renounced. I am of opinion that it ought not, and that for reasons so manifest, if my opinion of the case otherwise is well founded, that it would be a waste of time to express them.

I should not, I confess, have thought it possible that the satisfaction of Mr Oliver's claim could

interfere with the disposition of the will otherwise than with respect to the settlement of the half of the testator's fortune bestowed on Mrs Oliver and her issue. That half was the full measure of her legal right of succession, including legitim, and the only objection was to the settlement of it in such manner as to defeat her husband's vested and indefeasible right to so much of it (about £2000) as was legitim. To this extent only the settlement of that half was in excess of the testator's testamentary power, and the husband, who alone was prejudiced, challenged it accordingly. He might have died immediately after the testator, leaving his right to pass to his executor, who would no doubt have enforced it. That the amount should be paid out of the half of the succession settled on Mrs Oliver and her issue I cannot think doubtful, for to that amount exactly the settlement of that half was *ultra vires*, the settlement of the other half on the son and his issue being within the testator's power, or if objectionable not objected to. Had the son claimed legitim, his claim must have been satisfied out of the half of the succession settled on him and his issue, and then a question of election and compensation (to his issue) would have arisen, he taking, or being entitled to take, benefit by the will. By Mr Oliver's claim I think Mr Macfarlane and his issue cannot be affected, for I should think it extravagant to propose to pay any part of it out of the half of the succession settled on them. If paid out of the other half, as I think it must be, Mrs Oliver will necessarily be disappointed in her liferent, and her issue in their fee, to that extent; and had Mr Oliver been entitled to any benefit by the will, the Court would, on the doctrine of election and compensation, have laid hold of that to compensate them for the disappointment. But he takes nothing by the will, which gives everything to them except what he takes of legal right. The case is simply this—that to the extent of the sum withdrawn to satisfy Mr Oliver's indefeasible legal right, the testator gave Mrs Oliver and her issue (not necessarily his) in liferent and fee respectively more than he was at liberty to do.

That Mrs Oliver's alimentary liferent, exclusive of her husband's *jus mariti*, shall not be affected beyond the reduction occasioned by the withdrawal of so much of the capital as has been paid to her husband *jure mariti*, is, I think, clear. To compensate her children at her expense, by withdrawing from her and accumulating for them the alimentary liferent bequeathed to her, exclusive of her husband's *jus mariti*, because he asserted his *jus mariti* in the matter of legitim, would, I think, be unjust. There is no question, so far as I see, about compensating the children at the expense of Mr Oliver, who got the money. This indeed could only be done by ordering him to restore it, and restoration is not compensation, although quite as satisfactory. He happens to be still alive, but that is an accident. The question would have been the same had he died immediately after the testator, or after getting his money. Nor is there any proposal to compensate Mrs Oliver herself, who is the immediate and principal sufferer. Her husband, while he lives, may also feel the loss or diminution of her annuity, protected against him though it is. But he might have died, and she may yet survive him for years. She and her children must necessarily suffer by the withdrawal of the money, there being so much less for the bequest to her and them to operate on; but with respect to the balance, I see no reason why the bequest should not have effect according to its terms.

I cannot admit the assumption on which the whole controversy about election and its consequences is based—viz., that regarding the will in question as applying to the testator's whole estate, he must be taken to have intended that the bequest to his daughter should be dependent and conditional on the renunciation of her legitim. The will expresses no such intention; and whether or not it is reasonable to imply it depends on the whole tenor of the instrument, and particularly, I should say, on the nature of the bequest to the daughter. Now, I think that when a testator bequeaths an annuity to a married daughter, 'for her liferent alimentary use and behoof allenarly, exclusive always of the *jus mariti* of her husband' (the particular expressions are immaterial, the sense being clear)—albeit the will applies to his whole property—the renunciation of the daughter's legitim by her husband cannot be implied as a condition of the bequest. It may be reasonable (or not) to impute to the testator a knowledge of the law of legitim, but the knowledge imputed must be accurate. The knowledge imputed to the testator is therefore this—that if his daughter and her husband both survived him, her husband might, if he pleased, claim her legitim *jure mariti*, and withdraw so much from the succession at his disposal. But the testator's intention and purpose, anxiously expressed, was to protect his daughter against the *jus mariti* of her husband, whom he manifestly distrusted; for he excluded him, alone of all men, from ever being assumed as a trustee of his will. Now, we are asked to imply an intention on his part according to which the alimentary provision to his daughter shall be put in the power of her husband, against whom he so anxiously endeavoured to protect it—to the effect of enabling him, not indeed to take it to himself, but to deprive his wife of it by renouncing it expressly or impliedly for her, as the necessary condition (by the intention we are asked to impute) of procuring payment of a sum of money to himself. Having no knowledge of the testator's intention except what I derive from his will, I am thereby satisfied that this was not his intention, and therefore refuse to impute it to him by implication. I think he intended that his daughter should have her alimentary annuity unconditionally—at least to this extent, that it should not be in the power of her husband to deprive her of it by any exercise of his *jus mariti*. This is quite consistent with its suffering diminution to such extent as it may appear that he gave it out of of funds not legally subject to his disposal—a result in no way dependent on his intention. How the matter would have stood had the daughter been *sui juris* and elected for legitim I have not to consider.

I do not, of course, doubt that a married woman may be put to her election. She frequently has been, and there is no reason why she should not. I only venture to doubt if she is, and on consideration to think that she is not, with respect to an annuity directed to be paid to her, for her personal use exclusive of the *jus mariti*, by her father's trustees out of funds con-

veyed to them for the purpose. The expression of a condition under which the excluded husband —excluded for the protection of the gift to the wife—might at his pleasure altogether defeat the gift, would have been a striking inconsistency; and without implying it, and taking the will exactly as if it had expressed it, there is, I think, no case for election.

But if the law be otherwise, and the case really one for election, Mrs Oliver urges that she is entitled to be restored against the election that was in fact formally made—offering to replace the money paid to her husband out of the arrears of her liferent which have been accumulating in the hands of the trustees. And on the admitted facts I should be disposed to regard this demand favourably; for these facts suggest that she was so ill-used (if her annuity was renounced) that it is impossible to account for what occurred otherwise than by gross error or undue influence. I find no trace of any inquiry or consideration of what was beneficial for her, although the election was between a sum to be paid down to her husband and an annuity to her for life with protection against him.

An alimentary liferent provided to a wife by her father for her own use, exclusive of the *jus mariti*, is not readily permitted to be renounced or sacrificed by her husband for his personal advantage; and when he has prevailed on her to join him in the renunciation, it is, I think, in the power and according to the duty of the Court to restore her if it shall appear that her interest was not duly attended to, and that restoration can be made without injustice to third parties. Now, no account was had of Mrs Oliver's interest, or of the sacrifice that was being made of it,—according to the assumption I am now making,—and I think it clear, on that assumption, that it was unduly sacrificed. I think no discreet and disinterested guardian of her interest would have permitted the sacrifice. The legitim was paid to her husband on 15th April 1876 (four years after her father's death), the amount with interest being £2500, 3s. 1d., the unpaid arrears of her liferent then (at least on 15th May 1876) amounting to £1376, 17s. 4d., "exclusive of interest," as the accountant informs us. The revenue of the estate was then estimated at £625, and to one-half of this she had right for her life—to be increased by the addition to the estate of £3000 on the death of the testator's widow. The arrears then due to her and her liferent for the future she was made to renounce for £2500 paid down to her husband. I think this was an improper proceeding, and am not disposed to believe that both husband and wife acted in gross error or on bad advice. However this may be, I am of opinion that Mrs Oliver is entitled to be restored, if that be possible without injustice to others, and I think it is possible. To the extent of £1376 the payment to her husband was made (or with perfect justice to others may be held to have been made) out of the arrears of income due to her at the date of the payment. Since then the income due to her according to the will has been accumulating in the hands of the trustees, and already amounts to more than the balance of the payment. This accumulated fund is now in Court, to be administered under the direction of the Court, and I am of opinion that it ought to be applied so far as necessary to replace the capital withdrawn by Mr Oliver in 1876. Any balance Mrs Oliver is entitled to; and she is also, I think, entitled to her liferent in future of one-half of the estate, which is now again restored to its original amount without the loss of a shilling to anyone interested except only Mrs Oliver herself, whose liferent during past years has been lost to her. This loss she seems willing to submit to—the claim for her husband and herself being, as I understand it, only for the liferent after the capital was restored by the revenue withheld from her. I should have preferred the view that Mr Oliver was legally entitled to the legitim in his own right *jure mariti*, and that having regard to the tenor of the will and the character of the bequest to his wife there was no necessity or power on his part to renounce the bequest or affect his wife's rights under it—the logical, and I think legal, result being that his demand should be satisfied out of the capital of the half of the succession settled on Mrs Oliver and her issue, so reducing the amount of their liferent and fee respectively to the extent of the sum withdrawn, but beyond this affecting the right of neither. The other view, whereby the whole loss is put on Mrs Oliver, out of whose income the capital is made up for the fiars, is that which she, with the assent of her husband and her legal advisers, takes for herself. I should nevertheless allow them to amend their claim and pleas if they are disposed to do so. A multiplepoinding is a comprehensive and elastic process; and I cannot state it as my opinion that Mrs Oliver is not entitled to the liferent of one-half of the succession from her father's death, after deducting from the capital-yielding income the sum paid to her husband as legitim. I think she is.

On the general question of forfeiture or compensation in a proper case of approbate and reprobate or election, where a property or fund is, in the exercise of a legal right, voluntarily withdrawn or withheld from the disposition of a will by a beneficiary under it, my opinion agrees with that of the Lord Ordinary. I think the doctrine is equitable, and that the equity is satisfied by indemnity or compensation to those who suffer by the withdrawal or withholding. I quite see and appreciate the argument that when the benefit by the will consists of an annuity or life-interest the value of which depends on longevity, it ought to be forfeited absolutely, inasmuch as it may be more or less than compensation for what is withdrawn or withheld, just as it happens —the one risk being set against the other. But I cannot accept this view. The beneficiary withholding or withdrawing a fund from the operation of a will must do so in the exercise of a legal right. Now, the other beneficiaries by the will may indeed suffer from the exercise of a legal right, by not getting what the testator meant them to have, though he had no power to give it; but I know of no rule of law or principle by which they can benefit by it, and so take more than the testator intended for them and gave them. The equity of compensation or indemnity is reasonable, and at least well established; but benefit through such exercise of a legal right is another matter, and for that there is no principle or authority that I know of. I do not at all refer to the case of a gift on express condition. A testator may bestow a benefit, however large, on a condition within the power of the beneficiary, however small, and the benefit will no doubt be

forfeited on his failure to comply with the condition on which it is given. Such a case depends on other considerations than approbate and reprobate and election, where a condition implied by equity is enforced within the rules of equity.

In the present case, which is very gross no doubt, the fund withheld or withdrawn from the operation of a provision by will to a married woman for life and her issue in fee was £2500 of legitim, which her husband claimed *jure mariti*. Her life-interest, withheld on purpose, has in fact paid the amount in a few years, so that the will may now operate on all that the testator left and intended it to operate on. There is no sufferer by the withdrawal except the wife, and so nobody but her to be compensated if there were anything to compensate her with, which there is not. In these circumstances, the Court, as a Court of Equity, or acting on equitable considerations, which are none the less so because part and parcel of our law, is asked to declare the residue of the wife's life-interest to be forfeited. To go to whom? To the other beneficiaries by the will. But they have lost nothing, getting everything the will gives them. Why then should they have the residue of the wife's liferent? Because had she not lived long enough to suffer the loss herself it would have fallen on them. She has in fact borne all the loss that has occurred, and no more can occur; but as she might have escaped by death, she shall suffer a forfeiture for behoof of those who would in that case have been the losers This seems to me to border on extravagance, even without reference to the consideration that had she, who in fact bore the loss, died before it was met, the money with which she met it would have passed to those who seek the forfeiture because of the risk they ran of her premature decease.

Lords Craighill and Lee returned the following opinion:—The principal question raised by the record we consider to be, Whether the provisions in favour of children, contained in the will of the late Mr Macfarlane, were intended to be conditional upon legitim being renounced.

Our opinion upon this question coincides with that of Lord Fraser. We only think it necessary to add, that in arriving at this opinion we think that the purposes of the settlement are sufficiently expressed to prevent intestacy to any extent in the event of the implied condition not being accepted.

We think that the fixed rule of construction which was given effect to in *Collier* v. *Collier* (11 Sh. 912) and *Breadalbane's Trustees* v. *The Duchess of Buckingham* (2 D. 731), and the series of decisions there referred to, is applicable to the settlement in question, and that there is implied an intention on the part of the testator to dispose of his whole estate, notwithstanding that the condition is rejected, in the manner most favourable to the execution of his purposes in regard to the beneficiaries who have not repudiated the will.

This view suggests the answer which should be given to the second of the questions submitted to the consideration of the consulted Judges—What is the destination of the revenue set free by Mrs Oliver's election of legitim? and particularly, What becomes of the surplus after replacing the portion of the funds withdrawn by her election? Does it constitute a partial intestacy, or does it fall into residue? We are of opinion that the latter result is in accordance with the presumed intention of the testator—thinking that the terms of the testator's deed, disposing of the "whole residue and remainder of my means and estate," are sufficient to carry interest, either before or after the period of vesting, in the event of the death or renunciation of the liferenters, and that the direction to apply intermediate income to the benefit of children presumptively entitled to the fee, in such way as the trustees may think best, "in and towards the maintenance and education of such children," is sufficient to show his testamentary wishes in that event. The surplus forms part of the trust-estate—in other words, falls into residue and becomes applicable to the benefit of those who retain an interest under the will, either by way of liferent, as in the case of the son, or as fiars, like the grandchildren.

With regard to the cases in which the doctrine of equitable compensation is said to have been given effect to, we have only to say that in our opinion they do not recognise that doctrine as applicable to such a case as this. In the case of the *Breadalbane Trustees*, for example, compensation was not the principle of the decision. On the contrary, it was explained by the Judges that the principle of *surrogatum* is that which must be given effect to. "This principle of *surrogatum* was given effect to" (says Lord Medwyn) "in the case of *Kers* v. *Wauchope*, 3d May 1819, in the House of Lords, of *M'Alister*, 29th June 1827, and of *Peat*, 14th February 1839." Lord Moncreiff's statement on the subject was—"I cannot reject the principle of *surrogatum* when it is laid down both in *M'Alister* and *Peat*. If there be an equity, does it not go to allow those who suffer by her taking her legitim to derive benefit by her not being allowed to take her half of the rents?" It was contemplated, therefore, that the result might be to give to those who accepted the will a benefit greater than they would have had if nobody had elected to take against the will, and it was not thought necessary to postpone the decision until it should be seen whether the half of the rents accumulated during survivance of the Duchess of Buckingham would have sufficed to leave a surplus after compensating the personal estate.

In the case of *Kers* v. *Wauchope* the judgment put an end at once to all possibility of the Ladies Ker retaining an interest in the liferent of the personalty, "either as next-of-kin or in any other way" (1 Bl. p. 41). It seems to have been quite in view that this liferent might prove sufficient to form a fund for compensation. Because one of the respondent's arguments was, that if the liferent did not fall into residue it was a fund out of which they should be compensated. But the judgment did not proceed upon that view; on the contrary, the complete exclusion of the Ladies Ker was declared immediately.

Lord Rutherfurd Clark concurred in the following opinion of Lord M'Laren:—The question referred to the Court is of importance to the law, and its decision will probably influence the distribution of personal succession in many cases. It is easy to see that a legatee, under the pressure of necessity, may elect to accept a present capital sum in preference to an alimentary liferent or

protected testamentary provision of greater value; and where such an election is made the question will arise, as in the present case, whether his right under the will is forfeited, or whether it is only surrendered for the purpose and to the effect of replacing the sum which he had withdrawn from the testamentary estate?

In the present case I assume, in consonance with the Lord Ordinary's findings, that the trust-estate of the deceased Mr Macfarlane has been fully compensated out of the one-half share of the income of the trust which was destined to Mrs Oliver. In other words, the legitim claimed and received by Mrs Oliver has been restored to the trust-estate with interest, by applying the share of income provisionally destined to Mrs Oliver in replacement of the capital withdrawn from the trust-estate. The trustees came into Court asking instructions as to the disposal of Mrs Oliver's share of future income; and it is contended by the parties respectively interested —(1) that the money should be divided amongst the legatees, other than Mrs Oliver, in proportion to their interest in the succession; (2) that it should be treated as intestate succession; (3) that it should be paid to Mrs Oliver herself, in terms of Mr Macfarlane's will.

There may be variations of the first of these modes of distribution; but the alternatives to Mrs Oliver's claim are—first, a testamentary distribution from which she is to be excluded; and secondly, distribution according to the rules of intestacy.

1. The first question, as the argument presents itself to me, is this—What is the legal consequence of a claim by a legatee inconsistent with the scope of the will? Is it forfeiture or satisfaction? If the former, Mrs Oliver's present claim is irrevocably barred. If the latter, then, it is possible to hold, with the Lord Ordinary, that the election is truly between the legal claim and its equivalent in value under the settlement, with a reservation of the legatee's claim to the excess in value of the legacy or testamentary provision over the legal provision. The principle of satisfaction thus limited comes recommended by the consideration that it supplies the fund which is requisite, and no more than is requisite, for that "equitable compensation" which is the motive or reason of the rule, however we define it. I am of opinion that there is a real distinction between the cases of forfeiture of a conditional bequest, and satisfaction of an unconditional bequest by reason of the acceptance of a provision to which the legatee has an independent right in law or by contract. The case of proper forfeiture, with which we are familiar, is where a legacy or a share of succession is given subject to a condition, with an irritancy or clause of forfeiture provided to take effect upon the failure of the legatee to comply with the condition. The forfeiture under such a clause will, I apprehend, be regarded as a lapsed interest, and the fund will be divisible, as in the case of the death of the legatee in the testator's lifetime.

In such a case I apprehend the order of preference among claimants would be (1) conditional institutes, (2) residuary legatees, (3) next-of-kin; and it would depend on the provisions of the will and the nature of the interest forfeited, whether the benefit of the lapse was to accrue to one or the other of these classes In such cases there is no question of compensation. A legacy is given on condition that the legatee assumes a certain surname and arms, or that the legatee remains a widow, or resides in the country. The failure to comply withdraws nothing from the general estate, and the forfeiture is an accession to it. These are the cases in which I think the term forfeiture is properly applied; and it appears to me that they must be carefully distinguished from cases of election, where the consequence is not forfeiture to the general estate, but compensation to the particular interests which suffer through the exercise of the right of election.

In the cases of *Annandale* and *Alexander's Trustees*, referred to in the minutes of debate, where the widow claimed *jus relictæ*, and submitted to the withdrawal or forfeiture of her annuity, it was held that the estate became distributable as in the case of death, and there being no reason for keeping up the trust, except the securing the annuities, decree was given in each of these cases for immediate distribution. But these were cases arising under wills of a very simple character, under which all the legatees would suffer a proportional abatement through the withdrawal of the *jus relictæ* by the truster's widow. In such cases an immediate division amongst the children (as in the case of death) is the simplest and best way of compensating the children for the withdrawal of a part of the capital. I refer to these cases because it has been maintained in argument that in them the rights of the legatees, consequent on the rejection of the widow's provision, were ascertained and worked out upon the principle of forfeiture. I think these were really cases of compensation, or at least were cases where the principle of forfeiture and the principle of compensation would lead to the same results. They are therefore inconclusive as regards the present question. While in other cases of election between legal and conventional provisions the term "forfeiture" and expressions of a like import have been used to express the consequence of a taking adversely to the scope of the will, I think it will be found that these expressions are always used as equivalents of the liability to make compensation to the legatees whose interests are affected, and never in contradistinction to that liability, or as implying an obligation of a different character. Nothing can be more authoritatively or satisfactorily settled than the rule by which provisions surrendered to the uses of a will are applied in compensating the interests affected by the exercise of the privilege of election adversely to the will. That being so, I cannot attribute any special significance to the use—it may be the inaccurate use in previous cases—of the words "forfeit" and "forfeiture" to describe this consequence, nor can I hold that the use of such expressions ought to prevent the Court from considering on its merits the question of the proper disposal of the surplus fund in a case in which a surplus has arisen after satisfying all claims of compensation.

I am disposed to go further, and to say that the principle of equitable compensation and the principle of forfeiture are inconsistent, and that the recognition of the former principle amounts to a rejection of the latter. Forfeiture operates in favour of the estate out of which the testamentary provision is given; equitable compensation operates in favour of the estate out of which the

legal claim is to be satisfied. This appears to me to be a very fundamental distinction. For example, if a testator leaves his widow an annuity out of the rents of his heritable estate, and declares it to be in satisfaction of her *jus relictæ*, and she claims her *jus relictæ*, the principle of forfeiture would operate in favour of the heir-of-law, whose estate would then be disburdened of the annuity. But under the principle of compensation the heir-at-law would continue to pay the instalments of the annuity to the trustees of the personal estate until they should amount to a sum adequate to replace the *jus relictæ* withdrawn from that estate, with interest. Principles which lead to such different results cannot, in my opinion, be concurrently applicable; and this, I think, is a reason for adhering strictly to the principle of compensation in cases like the present, and for rejecting that of forfeiture.

2. If, then, the principle on which claims adverse to a will should be treated is satisfaction and not forfeiture, the next question is, How is the claim to be satisfied, assuming that the claimant elects to take the legal provision? I think the claim is to be satisfied by appropriating so much of the testamentary provision, and no more than is necessary for the purpose. According to the first reported case of *Fisher* v. *Dixon*, 10 S. 55, 6 Wils. & S. 431, it would not be competent to appropriate the gross fund destined to Mrs Oliver in liferent and her children in fee so as to reduce the capital sum ultimately payable to the children. The majority of the consulted Judges observed on this subject—"We cannot see upon what grounds in justice the children can be deprived of the fee by any act or deed of the liferenters, who are entitled to manage their own property as they think fit, without control on the part of their children." From this statement it would appear that the legitim must be satisfied out of the share of income appropriated by the truster to Mrs Oliver's liferent. The legitim being thus satisfied, the will, as I conceive, takes effect upon the remainder of the income. I come to this conclusion independently of the consideration which the circumstances render probable, that the election in this case was rather the act of the husband than of the wife. In previous cases, of which the second case of *Fisher* v. *Dixon* is an example, I think the election by a married woman has been regarded as her individual act, and there are even indications that the Court would not allow a husband to elect to his wife's prejudice. The point is of less importance now than formerly, because under the Married Women's Property Act 1881 the legitim will for the future vest in the wife as her separate estate. Again, I do not think that the law ought to view with special disfavour the assertion of a claim to legitim, which is itself the creature of law. Where a testator is not professing to dispose of the legitim fund, but only of the dead's part, there can be no question but that the child or children will be entitled to legacies bequeathed by the parent over and above their legitim. There is no reason that I know why the father who makes a will, or the law which interprets and gives effect to it, should regard the claiming of legitim as a hostile proceeding, to be visited with penal consequences analogous to those which follow the contravention of an entail. I am speaking of the case where no forfeiture is declared. Where the will disposes of the legitim fund, as well as the dead's part, the child cannot get the provision which his father intended for him in addition to his legitim, because the same fund cannot be distributed in two different ways. He must therefore elect between the provisions—that is, he must shape his claim consistently with the possibilities of the case. It is the impossibility of double payment out of the same fund which in my opinion entitles the trustees or representatives of the deceased to put the child or widow to an election; where there are funds sufficient for the satisfaction of the legal as well as the conventional provision, both are to be paid, and no case of election arises. So also with reference to claims arising under marriage-contract and testamentary provisions. There are cases where the one provision is not held to be in satisfaction of the other, and in such cases it will depend on the sufficiency of the funds left by the testator whether both claims are to be paid in full.

3. Reverting to the case of election between legitim and testamentary provisions, I have indicated an opinion that the two claims are not necessarily or always inconsistent; that election is only requisite where the claims are inconsistent, and that it is a consequence of the necessary limitation of the aggregate of claims to "once and single payment" out of the estate. If these views be well founded, it follows that when the estate is sufficient to afford payment of a part of the legacy in question in addition to the legal claim, such payment ought to be made. Thus, if a testator having only one child should leave that child his heritable estate and also a legacy exceeding the value of the legitim, but subject to an alimentary clause or other personal condition, it would seem that the child might claim legitim on condition of surrendering the pecuniary legacy, and that he would not be bound also to surrender the heritable estate. Of course, if the will should attach a condition of forfeiture (in the case I am putting) to the act of claiming legitim, such forfeiture must be enforced, on the principle that every clause of the will is to receive full effect. But where there is no forfeiture and no express exclusion of legitim, but an implied exclusion, founded on the circumstance that the will disposes in whole or in part of the legitim fund, I think the implication should not be extended further than is requisite to avoid inconsistencies, and to prevent injury to the rights of others. If after the legitim is provided and the residuary legatees compensated there are funds available for a payment to account of the testamentary provision, the right to which has been suspended, I am not aware of any rule of construction or of equity which should disentitle the beneficiary to receive the benefit intended for him or her by the maker of the will.

It may be observed that what is termed legal implication is for the most part a form of indirect demonstration. Something is held to be implied, because on the contrary supposition some absurd or inequitable consequence will follow. Thus in the present case an exclusion of double claims is supposed to be implied although not expressed, because the whole estate is disposed of under the will, and because if double claims were allowed the estate would be in a sense insolvent. But when it is shown that the inequitable result here apprehended may be

avoided in another way, namely, by giving effect to the claim of legitim, and merely suspending the right to the income for such time as is necessary to replace capital, the implication is certainly not very strong that the testator meant to exclude the double claim. In such a case it seems more reasonable to imply that the testator meant only to exclude the legitim so far as might be necessary to give effect to his scheme of distribution.

4. The result of the consideration I have given to the question may be expressed in the two propositions in which Mr Swanston states the import of the English authorities—(1) That in the event of election to take against the instrument, Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his election disappoints; and (2) That the surplus after compensation does not devolve as undisposed of succession, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right.—(1 Swanston's Reports, 433).

I think it would be a subject for regret if the decision to be given in this case should introduce a new or at least hitherto unsuspected distinction between our law in relation to wills and that of England. The distinction would not be founded on any principle peculiar to the law of Scotland, but would merely represent a divergence of opinion between two Courts dealing with the same question of jurisprudence. Irrespective of these considerations, the weight of authority by which the rule of the law of England is supported recommends it to favourable consideration; and in the absence of any opposing decision of the Courts of Scotland, should probably be decisive in favour of the view so recommended.

5. Being of opinion that the interlocutor of the Lord Ordinary ought to be adhered to, it is unnecessary for me to consider the relative merits of the claims of the residuary legatees other than Mrs Oliver and of the next-of-kin. But in case a majority of the Court should be of a different opinion, I may add, that if the unappropriated income destined to Mrs Oliver is held to have lapsed through forfeiture, it will in my opinion be intestate succession. The share of income in question is part of the residue, and in the absence of words importing accretion I think that a lapsed interest in residue is undisposed of succession, and falls to the heirs *ab intestato*. Residue doubtless includes, as pointed out by Lord Westbury in a case referred to in the argument, the entirety of the estate not required for the antecedent purposes of the will; and if the fund under consideration had been estate which was either not specially appropriated, or was appropriated to an antecedent purpose which had failed, I do not doubt that it would have fallen into residue. But in the case under consideration it is assumed that the testator has left a part of the residue itself unappropriated, and there is no second residue or ulterior destination upon which the residuary legatees can found a claim to have the shares increased. This would be in my opinion a manifest case of partial intestacy. While, therefore, I am of opinion that the surplus belongs to Mrs Oliver in virtue of the will, I think that if the will is held to be inoperative in her favour, it is also inoperative as regards the other claimants, and that failing Mrs Oliver's claim to the fund, the claim of the next-of-kin, which she supports in her alternative argument, ought to prevail.

Lords Adam and Kinnear returned the following opinion:—The first question is, whether the claimant Mrs Oliver has forfeited all right under her father's settlement by reason of her having claimed legitim? and that appears to us to be a question of intention, to be determined by the import of the settlement. We take it to be fixed that a total settlement, such as the present, purports to dispose of the legitim fund; and therefore that the children can take no benefit under it except upon condition of allowing the legitim fund to be carried in conformity with its dispositions. But Mrs Oliver has satisfied that condition. She had withdrawn her legitim from the operation of the settlement. But she has now replaced the whole amount so withdrawn; for the liferent provided to her out of the dead's part has fully made good the amount taken away as legitim; and the other legatees are no longer in a position to maintain that they have been disappointed, by her claim, of any benefit which the testator intended for them.

It seems to follow that if there be no other condition attached to the bequest in her favour than that which we have already stated, she is now entitled to the income of her half of the residue, in conformity with the provisions of the will. But it is maintained that by force of an implied condition she has forfeited, by taking legitim, all right under the will, even to the excess of the provisions in her favour, after the legitim has been made good. We are of opinion that no such implication is involved in the dispositions of the will. It does not arise from any bequest in favour of other legatees, because these are fully satisfied. But it is said to be inferred from the terms of the bequest to Mrs Oliver herself, the argument, as we understand it, being that by taking legitim she has not only withdrawn a portion of the estate from other legatees, but also defeated *pro tanto* the conditions by which the liferent interest bequeathed to her is protected from her husband. But these are conditions for her own benefit; and we think it impossible to infer from the mere fact of a testator assuming to dispose of the legitim, along with the dead's part, in favour of the children already entitled to legitim, but under conditions imposed for their own advantage, that he intended to forfeit every other benefit he has bequeathed to them in case they should prefer to take the legitim by virtue of their paramount title rather than under the will. It is not, in our judgment, an untenable hypothesis that a testator may desire to protect his daughter's whole estate from the *jus mariti*, without intending to deprive her of everything he has power to dispose of, if that protection should be even partially defeated by her claiming legitim. The argument assumes that the testator contemplated the possibility of the legitim being withdrawn, and the amount being made good to the estate during his daughter's lifetime. But if, in contemplation of that event, he had intended to deprive her absolutely of her liferent, even after the legitim had been replaced, it appears to us that he must have expressed that intention either in terms, or at least by the clear implication

which would arise from a contrary disposition applicable to the event. But not only is there no ground for inferring any intention to deprive Mrs Oliver of the remainder of her liferent, but she cannot, in our opinion, be deprived of it without defeating an intention that is clearly expressed. For it cannot be taken from her without giving it to persons who have no title to it under the will. It is certain that the testator did not intend to die intestate with regard to any part of his estate; and we think it equally clear that he did not intend the other legatees to take an interest which he has not bequeathed to them. No doubt these legatees are entitled to the interest the testator has given to them in Mrs Oliver's legitim. But when that has been made good they can claim nothing more as a benefit intended for them under the will. Mrs Oliver's claim, therefore, cannot be rejected, for the benefit either of the next-of-kin or of the other legatees, without making a new will for the testator contrary to that which he has made for himself.

We think no difficulty arises from the apparent election which Mrs Oliver has made as between her legitim and her provisions under the will. The result might have been different if in the interest of other legatees she could have been compelled to make an absolute and final election upon the succession opening. But she could not be required to make a final election until the subject-matter had been ascertained. She could not claim legitim without permitting the income, which would otherwise have been payable to her, to be applied in making compensation to the persons disappointed by her claim. But she would, in our opinion, have been entirely within her right if she had expressly stipulated that when full compensation had been made she should be entitled again to come in and claim under the will. And nothing has been done to prejudice that right; for the estate is still in the hands of the trustees, to be disposed of in conformity with the directions of the will; and there is no one disappointed by her of any benefit intended for him by the will, so as to entitle him to interfere and object to the provisions in her favour receiving effect.

We are therefore of opinion that the Lord Ordinary's interlocutor should be adhered to. But in case it should be recalled we find great difficulty in forming an opinion as to the manner in which the forfeited income should be disposed of, since in the view we take of the will the testator's intention would be equally defeated whether it were given to the residuary legatees (Macfarlane and his sons), or to the next-of-kin. But as we consider that disappointed legatees can never take, by way of compensation, a greater benefit than the testator intended for them, we are of opinion that if there be a forfeiture at all the forfeited income should be treated as undisposed of by the will, and therefore given to the next-of-kin as intestate succession.

Lord Fraser—The right to legitim which vested in Mrs Oliver at her father's death would, according to the common law of Scotland, have passed over to her husband in full property in virtue of his *jus mariti*; and he could have sued for the money in his own name and without joinder of his wife (*Macdougal* v. *Wilson*, 20 D. 658). But this rule of the common law was altered by the Court in virtue of its equitable jurisdiction. They found, in contradiction to the common law, that where a sum of money, declared to be in lieu of legitim, was bequeathed to a wife, and the *jus mariti* was excluded from it, the husband's creditors could not insist upon the wife's claim for legitim from which the *jus mariti* was not excluded—the consequence of any such claim being that she would have forfeited the bequest given to herself for her own benefit. It was held that the right of election belonged to her, and that neither her husband nor his creditors could control her in the right (*Stevenson* v. *Hamilton*, 1 D. 181; *Lowson* v. *Young*, 16 D. 1098; *Millar* v. *Birrell*, 4 R. 87).

Subsequent legislation in the same spirit still further enlarged the rights of property of married women. The 16th section of the Conjugal Rights Act gave a wife a right to demand a reasonable provision out of all property to which she succeeded; and the Married Women's Property (Scotland) Act 1881 (44 & 45 Vict. cap. 21) abolished the *jus mariti* altogether.

Mrs Oliver therefore was entitled to have claimed the provision under her father's settlement, or to have rejected it, as she thought fit; and if she had rejected it there was no paramount right on the part of her husband to compel her to claim legitim in order that that fund might come to him in virtue of his *jus mariti*. This, however, she did not do, but, on the contrary, claimed and obtained payment of the legitim—which it is stated is now all spent. There is an averment upon the record to the effect that when this was done it was under the influence of bad advice; but there is no offer of proof that would justify the Court in inquiring into this matter. The case has been presented for her and her husband, without any demand for investigation as to the circumstances attending the repudiation of the provisions under her father's will.

In these circumstances we must consider the effect in law of her proceedings. It is not disputed that if the liferent which was given to her of one-half of her father's estate had been bequeathed upon the express condition that she must take it in lieu of legitim, her present claim would have been inadmissible. Now, starting from this point, it remains to be considered whether the case does not raise an implied condition as effectually leading to the same conclusion.

The legitim having been paid, Mrs Oliver ceased to draw the liferent of one-half of the estate which her father had bequeathed to her. It is not maintained by her that she was entitled to that liferent as from her father's death, and also to the legitim. The question then necessarily arises, Upon what ground is it that she could not thus claim both these provisions from the time of her father's death? That question is answered by saying that there was an implied condition to the gift under the will, to the effect that that gift shall not be demandable if legitim were claimed. The settlement here was a settlement of the total estate of the father. It included every moveable fund which he possessed. Legitim was simply a debt claimable against the estate vested in the father, which whole estate he conveyed over to his trustees. When, therefore, he proceeded to distribute and apportion that estate amongst various legatees, he clearly meant that there should be on the part of these legatees no claim made by them which would upset his

settlement and interfere with his testamentary arrangements. Therefore any child by asserting a claim to legitim acted inconsistently with the father's will, and thereby reprobated the will. This construction of the meaning of a settlement of a total estate has been made the subject of repeated decision, beginning with the case of *Henderson* v. *Henderson*, M. 8191, in 1782, afterwards enforced in the case of *Breadalbane* v. *The Duchess of Buckingham*, 2 D. 731, and in other cases, the last being *Davidson* v. *Davidson*, 9 Macph. 995; and it must now be held as settled law. Now, although the point raised in the present case was not expressly decided in any of these cases, the principle upon which the whole of them proceeded was simply this, that the implied condition arising from the character of the will, as being one dealing with the whole estate, was as effectual as the most express condition declaring the legacy to be in satisfaction of legitim. Of course it became necessary for the Court to determine what should be done with the repudiated legacy when the legitim was claimed, and this was given—in the first instance at least—to the persons who suffered in consequence of the legitim having been claimed. In England this branch of equitable jurisdiction is called the "equity of compensation," and the same equitable relief is recognised in our own law under the names of "restitution" and "*surrogatum*."

After those persons who are damnified through the claim of legitim having been made are compensated by the restoration of the fund withdrawn, then comes the question, who shall get the balance of the legacy? It is claimed by Mrs Oliver, who maintains that after compensation has been made to the beneficiaries, whose interests were lessened in consequence of her claim for legitim, the will immediately revives in her favour; and that the holders of the fund hold it in trust for her. This seems to be an assumption altogether unwarranted, if this be, as it ought to be, regarded as a *quæstio voluntatis*. There is no ground either in fact or probability that the testator did intend this fund to be held in trust for the daughter who had upset his testamentary settlement. It is difficult to hold that the testator, who knowing the circumstances of his children better than any other person, intended, when he strictly limited his daughter's interest to a liferent of the half of his estate, excluding the *jus mariti*, that she should be entitled to claim legitim, and after the legitim was repaid to the trust-estate be entitled to claim the legacy. This is a conclusion that cannot be reached consistently with the grounds upon which the decisions in *Henderson* v. *Henderson* downwards have proceeded. It is more reasonable to hold that the implied condition under such a will as this is as positive and imperative as if it had been expressed, and that therefore the insisting upon the payment of legitim is an absolute forfeiture of all right under the will.

The ground upon which this conclusion is arrived at is simply this, that a person cannot take anything under a will without conforming to it so far as he is able, and giving effect to everything contained in it, and in particular that he shall not assert his paramount claims against it. But it is said that this is not a case of election, or of approbate and reprobate. I cannot conceive a more clear case of election than the present one. Where a father, having no power to dispose of an estate belonging to a child (viz., legitim), does dispose of it, but at the same time bequeaths to the child a legacy inconsistent with the claim of legitim, the child is here put, in the most direct form and manner, to his election; and the election is simply to take the legacy once for all, or the legitim once for all—and there an end of it. There is a condition to all such bequests as that in favour of Mrs Oliver, that the legatee shall do nothing to disturb the disposition which the testator has made. Unless this were the case, it is very obvious that it would be very seldom that the testator's intention would be carried out. A daughter to whom a half of the estate is left in liferent would plainly act against her own interests if she took the legacy at the outset. Her course would be to take the legitim, and allow the liferent to go in compensation of the fund so abstracted, and then after compensation had been made, to fall back upon the liferent. No benefit would be gained by effectuating the will of the testator, and nothing would be lost by defeating it. There need no longer be those appeals (as in the case of *Keith's Trustees*, 19 D. 1040) for delay as to making the election, in order that the child may inquire into the relative value of the two estates—the legitim and the legacy. In all cases the legitim will be claimed first,—trusting to the possibility of being restored to the legacy at some future time after compensation has been made.

With regard to the claims of Mrs Oliver's children and of the Macfarlane family to the surplus, I am of opinion that neither of these can be sustained. These persons are entitled to, and have received, full compensation by the restoration of the fund taken away from legitim, and their claim to the benefit of the forfeiture by Mrs Oliver, over and above the compensation price, is one inconsistent with the principle on which a Court of Equity has acted in establishing the doctrine of compensation. The Court goes no further than to redress the particular hardship complained of. It provides compensation, but nothing more; and if after this is made the Court should hand over any surplus to the compensated legatee, it would be making a will for the testator which he did not intend, and giving legacies which he did not bequeath.

The conclusion to which I come is, that the surplus was undisposed of, and must pass to Mrs Oliver and her brother George Macfarlane as the next-of-kin. There can be no doubt that the testator did not intend to die intestate with regard to any part of his estate, and he would not have so died if Mrs Oliver had taken her legacy *modo et forma* as it was given to her. The total estate was conveyed to the trustees, who were directed to distribute it in a certain way; but the testator did not anticipate the event which happened—of one of his children repudiating the settlement—and therefore gave no directions as to what was to be done with the legacy bequeathed to her in that event. *Quoad* that legacy there was thus a resulting intestacy after compensation had been made. That portion of the residue was neither conveyed to Mrs Oliver's children, who were limited to the fee of a half, only payable to them at their mother's death; and the share of George Macfarlane and his children was limited to the other half. I do not see anything to raise up implied

will on the part of the testator in their favour, so as to give them, or any of them, the forfeited liferent. There seems, indeed, no principle on which those persons are entitled to anticipate their right, or to enlarge, as under the will, the shares of the residue specifically appropriated to them. The case of *Breadalbane* v. *Pringle*, 3 D. 357, throws some light upon this kind of claim; and the opinions there expressed are entirely hostile to it.

With regard to Mrs Oliver and her brother—although they cannot claim under the will the surplus after compensation has been made, there is nothing to prevent them claiming it by any other title independent of the will. The equity of compensation is a doctrine distinct from that of election, and raises a question merely between the disappointed beneficiaries and the next-of-kin, after the claim of the child electing against the will has been displaced by his election. The legacy being taken from the latter because of such election, the Court, before allowing the next-of-kin, in whose favour the election would otherwise operate, interferes merely to the effect of compelling such next-of-kin to make up in the first place the loss to the disappointed beneficiary. After this compensation has been effected, the fund or estate passes over to the next-of-kin as undisposed of in the circumstances which have occurred.

Lord Justice-Clerk—I concur in the opinion of Lord Fraser as regards the effect of Mrs Oliver's repudiation of the settlement, and I concur with the opinion of Lords Craighill and Lee on the question of intestacy.

At advising—

The Lord President read this opinion—The question to be determined depends on the meaning and effect of the settlement of the late George Macfarlane, and in all cases of this description the legal rules of construction must conform themselves as nearly as possible to the obvious intention of the testator.

The scheme of that gentleman's settlement is simple. He conveys his entire estate to trustees. He provides an annuity to his widow of fixed amount, prescribes to the trustees certain indulgence to his son as to the payment of debt due by him to the testator, and then appoints them to divide the whole residue of his estate, after payment of debts, &c., into two equal parts, and to settle one part on his only son in liferent allenarly and his children in fee, and the other half on his only daughter, Mrs Oliver, in liferent allenarly, excluding the *jus mariti*, and on her children in fee.

There seem to me to be three points on which it is quite impossible to mistake the intention of the testator—(1) He intends his settlement to convey to his trustees everything he should die possessed of, including the legitim fund. (2) He intends to dispose of the whole estate so conveyed, and to leave nothing to intestacy. (3) He intends that there shall be a perfectly equal division of the entire estate between the two families of Macfarlanes and Olivers. Any judgment, therefore, which either makes the division of the estate between the two families to any extent unequal, or which leaves any part of the estate to be disposed of as intestate, is opposed to the distinctly expressed mind of the testator. And yet the whole contention of the reclaimers against the principle of the Lord Ordinary's interlocutor necessarily leads to one or other of these results.

After the testator's death Mrs Oliver and her husband claimed her legitim, and that claim was given effect to, and a capital sum paid to them in discharge of their right to one-half of the legitim fund. Thereafter the trustees for a series of years applied the proceeds of the liferent provided to Mrs Oliver to compensate the family of Macfarlane for the loss sustained by them by reason of Mrs Oliver's claim of legitim until the term of Whitsunday 1881, when this application of this liferent had fully compensated the Macfarlane family for all the loss they had thereby sustained.

What is to be done with the proceeds of Mrs Oliver's liferent from and after Whitsunday 1881? If it is given to Mr Macfarlane's family in any shape, then they will receive more than one equal half of the testator's estate, and consequently more than the testator intended them to have. If it is held to fall into intestacy, again the testator's intention will be set at nought. If it is given to Mrs Oliver for the remaining period of her life—which is the only other alternative that can well be suggested—the division of the whole residue will be precisely equal, and the clearly expressed purpose of the testator will receive effect.

But though I think there are thus sufficient reasons on the face of this particular settlement to dispose of the question before the Court, it is proper to consider how far the result is in accordance with general principle and in harmony with previous judgments of the Court.

It is maintained by the reclaimers that under such a settlement as the present a legatee claiming legitim can never under any circumstances take benefit under the settlement, or, in other words, that the claim of legitim infers a forfeiture of the testamentary provision. To that doctrine I cannot subscribe.

If a provision is given by will in lieu of legitim, or on condition of the legatee renouncing his claim of legitim, of course the condition must receive effect, and the provision cannot be claimed either in whole or in part without a complete surrender of the legitim. But the provision is not affected in the present case by any express condition or any declaration of forfeiture. There is an implied condition arising from the legitim fund being embraced in the settlement and disposed of, to the effect that no one can claim both the provision and the legitim, because that would be to take double payment at the expense of the other legatees.

The important question is, What is the nature and extent of this implied condition? When a condition is implied in a will, though not expressed, it must be because without such implication the will cannot be carried into practical effect according to the mind of the testator. This is the reason why the law implies the condition. But the implication must not be extended beyond the reason for it. The two must be commensurate.

In the great majority of cases the whole provision of the refractory legatee, and more, is required to restore the administration of the estate against the disturbance created by the claim of

legitim, because the legatee would not prefer the legitim unless it were, or were believed to be, more valuable than the testamentary provision, and the result accordingly in the majority of cases is the same as if the refractory legatee had forfeited his right, and hence the term forfeiture has been occasionally—though, I think, inaccurately—applied to such cases. On the other hand, if the result of the claim of legitim and the subsequent administration of the testamentary trust be in the end to make the division of the estate substantially, though not in form, identical with what the testator designed, then to carry the implication the length of absolute forfeiture would be to go quite beyond the reason of the implication.

This, I think, is the true foundation of the doctrine of equitable compensation (a doctrine now established in the law of Scotland), which is not merely something short of forfeiture, but something entirely different in principle.

The essential difference between the two is well illustrated by the case suggested by Lord M'Laren, of a testator leaving his widow an annuity out of the rents of his heritable estate in satisfaction of the claim of *jus relictæ*. The widow claims her *jus relictæ*, and it is paid by the executor out of the moveable estate. If the widow's right under the settlement is forfeited, the resulting benefit accrues entirely to the heir whose estate is thereby disburdened. But if the principle of equitable compensation is applied, the rents of the heritable estate will during the survivance of the widow be payable in compensation of the executors.

Forfeiture and compensation then being thus essentially distinct, not only in principle, but also in their possible operation and effect, the question arises, which of them (in a case not of a gift with an express condition, but of implied direction that the legatee is not to take both the legal provision and the testamentary) is best calculated adequately to redress the disturbance of the settlement occasioned by the claim of the legal provision, and least to interfere with the general purposes of the testator.

In most cases, as I have already said, the result would be the same, whether you hold the provision to be forfeited, or the refractory legatee merely bound to allow compensation to be made to the disappointed legatee or legatees out of the refractory legatee's provision, because that provision will be insufficient or barely sufficient to make full compensation. But where the provision of the refractory legatee turns out to be more than sufficient to make full compensation, the result must always be—if the principle of forfeiture is applied—either to enrich the disappointed legatee beyond what the testator intended, or to create a partial intestacy not intended by the testator?

The present is a most instructive example of the effect of applying the principle of forfeiture to such cases, because here the testator expressly provides absolute equality in the division of his estate between his two children and their families, while the contention of the reclaimers is to produce ultimate inequality. But it will be found that the same reasoning holds good where no equality is designed. Suppose that the testator had provided a sum of £2000 to Mrs Oliver in liferent and her children in fee, and had bequeathed the residue of the estate to his son, any division of the estate which should give to his son more than the full amount of the residue *minus* £2000 would enrich the residuary legatee beyond what the testator intended, and would impair the provision to his daughter and her family to the same extent contrary to his intention.

I am of opinion that no such purpose can be implied from such a will, for the reason already stated, because this would be to carry the effect of the implication beyond the reason on which alone it is founded, and to defeat the intention of the testator by implying what he plainly did not intend.

For these reasons I concur with the majority of the consulted Judges in adhering to the interlocutor of the Lord Ordinary.

I observe that some of the consulted Judges in the majority express an opinion on the question, Whether assuming Mrs Oliver's provision to be absolutely forfeited, the surplus proceeds of her liferent, after fully compensating the injured legatees, should be given to those injured legatees in addition to their full compensation, or should be divided as intestate succession? I am unable to give any opinion on that question as a question on the construction of the testator's settlement, because I cannot say which alternative is the more inconsistent with the intention of the testator. They appear to me to be equally so.

Lord Deas — The late George Macfarlane senior, a domiciled Scotsman, died at Glasgow on 12th February 1872, survived by a widow and two children, George Macfarlane and Margaret Macfarlane or Oliver, wife of Andrew Oliver, residing in Glasgow, formerly in Kilmarnock, and several grandchildren, the issue of that marriage. George Macfarlane senior, whom I shall call the truster, left a *mortis causa* deed of settlement conveying his whole means and estate, heritable and moveable, to trustees with a power to sell and realise the same. The primary or preferable purposes of the deed were—1st, payment of debts and expenses; 2d, implement of the obligations undertaken by the truster to his wife under their antenuptial contract of marriage; 3d, to deliver to his eldest son George the contents of a house at Row, the succession to which house had been otherwise secured to him; 4th, to allow George ten years to pay up the debt due by him to the truster (but this condition did not become prestable, as George had paid up the whole debt in the truster's lifetime).

By the fifth purpose the trustees were directed to divide the whole residue, including what might be set aside to meet the widow's provisions, into two equal parts—one to be held for the truster's son George in liferent for his alimentary use and behoof, not assignable nor affectable by his debts or deeds nor the diligence of his creditors, and upon the death of George the fee of that half to be divided equally among his children, the issue of those deceasing coming always in place of the parent; and the other half of said residue he directed his trustees to set aside for his daughter Mrs Oliver "in liferent for her liferent alimentary use and behoof allenarly, exclusive always of the *jus mariti* of her said husband, or of any future husband whom she may marry, and not assignable by her,

nor affectable by her own or such husband's debts or deeds, or by the diligence of creditors," and upon her death the truster directed his trustees to divide the fee of this half equally among her children, the issue of those deceasing coming always in place of the parent, &c.

The sixth purpose contains the power of sale already mentioned, and power to invest and reinvest the proceeds of the whole estate, so that these proceeds might be secured against being to any extent set free from the purposes of the trust.

By a codicil to his deed of settlement the truster directed, that failing the whole issue of his son George when the fee of half the residue of the trust-estate would have opened to them, the trustees should hold the fee of such half for Mrs Oliver, in liferent for her liferent alimentary use and behoof, exclusive always of the *jus mariti* of her present husband or of any future husband she may marry, and not assignable by her, nor affectable by or for her own or such husband's debts or deeds, or by the diligence of creditors, and for her children and the survivors or survivor of them—the issue of any of them who may decease leaving issue—in fee. Then follows a similar clause in favour of the children of George and their issue failing the whole children of Mrs Oliver and their issue.

In June 1876 the trustees who had accepted under the deed of settlement and codicil instituted the present action of multiplepoinding, to which the children and grandchildren, and apparently all interested, have been called as parties. The summons bears that "it should be found and declared that the pursuers are liable in once and single payment only of the sums of annual revenue or interest accrued and accruing on the funds and property forming the residue of the estate of the said now deceased George Macfarlane senior, and that to the persons who may have just right thereto." The leading object of the action thus seems to be the just distribution of the whole annual income, past and future, of the residuary trust between Macfarlane and his sister, who between them (each to the extent of one half) liferent the whole estate. The first article, however, of the condescendence of the fund *in medio*, and subsequent articles, seem to import that the capital itself is to some extent within the scope of the action, and, at all events, in order to ascertain the income it was and is first of all necessary to ascertain the capital.

The reclaiming-note against Lord Curriehill's interlocutor of 27th June 1881 brought up all previous interlocutors in the case. It is only fair, therefore, to hold that none of the parties were up to that time finally bound by anything they had previously done or proposed to do; and this I rather think is the construction put by the parties themselves upon their different pleadings.

The leading question in any view is, and has all along been, that which arises in connection with the legitim. There were in this case two bairns of the house, and two only—George Macfarlane and his sister. The father had by his *mortis causa* settlement disposed of his whole estate, giving specific shares to his children. As the Lord Ordinary observes in his note, either or both of the children might nevertheless claim legitim, if not forisfamiliated, but, as his Lordship further observes, the child so claiming is put to his election between his legal "rights and his conventional provision. He cannot claim both."

It has been suggested that in this case there was no room for election. The legitim, it is said, being succession which the father had no power over, vested in Mrs Oliver, and thereby in her husband *jure mariti*, the moment the breath was out of the father's body. If this were a sound view, the logical result would no doubt seem to be to entitle Mr Oliver or his creditors to pocket his wife's share of the legitim fund whatever might become of any other questions in the case.

But this view I apprehend to be altogether unsound. There was an election to be made, but not by Mr Oliver. Nothing could be clearer than the intention of the truster to exclude the husband from all power over the provision, and to secure the benefit of it to Mrs Oliver during her life and to her children by whatever marriage after her death. Nor could the objects the truster had in view have been more stringently or better expressed than they are by the terms of the trust-deed if duly carried out. The trustees were directed and appointed to set aside and hold for Mrs Oliver's alimentary liferent allenarly one-half of the whole residuary estate, in the enjoyment of which she is protected not only against her present or any future husband but against herself—that is, against her own folly or the seductive influence of her affection for her husband. But the trustees have made no claim on behalf of Mrs Oliver, as it was their undoubted duty to have done. On the contrary, the whole tenor of their minute of debate, lodged in obedience to the order of 25th January 1882, appears to me to be adverse to the interests of Mrs Oliver. Nor has any separate claim been lodged for Mrs Oliver herself. The minute of debate laid before the whole Court was likewise a joint pleading for the husband and wife, and did not present for consideration what I apprehend to have been the primary question for decision in the case, namely, What were the rights and interests of Mrs Oliver viewed separately and independently from those of her husband?

The question what was to be held the amount of the legitim fund in the present case seems to have been discussed before Lord Shand (Ordinary) in the action of count and reckoning at the instance of Mr and Mrs Oliver, and was remitted by his Lordship to the Auditor *qua* accountant, who reported that the parties were agreed that by antenuptial contract of marriage between the truster and Mrs Elizabeth Dunn or Macfarlane, who still survives, the latter renounced her legal rights, including her *jus relictæ*, and in lieu thereof accepted an annuity of £100, a sum of £50 as an allowance for mournings, and the liferent of the furnishings of the truster's dwelling-house. In these circumstances the accountant held that the legitim fund consisted of the whole personal residue of the trust-estate, which amounted, with interest as at 14th July 1874, to £4826, 6s. 4d., after deducting the half of which, payable to Mr Macfarlane, who claimed it under the deed, there remained substantially the other half payable to Mr and Mrs Oliver as her legitim, but the precise amount of which (as interest had run on it separately and some trifling business charges affected it) was £2407, 0s. 3d. The accountant at the same time reported that as £3000

had been retained to meet the widow's annuity, a further payment would fall to be made to George Macfarlane on account of his provisions, and a further payment to Mr and Mrs Oliver on account of her legitim.

In the important case of *Lord Panmure* v. *Crockat and Others*, which came before me as Ordinary in the Outer House, there was, as here, a widow who had accepted her marriage-contract provisions in full of her legal rights. There was also a child who claimed his legitim. I had occasion to decide, amongst other and more difficult questions, how this state of matters affected the amount of the legitim fund. My interlocutor was affirmed by the unanimous judgment of the First Division, and the grounds of it, set forth in a long note, were expressly adopted by the Court as the grounds of that judgment. I shall not, however, pause to consider how far the grounds on which the accountant and Lord Shand fixed the amount of legitim in this case harmonise with those adopted in *Panmure's* case and other cases, because none of the parties have indicated any objection to the amount as so fixed, and I am not disposed to originate any inquiry at this stage of the litigation as to the soundness of these grounds. I assume, therefore, that the legitim fund was rightly fixed at £2175 odds, which was the sum withdrawn from the trust-estate and paid over nominally to the wife, but truly to the husband and his creditors, leaving a proportion, which the accountant rates at one-fourth, of £3000 retained to meet the widow's annuity, to be added to the £2175 at the widow's death, besides a fourth of the value of the furniture liferented by her, as the same may then be ascertained.

It appears to me, however, to have been obvious both in the action of count and reckoning and in the action of multiplepoinding that there was a conflict of interests between the husband and wife—the interest of the one being that she should accept her provisions, which were secure against all risk, and the other that she should elect to claim legitim, which would give him an opportunity to get, and a plausible claim to keep, the money as his own if solvent, or to get his creditors paid out of it if in labouring circumstances or insolvent, which he seems to have been all along and to be still, if I may judge by the assignations produced in process granted by him and his wife in security of debts owing by him.

At all events, I can have no doubt that it was the duty of the testamentary trustees to have taken steps for the protection of the wife in regard to her provisions, which formed separate estate in her person, and when it was seen that they were not doing so, that it was the duty of the Lord Ordinary on the count and reckoning, and thereafter, as he had not done so, of the Lord Ordinary and the Court in the multiplepoinding, to have appointed a properly qualified curator *ad litem* to the wife, who would not only have advised her whether she should accept of her provisions or claim legitim, but whose duty it would also have been to see those provisions, if accepted, safely invested and secured for the purposes of the deed.

The question involved is, in my opinion, even upon its merits, purely and simply a question of the law of Scotland. But however this might be, the question of procedure was undeniably a question to be regulated by our own law and practice. By that law and practice the appointment of a curator *ad litem* was, in my view, a judicial duty, the exercise of which was imperatively called for in the circumstances. For this, besides the all but universal practice, we have the example of the course followed in a case precisely similar in its circumstances to the present, viz., *Stevenson and Others* (*MacIntosh's Trustees*) v. *Hamilton and Others*, December 7, 1838, 1 D. 181.

As that case is not only a precedent on the question of procedure, but a direct authority on the question whether Mrs Oliver or her husband was the party entitled to elect between her provisions and her legitim, I shall here cite it fully enough to save repetition by quoting from it again.

Captain MacIntosh, the testator in that case, had died in March 1830 leaving a trust-settlement of substantially his whole heritable and moveable estate, with instructions to his trustees to divide the residue, which was almost entirely moveable, and of the value of from £8000 to £9000, between his three daughters Mary, Cecilia, and Helen, and his son William. The shares of the daughters were appointed to be lent out in the names of the daughters, along with the trustees, "for the use and behoof of my said daughters in liferent allenarly, and their lawful children in fee, the fee being divisible among the children by any deed of the mother, or failing such writing, equally," the issue of those deceasing coming in place of the parent. The deed likewise contained this clause—"And further, I declare that in case my said daughters before named shall marry, their respective husbands shall have no concern or right to interfere with the provisions before conceived in their favour, nor shall the same be subject to the diligence of their creditors, the *jus mariti* and right of administration of their respective husbands being hereby secluded."

One of the daughters, Mary, married Francis Hamilton, W.S., on 2d November 1829, without any antenuptial contract having been executed between them. On 20th May 1830 they executed a postnuptial contract reciprocally conveying to each other during the marriage, and to the survivor, their whole heritage and moveables, and specially Mrs Hamilton conveyed to her husband and herself during the marriage, and to the survivor, the whole estate and interest accruing to her through the decease of her mother or of her father, or of any of her relations, and with power to the husband either to repudiate or to accept of the provisions under her father's settlement, and power to claim legitim, &c., or not, as he might judge expedient. This deed was ratified on the same day by Mrs Hamilton outwith the presence of her husband.

In December 1831 arrestments were used by creditors of Hamilton in the hands of his father-in-law's trustees, and it forthwith turned out that extrication of Hamilton's affairs was altogether hopeless. Mrs Hamilton consequently, in February 1832, executed a revocation of the postnuptial contract, and a ratification of her father's deed, expressly renounced her legal claims, and declared her acceptance of the provisions made for her by her father in lieu of all legal rights.

Shortly thereafter Hamilton and his creditors raised a multiplepoinding in the names of Mac-

Intosh's trustees. In that process Mrs Hamilton lodged a claim for the fourth share of her father's residuary estate provided to her by his settlement, to be invested for her and her children in liferent and fee, excluding the *jus mariti* in terms of that deed. A curator *ad litem* was appointed to Mrs Hamilton, who concurred with her in that claim. Opposing claims were lodged by Hamilton and his creditors, and a separate and contingent claim for Hamilton's children, to whom a curator *ad litem* was also appointed. The Lord Ordinary (Moncreiff) ordered cases, and made avizandum therewith to the Second Division, who ordered a hearing in presence to take place upon the cases before the whole Judges, the result of which was that the Court pronounced an interlocutor bearing—"In respect of the opinions of the majority of the whole Judges, find that in the circumstances of this case the mutual claims of Mr Hamilton and his creditors and of Mrs Hamilton do not admit of any adjustment and division of the fund between them being made by the Court, and prefer the claim of Mrs Hamilton."

The doctrine that the legitim had vested in Mrs Hamilton the moment her father died, and thereby *eo ipso* passed to the husband, was substantially the whole ground of the opinions of the minority of the Judges in the case of *MacIntosh's Trustees*. This doctrine was proposed for reconsideration by the first Lord Curriehill, who with that view reported the case of *Lowson* (*Young's Trustee*) v. *Young* to the First Division of the Court. In that case, as in the present, the husband and wife had formally intimated to her father's testamentary trustees on 8th July 1851 their intention to claim legitim in place of her provisions under the settlement from which the *jus mariti* and right of administration were excluded. But in May 1852, by which time the husband's estates had been sequestrated, they intimated their final resolution to abide by the settlement, of which Mrs Young executed a ratification, and also a discharge of the legitim. The trustee on the husband's sequestrated estate instituted a reduction of these deeds, and it was this action of reduction which came before Lord Curriehill, and with which he made avizandum to the Court. At advising, 15th July 1854, 16 D. 1098, the Lord President (Colonsay) observed (p. 1103)—"The Lord Ordinary has reported this case to us on the ground that a certain case to which he refers stands in conflict with the opinions of the Court in the case of *Hamilton* and some other cases which have proceeded on the footing that that case involved and settled the general principles applicable to such a case as the present. From the discussion that that case underwent at the bar I am not satisfied that any apparent conflict that influences the Lord Ordinary does when examined amount to any real conflict, and I can hardly think that the judgment in the case of *Fisher*, which was pronounced after a great deal of discussion and consideration in 1840, does in the slightest degree trench on the case of *Hamilton*. I never so regarded it. We were not looking to that point at the time, and it was not then contended that we were dealing with a settled principle. The case of *MacIntosh* v. *Hamilton* was one considered by the whole Court, and has been looked to as fixing a principle."

Lord Ivory said—"I am entirely of the same view. This is just the case of *Hamilton* over again. The authorities referred to do not seem to me to affect the question at all." Lord Robertson said—"I concur." Lord Rutherfurd said—"I am also of the same opinion. I do not think, in the first place, that there is any inconsistency in the course of the decisions with the exception of *Stewart's Trustees*, which did introduce a principle we do not find recognised except in that case. But I think there must be some mistake in the report."

Lord Ivory having observed that "the case afterwards appeared on the roll on another point which explained that report," Lord Rutherfurd added—"Certainly there is no inconsistency in the decisions with what was done in the case of *Hamilton*, which has always been regarded as a ruling case, and settling a very important point. This case is very much the case of *Hamilton*."

The Court pronounced the following interlocutor:—"Find that in the circumstances the defender Mrs Young had the option of adopting the provisions of her father's settlement and rejecting legitim, and that she could not be controlled to any extent in the exercise of that option by her husband or his creditors; and with these findings remit to the Lord Ordinary to proceed with the cause."

In this last case of *Lowson* there was of course no room for the appointment of a curator *ad litem*, as the wife was resisting a claim to which she and her husband were equally opposed.

These cases settle, I think, the following points, if any points can be held settled by decisions—1. That in such a case as the present the legitim does not vest *ipso jure* on the father's death even in the wife, still less in the husband, to whom it in no sense belongs. 2. That the legitim can only vest by the exercise of an option (which belongs solely to the wife) to choose it in preference to her provision under her father's deed. 3. Where it is for the interest of the husband, but not for the interest of the wife, that the legitim should be preferred to the provision, it is the duty of the Court, pending legal proceedings such as were here instituted, to take care that the wife shall be duly protected against the influence of her husband by the appointment of a curator *ad litem*.

The principle applicable to such cases is very well and tersely stated by the Lord Justice-Clerk (Moncreiff) in the recent case of *Menzies* v. *Murray*, where, after alluding to what a wife can do after the dissolution of the marriage, he says—"But the element which rules while the marriage subsists is that she is not considered a free agent in matters in which her husband may have an adverse interest."

In the present case the judgment I would suggest to your Lordships, although I have no hope you will adopt it, would be to find that Mrs Oliver, who has died since the case was sent to the other Judges, did not in her lifetime *causa cognita* and effectually elect to claim legitim from her father's estate in place of her provisions under his settlement, and that the consequence is that she is to be held to have acquiesced in that settlement, and that to exhaust the cause a state should be made up crediting her and her successors with her testamentary provisions on the one hand, and debiting them on the other hand with all the payments she has received, on the footing that they had been payments towards these provisions.

It is apparent, I think, that the consulted Judges have regarded the interlocutor of 25th January 1882, under which the case was remitted to them for their opinions, as proceeding upon the footing that there had been a good election to take legitim, and consequently that it was not left open to them to enter upon that subject. The Court that pronounced that interlocutor consisted of three Judges only, who were quite entitled to insert in it any ratio which they or the majority of them approved of, and to make any remit to the other Judges they thought proper. For my own part, I was not in a position to join in doing either the one or the other, any more than to join in deciding the cause out and out on its merits, which they might quite competently have done if they had considered it ripe for decision. They had heard an argument on the reclaiming-note against the interlocutor of the Lord Ordinary, but as I had been absent from serious illness, it would of course have been incompetent in me to have interfered in what was done or decided at that stage, and I did not attempt to do so.

I am therefore free to express my opinion that so soon as it appeared that there was a probable conflict of interests between Mrs Oliver and her husband, the course ought to have been taken which was taken in *Stevenson* v. *Hamilton*, of appointing an impartial curator *ad litem* to Mrs Oliver, whose duty would have been not only to advise her in the exercise of her option to adhere to her provisions, and not to elect to take legitim, but also to have seen those provisions properly invested when adhered to.

Mrs Oliver indicated different views on this subject at different times, just as her husband's views fluctuated as to what was most likely to be for his own advantage; but we have the best evidence of what she would have been likely to do under proper advice in the only condescendence and claim which was ever lodged for her in this multiplepoinding, and to which her husband gave for the time being the sanction of his name, and the second sentence of which bears—"The claimants never had any intention to impugn the settlement of the late George Macfarlane or to repudiate the provisions thereby made in favour of the claimant Mrs Oliver." The same condescendence bore—"She repudiates any claim for legitim made in her name."

That she was entitled to take this position at that stage of the litigation there can be no doubt at all. The cases cited are conclusive upon that point. In several of them probative deeds renouncing the testamentary provisions and claiming the legitim in lieu thereof had been subscribed by both husband and wife, but this was found to interpose no obstacle to the subsequent appointment of a curator *ad litem* and restoration of the wife to her just rights.

Subsequently to the closing of the record on the above condescendence and claim, under date 4th January 1881, the only evidence of a pretended change of mind on the part of Mrs Oliver was a letter procured by and produced by her husband, and which was subscribed by him along with her, bearing that they repudiated her provisions under the settlement, and in lieu thereof elected to take legitim. I think it requires no argument to show that this letter was altogether insufficient to effect the selfish purpose for which Mr Oliver had procured it.

I might here close my opinion upon the footing that there having been no election to take legitim by the party entitled so to elect, the question argued in the pleadings laid before the consulted Judges as to what seems to be called in England the equity of compensation did not and could not arise but upon the assumption that there had been such an election. I think it right to say that this doctrine as it is described in these pleadings can in my opinion have no place in a question as to legitim under the law of Scotland. Legitim is not said to be as much as known in the law of England. We have what I may call a code of law arising out of decisions pronounced from a very early period downwards, which are calculated to operate no inequitable results if foreign elements are not attempted to be mixed up with them, but these, however well they may work in a country where the other laws harmonise with them, are calculated to operate very differently in a system which had grown up without them. I think this has been exemplified by the great expense and interminable delay of the proceedings in the present case, which might have been and should have been a very short and simple one.

I agree in that part of the opinions of Lord Fraser and the Lord Justice-Clerk (Moncreiff) which I understand to import that a child who claims legitim, and so repudiates the settlement of a parent conveying the *universitas* of his or her means and estate, cannot claim any part of his or her provisions under that settlement. There is in such a case no forfeiture in any correct sense of the term. The position of the father with reference to the legitim fund, as the Lord Chancellor Cottenham observed in *Fisher* v. *Dixon*, is virtually that of a debtor who offers a provision in payment of the debt, or of a purchaser who offers the provision as the purchase money of the legitim for behoof of the dead's part, or of the residuary legatee as the case may be, so that the debt cannot be claimed twice or the price exacted while the thing purchased is retained. Nor does it make any difference, according to Lord Chancellor Cottenham's reasoning, whether the condition that a child cannot take both is express or implied. There was no such express condition in the father's deed in the case of *Stevenson* v. *Hamilton*, but the condition was given effect to nevertheless.

I am therefore of opinion that all pecuniary questions in the case as it now stands ought to be dealt with on the footing that there has been no election to take legitim. But if it is to be held or assumed that there was such an election, I am, in that case, of opinion that all pecuniary questions ought now to be dealt with on the footing that Mrs Oliver did and could take nothing but her legitim.

The results as affecting the pecuniary interests of the parties in this case are of no moment as compared with the assertion and vindication of the law and practice of the country as exemplified in the cases I have cited in the one view and the cases referred to in Lord Fraser's opinion in the other view, which to the extent I have explained I should be disposed along with the Lord Justice-Clerk alternatively to adopt.

Lord Mure—There are three different classes of settlements in which questions of the pres-

ent description are generally raised as between parties claiming their legal rights, and also the provisions made to them under a settlement, and the other beneficiaries under that settlement, viz., 1st, settlements in which forfeiture of the testamentary provision is expressly declared in the case of the beneficiary who claims his legal rights; 2d, settlements in which the testamentary provisions are expressly declared to be in satisfaction of all legal rights; and 3dly, settlements by which a testator's whole estate is disposed of, but which do not contain any declaration of forfeiture, or any declaration that the testamentary provisions are made in satisfaction of legal rights.

As regards the first and second of these classes of cases, the law is, I apprehend, quite settled, to the effect that the beneficiary electing to take his legal rights as against the will is held to have forfeited everything the will gave him beyond the amount of those rights. But the question here raised for decision is, whether under a universal settlement in which there is no such express declaration of forfeiture, a total forfeiture is to be implied in the case of every beneficiary who claims his legal rights against the provision of the settlement, even where, as here, the sum carried off as legitim can in the course of the administration of the trust be replaced to the other beneficiaries at the expense of the beneficiary by whom legitim had been claimed. The Lord Ordinary has held that no such forfeiture is here to be implied, "in respect that full compensation and provision has been made out of the liferent destined to Mrs Oliver for all loss sustained or to be sustained by the residuary legatees in consequence of Mrs Oliver having claimed her legitim."

When this question was argued under the reclaiming-note it appeared to me that in such a case, and in the absence of any express declaration of forfeiture in the will, there were strong grounds in equity for holding that the Lord Ordinary had come to a sound conclusion. But I at the same time felt that although the question thus raised had never before been made the subject of actual decision in Scotland, there were cases in which rules had been laid down and opinions expressed which made it difficult, consistently with the decisions in those cases, to give effect to the Lord Ordinary's views. The decision which appeared to me to stand most in the way of the result which the Lord Ordinary had arrived at was that of *Keith's Trustees*, July 15, 1857, in which the Court refused to allow Mrs Villiers to delay making her election, which she wished to do, in order that it might be seen whether compensation so far as necessary could not during the administration of the trust be made to the parties who might be prejudiced by her taking legitim.

But having again carefully considered that case, with the opinions of the consulted Judges, I am satisfied that the grounds on which the Court there proceeded in refusing to allow Mrs Villiers to delay making her election do not necessarily apply in the circumstances of the present case. For the main ground on which, as it appears to me, and as explained in the opinion of Lord Curriehill, the Court proceeded was that the proposal made by Mrs Villiers "could not be adopted without contravening the express directions of the settlement as to the time when the entail was to be executed." Here, on the other hand, no such difficulty occurs. The opinion, moreover, expressed by Lord Cowan in the subsequent case of *Davidson*, July 15, 1871, shows that there might in his view be cases in which "the distinction between the legal effect of approbate and reprobate, and that of equitable compensation, might come into prominence, viz., cases where the subjects given specifically were of greater value than the loss suffered by the general estate through the assertion of the claim for legitim. But (he adds) no case of that kind is raised under this record."

A case of that kind, however, has, as it appears to me, been here raised, and if the view thrown out by Lord Cowan can be gone into and adopted without contravening the express directions of the settlement, and the intention of the testator, which I think it can, I see no reason why the principle of equitable compensation instead of the rule of implied forfeiture should not be held here to apply.

Holding the question, then, to be still an open one, I am of opinion that the direction of the settlement will not be contravened by adopting the views expressed by the Lord Ordinary. And upon the question of intention, which must always be the *regula regulans* in all such cases I am very clearly of opinion, on the grounds so fully explained by your Lordship, that the intention of the testator in this case was that there should be absolute equality of division between his two children and their families, and that being so, that the construction of the settlement ought to be adopted which will most effectually carry out that intention. For the reasons stated by your Lordship, it appears to me that the intention of the testator will not only not be defeated but will be carried out by giving effect to the views of the Lord Ordinary, while that intention would, on the other hand, be defeated by holding that any such condition as that of absolute forfeiture was in the circumstances which here occur to be implied where it had not been distinctly expressed in the deed. For these reasons I have come to the same conclusion as the majority of the consulted Judges on the main question raised between the parties.

On the question of intestacy it is unnecessary as matters stand that any decision should be given. But upon that point, had it arisen, I should have been disposed to concur in the opinion of those of the consulted Judges who think that had an opposite conclusion from that adopted by the Lord Ordinary been arrived at a case of intestacy would have arisen, and that the forfeited income would have belonged to the next-of-kin.

LORD SHAND concurred with the LORD PRESIDENT.

This interlocutor was pronounced:—

"The Lords having resumed consideration of the reclaiming-note for Mr Macfarlane's trustees against the interlocutor of the late Lord Curriehill of 27th June 1881, along with the revised minutes of debate for the parties and the opinions of the consulted Judges, in conformity with the opinion of a majority of the whole Judges, Adhere to the interlocutor reclaimed against, refuse the reclaiming note, and decern: Find the reclaimers and the claimants George Macfarlane and others liable to the claimants Mrs Margaret Oliver, now represented by Andrew Oliver, executor

of the said Margaret Oliver, and the said Andrew Oliver, in expenses since the date of the Lord Ordinary's interlocutor; allow an account thereof to be lodged; and remit to the Auditor to tax and to report to Lord M'Laren in place of Lord Curriehill, with power to his Lordship to decern for the amount due, and to proceed further in the cause as may seem just."

Counsel for the Trustees and for the Macfarlanes—Gloag. Agents—Ronald & Ritchie, S.S.C.

Counsel for Mrs Oliver—Alison. Agent—John Gill, S.S.C.

Counsel for Mrs Oliver's Children—Low. Agent—D. Mackenzie, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Adam, Ordinary.

HOGGAN AND OTHERS *v.* THE THARSIS SULPHUR AND COPPER COMPANY (LIMITED).

Public Company—Articles of Association—Payment of Dividends upon Subscribed or upon Paid-up Capital—Reduction of Capital—Companies Acts 1862 *and* 1867 (25 *and* 26 *Vict. c.* 88, *and* 30 *and* 31 *Vict. c.* 131).

By the articles of association of a limited company it was provided that the directors might declare "an interim dividend, and pay the same to members in proportion to the capital held by each," and further, that they might "receive from any member willing to advance the same the moneys due upon the shares held by him beyond the sum actually called for, and pay interest therefor, which interest shall be in lieu of dividends in respect of such advances." The original capital of the company was £300,000, but it had been increased by special resolution to £1,236,660, consisting partly of fully paid-up shares of £10 each, and partly of shares of £10 on which £7 had been paid. The company proposed to call up £1 upon the £7 shares, and to reduce its capital by striking off the remaining £2, making them £8 shares fully paid-up, and by issuing new shares at a high premium, and with the money thus obtained to extinguish the debenture debt. The Lords *held* that as the articles of association gave no interpretation of the word "capital," and were silent on the subject of dividends, these fell to be paid according to the general rule of common law upon paid-up and not upon nominal capital; that subscribed but uncalled capital was a liability upon the shareholder, and that if lent to the company, interest only, and not dividend, was payable upon it; that a scheme beneficial to the company as a whole, and carried out in conformity with the Companies Acts, could not be held as illegal because the interests of some shareholders were prejudiced by it; and that therefore the holders of the £7 shares were not entitled to demand that the unpaid capital on their shares should be called up before any debenture debt was incurred.

The Tharsis Sulphur and Copper Company (Limited), a joint-stock company limited by shares, and having its registered office in Glasgow, was incorporated under the Companies Act of 1862 on the 25th October 1866. Under the memorandum of association the nominal capital of the company was declared to be £300,000, divided into 30,000 shares of £10 each, with powers to increase. At a meeting held upon the 23d of October 1867 a resolution was passed authorising the directors to borrow money upon the security of debentures to be issued by the company, and £100,000 was accordingly raised in this way. Owing, however, to the increased operations of the company it became necessary for them to raise additional capital, and accordingly at a meeting held in October 1868 special resolutions were passed referring to the proposed increase of capital. The effect of these resolutions, which are quoted at length in the opinion of the Lord President, was that the capital of the company was increased from £300,000 to £1,000,000, which was divided into 100,000 shares of £10 each. When these shares were issued a certain number were fully paid-up, and on the others £7 of the £10 was paid-up. The shares of this capital, with additional shares subsequently issued as narrated below, stood thus on the 31st of January 1882 as regarded the amount paid on them: there were 91,896 £10 shares fully paid-up, and 31,100 £10 shares upon which £7 per share only had been called up.

On the 23d April 1874, at a general meeting, it was submitted by the directors that a further sum of £150,000 should be raised on debenture to meet the continued enlargement of the company's business, and this resolution was accordingly passed, and the amount thus authorised was borrowed on debenture.

The operations of the company continuing still further to increase, additional capital was raised in December 1878 for the purpose of acquiring the copper mines of Huelva. Special resolutions were passed at a meeting held upon the 24th of December 1878, and registered on the 8th of January 1879, the most important of which is as follows:—"3. That to enable the directors to pay out to the members of the said company of the copper mines of Huelva the value of their respective shares and interests therein, which has been fixed by the said treaty articles or agreement at the aggregate amount of £430,900 sterling, (1) the present share capital of this company be increased from £1,000,000 to £1,236,660, and that the amount of such increase, being £236,660 sterling, divided into 23,666 shares of £10 each, be deemed and issued as fully paid-up; and (2) the directors be and hereby are instructed and empowered to borrow upon debentures of this company, in addition to the sum of £250,000 already authorised to be borrowed by them, the further sum of £150,000, to be applied, along with £44,240 of ordinary funds of the company, in settlement of the balance of the said sum of £430,900." By these resolutions the capital of the company was increased from £1,000,000 to £1,236,660, at which amount it stood at the date of the action.

In the spring of 1881 certain shareholders,