thereby exercised a power of disposal of a sum of money conferred on her by the trust-disposition and settlement of her father. But in that case the Court recognised the authority of the cases of *Smith*, *Hyslop*, and *Grierson*, to which I have referred. Lord Deas said—"It is quite settled in our law and practice that where a testator leaves his whole means and estate to a person or persons named in his will, that may be a sufficient exercise of a power to dispose of funds not the property of the testator, but which the testator has been empowered by somebody else to dispose of. So much at least is settled, and we are not now to go back upon it."

In that case the Court thought it had not been the testator's intention to deal with the particular fund. In this case, for the reasons I have stated, I think it clearly was the intention of the testatrix to deal with the particular fund, because otherwise her funds would have been insufficient to meet the special legacies.

I think therefore the first question should be answered in the affirmative.

LORD M'LAREN—The most general principle that can be extracted from all the cases, where the question which had to be considered was the exercise of a power of appointment by a general deed, amounts to no more than this—that such a general deed may receive effect as an exercise of the power, provided it appears from the deed itself and the surrounding circumstances that it was the intention of the granter of the deed that it should be an exercise of the power. It does not appear that any absolute rule has been recognised, that in all circumstances a general settlement is sufficient to carry property over which the granter has a power of disposal; and where the donee of a power has no interest in the proprerty, and there is no evidence that he was aware of his power, then it would be difficult, or rather wrong, to assume that his general deed was an exercise of the power. One might instance the case of a trustee having no personal interest in the trust estate, but with a power to divide it among the truster's children. In such a case it would be obviously inadmissible that his general disposition should receive effect as an exercise of the power. But that is a very unusual case. On the other hand, it is a case—and very familiar to conveyancers—that a limited interest is given to a member of a family, with the fee to his children, and a power of disposal to others outside his family in the event of the failure of issue. The cases referred to by Lord Adam are of that description. Now, where a power of disposal is given to the taker of a limited interest, such as a liferenter, if there are also present these additional elements, that there is a destination of the fee to the liferenter's family in the first instance, and that the donee is cognisant of the power, it would be difficult to resist the conclusion that his general disposition was intended to carry the estate which is subject to the power. There is the further element in this case that Miss Dalgleish has made testamentary provisions to an amount which her individual estate is inadequate to satisfy, but which there is enough to satisfy if the property over which she had a power of disposal is taken into account. Here, then, we have a concurrence of all the elements which in former cases have been held to be *indicia* of intention to exercise a power of disposal although the power is not mentioned in express terms.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Jameson—C. S. Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Second, Third, and Fourth Parties—H. Johnston—Ferguson. Agents—Dalgleish & Bell, W.S.

Thursday, March 2.

OUTER HOUSE.

[Lord Low.

AIKMAN (SMITH'S TRUSTEE), PETITIONER.

Parent and Child—Legitim—Bankruptcy—Right of Trustee in Legitim Fund—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 103.

Held than an undischarged bankrupt was not entitled to reject his legitim, and take instead testamentary provisions from which his creditors were purposely excluded.

Observations on *Stevenson* v. *Hamilton*, 1 D. 181.

The estates of David Smith, wine broker, 95 Bath Street, Glasgow, were sequestrated on 13th October 1891, and Patrick Hamilton Aikman, C.A., 107 St Vincent Street, Glasgow, was elected trustee in the sequestration. On a realisation of the assets a dividend of 1s. 3½d. in the £1 was paid to the creditors.

The bankrupt's father, Mr Andrew Smith, S.S.C., Edinburgh, died on 24th July 1892, possessed of considerable means. He left a trust-disposition and settlement dated 20th February 1891, in which he nominated trustees and directed them, *inter alia*, to hold the residue of his estate and to pay over the free annual income to his daughter, Agnes Jane Smith so long as she lived and remained unmarried, and on her death or marriage, to divide the whole of his means and estate amongst his children in equal shares. By a codicil dated 7th December 1891, on the narrative that the estates of his son David Smith had been sequestrated, he declared that in the event of his decease before his said son had obtained his discharge, the latter should have no right or interest in his estate, and the trustees

should not pay any share of his estate to his said son, but they should (when the same became payable) set aside and hold the share that would have fallen to the said son under the above settlement, and pay over the annual income to his wife for her support and that of his children, and on the son's death should divide the sum so set aside equally amongst his children; but should his son have received his discharge before the period of division mentioned in the settlement, then the trustees should hand over to him the share to which he was entitled under the settlement to the same effect as if the codicil had never been granted.

On the death of his father the bankrupt intimated to his father's trustees that he elected to claim the testamentary provisions in his favour.

The trustee on his sequestrated estate thereupon presented a petition to the Lord Ordinary under the 103rd section of the Bankruptcy (Scotland) Act 1856, to have it declared that all the rights and interests accruing to the bankrupt in his deceased father's estate should be held as transferred to and vested in the trustee as at the date of the succession thereto for the purposes of the said Act. He contended that by the codicil it was illegally attempted to prevent said rights and interests from vesting in the trustee, and in any event that the trust-disposition and settlement and codicil were ineffectual in so far as they regulated the succession to legitim.

The bankrupt lodged answers, in which he admitted the facts as above narrated, and pleaded that it was within the power of the respondent alone to make the election of abiding by said provisions contained in the said deeds.

On 2nd March 1893 the Lord Ordinary (Low) pronounced a vesting order in terms of the prayer of the petition.

"*Opinion.*—By the 103rd section of the Bankruptcy Act of 1856 it is provided that if 'any estate shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him,' the same shall *ipso facto* fall under the sequestration, and the trustee shall present a petition to the Lord Ordinary for any order vesting the estate in him.

"By the 4th section of the Act the word 'estate' is defined as including 'every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt.'

"In the present case the bankrupt's father died after the date of the sequestration, and the bankrupt has not obtained his discharge.

"The bankrupt's father left a trust-disposition and settlement and codicil.

"By the settlement he provided that the residue of his estate should be divided among his children after the expiry of a certain liferent, and the provisions to the children were declared to be in full of legitim.

"By the codicil (which was executed after the sequestration of the bankrupt) the testator declared that in the event of his death before the bankrupt had obtained his discharge, the latter should have no right or interest in his estates, and the trustees were directed to hold the share destined to the bankrupt by the settlement (when it became payable), and to pay the income thereof to the bankrupt's wife for her support and that of his children, and on the death of the bankrupt to divide the share equally among his children. If, however, the bankrupt should have received his discharge before the period provided in the settlement for payment of his share, the trustees were directed to hand over to him the share of the estate provided to him in the settlement.

"The bankrupt's right to legitim was not in any way discharged, and if he had not been bankrupt he would undoubtedly have had the option of taking the provision made for him in the settlement or claiming his legal rights.

"The object of the present application is to have the bankrupt's share of the legitim fund declared to be vested in the trustee by virtue of the 103rd section of the Act.

"I am of opinion that the trustee is entitled to the order which he asks. It is settled that legitim vests *ipso jure* upon the father's death, and that being the case, it seems to me that the bankrupt's share of the legitim fund falls under the provisions of the 103rd section. It is clearly 'estate' as defined in the statute, and it descended or came to the bankrupt after the date of the sequestration, and while he was undischarged.

"The main argument of bankrupt was that he had a right of election between his legitim and the provisions in the codicil, that that right was personal to himself, and that the trustee could not force him to take legitim.

"Now, when his father died the right of the bankrupt to his share of legitim became absolute—it became in fact a debt due to him by his father's estate. The father by his settlement could not deprive the bankrupt of the right; he could only offer to him a provision in satisfaction of it, which the bankrupt was under no obligation to take. I cannot think that the bankrupt—being bankrupt and his estates under sequestration—can reject a fund which is his absolutely, and which is immediately available to his creditors, and that to take instead a provision for his family or for himself, as the event may turn out, from which his creditors will be entirely excluded.

"The bankrupt referred to the cases of *Stevenson* v. *Hamilton*, 1 D. 181, and *Lowson* v. *Ewing*, 16 D. 1098.

"In the case of *Stevenson* the question was, whether an insolvent husband and his creditors could enforce the wife's claim for legitim to the effect of repudiating her father's settlement, which she had ratified (although without her husband's consent), and which conferred upon her provisions

greatly more valuable than her legal rights. The testamentary provisions also were made exclusive of the *jus mariti* of the husband. It was held by a majority of the Whole Court that in the circumstances the wife's right of election could not be contested.

"The view of the majority seems to have been this—The wife's right to legitim no doubt passed to the husband *jure mariti*, but the wife was offered by the settlement in lieu of legitim an independent provision exclusive of the *jus mariti*. The right to elect the testamentary provision was primarily on the wife, and if the husband sought to exercise his power of administration to the effect of forcing his wife to reject the provision to her great injury, and against her will, the Court would interfere for her protection.

"The case of *Lowson* v. *Ewing* simply applied the principle recognised in *Stevenson* v. *Hamilton* to somewhat different circumstances.

"I am of opinion that these decisions have no application to this case. There may perhaps be cases in which the hardship or inequity of forcing a bankrupt to take legitim at the expense of forfeiting a more valuable conventional provision would be so great that the Court would interfere by an exercise of its equitable jurisdiction as it did in the cases of *Stevenson* and of *Lowson*. Such cases, I imagine, would be rare, but at all events this is not, in my opinion, one of them. I can see no special hardship or inequity in the holding that the bankrupt's share of legitim has vested in the trustee. No doubt the bankrupt will forfeit his chance of sharing in his father's estate in the event of obtaining his discharge before the period of the division of the residue. But I think there is nothing inequitable in that. If the codicil had not been made, the share falling to the bankrupt under the settlement would have gone to his creditors, and I do not think his creditors can be deprived of a fund which has vested in him in order that he may have the chance of hereafter acquiring a larger fund from which they will derive no benefit.

"Then as regards the provisions to the bankrupt's wife and children, I do not imagine that the forfeiture which is probably involved in the bankrupt's election to take legitim will involve a forfeiture of their right. If the period of division arrives before the bankrupt is discharged the direction to the trustees is to hold the share during his life and pay the income to the wife, and on his death to divide the capital among the children. The right of the wife and children is not made conditional upon the bankrupt not taking legitim, and I do not think that his taking of legitim will involve forfeiture of this right.

"It is true if the bankrupt claims legitim, and obtains his discharge before the period of division of his father's estate, he may forfeit any right to share in that estate, and his wife and family will not in that case be entitled to any part of the estate, because their right seems to depend upon the period of division arriving while the bankrupt is still undischarged. But I do not think that the wife and children can complain of that. They have no right except what the codicil gives them, and as I have already said, I do not think that the election of the bankrupt to take legitim will involve a forfeiture of their rights under the codicil. In the case supposed the wife and children will be in no worse position than they would have occupied if the codicil had never been made.

"Then it was said that *Stevenson* v. *Hamilton* was an authority for the proposition that the right to elect between legal and conventional provisions is a personal right which does not pass to the trustee. I think that the argument involves a fallacy. What passes to the trustee is the legitim which has vested, and that being the case the power to elect never comes into operation. In the case of *Stevenson* Lord Fullerton made certain remarks which appear to me to be very pertinent to the present question. He supposes the case of a third party on whose succession neither the husband nor the wife had any claim, leaving to the wife a choice between a sum of money in general terms, and a sum exclusive of the *jus mariti*, or between a sum of money and a heritable estate. Lord Fullerton then proceeds—'It would be difficult in such a case to deny that there was conferred upon the legatee an absolute option—a personal right to select which she thought the most expedient. But the essential circumstances in which in such a case the right of selection will be found to depend is the unqualified power possessed by the testator over both alternatives, and the corresponding freedom from all restraint consequently implied on the side of the party to whom the offer is made. For whenever one of the alternative rights exists independently of the testator the unqualified option ceases to be a necessary element; there is no longer the creation of a free choice between two benefits both the gift of the testator; the matter truly resolves itself into the offer of one which is within the power of the testator as a substitute for another which he cannot take away; and in every such case one part of the option, that is, the power of taking the substitute, must depend upon the power of the party to surrender the equivalent.'

"In the case of a bankrupt whose estate is vested in a trustee under a sequestration I do not think that there is a power to surrender the equivalent—that is, the legitim—I shall therefore pronounce a vesting order in terms of the prayer of the petition."

Counsel for the Petitioner—Galloway. Agents—Patrick & James, S.S.C.

Counsel for the Respondent—Craigie. Agent—Alex. Ross, S.S.C.