personal injury received by me on March 24th 1894 while in their employment, and this sum I accept in full discharge of all claims I can or may make in respect of said injury, either under the Employers Liability Act 1880 or otherwise." With regard to this receipt, which was produced in process, and which bore the pursuer's signature across a penny stamp, the pursuer averred—"(Cond. 9) Admitted that the pursuer received payment, through the defenders' manager Mr Forbes, of the sum of £10, and gave a receipt therefor. Denied that the defenders made said payment *ex gratia* or without admitting liability. The terms of said receipt admit or at least imply an admission of liability. Explained and averred that defenders' manager Mr Forbes called upon the pursuer within a week of his leaving the infirmary, and induced him, when he was in a weak state of body and mind, and without advice, to sign said receipt for £10, on the distinct assurance that he would not be left in want. The defenders have not implemented the conditions on which the said receipt was granted to them."

The Sheriff-Substitute (CAMPBELL SMITH) having sustained the defenders' plea to the relevancy, and dismissed the action, the Sheriff (COMRIE THOMSON) adhered, expressing further the opinion that the action could not be maintained in the face of the receipt.

The pursuer appealed. At the hearing it was stated that on the occasion of the granting of the receipt, the pursuer had not consulted any agent, and that the interview was one between the parties themselves; further, that the pursuer was willing to repay the £10 if the Court permitted the action to proceed.

Argued for pursuer—The averments were sufficient to elide the receipt, and reduction was unnecessary. These averments were that the pursuer was, when he granted it, an old man weak in body and mind from recent suffering, and under the pressure of dealing with his employer, who had ascendency over him, and promised him that if he signed the receipt he would be kept out of all want. The parties were not on equal terms, and the transaction ought not to stand, especially where the pursuer offered restitution. The case of *Woods* v. *North British Railway Co.*, July 2, 1891, 18 R. (H. of L.) 27, was not in point. In that case there was a proof as to the circumstances in which the receipt was given. Here the defenders asked judgment without inquiry.

LORD JUSTICE-CLERK — There may of course be some cases in which the pursuer, although he has granted such a discharge as we have here, may make such averments on record as would lead to inquiry being made into the circumstances in which it was granted. But in the present case I find on record no averment to the effect that the pursuer was not quite as fit both in body and mind to grant a discharge as the pursuer in the case of *Woods* was held to be. In that case I may remark that we gave our decision after the defenders' counsel had stated to us that he could not maintain the discharge to the effect of excluding the action, but in the House of Lords the learned Lords were asked to hold the discharge as excluding the action.

LORD YOUNG concurred.

LORD TRAYNER—I agree that this discharge is a complete bar to the present action. No doubt the discharge might have been set aside if relevant averments for the purpose had been made and proved. I think reduction would not have been indispensable, and that if averments sufficient to warrant setting aside the discharge had been made and proved, it might have been set aside by exception under the Sheriff Court Act 1877. But we have here no grounds to support reduction or exception. The discharge is complete and adequate, and there is nothing to show that it was not an honest settlement fully understood by the pursuer.

LORD MONCREIFF—I concur. I find in the statements of the pursuer no grounds which would support an action of reduction of this discharge.

The Court refused the appeal.

Counsel for the Pursuer—Blair. Agent—A. W. Ketchen, Solicitor.

Counsel for the Defender—Sym. Agents—Reid & Guild, W.S.

Wednesday, July 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROSS *v.* ROSS.

(*Ante*, p. 607.)

Succession—Provisions to Children—Legitim—Election—Equitable Compensation.

A testator by universal settlement conveyed to his widow his moveable estate for her own behoof, and his heritable estate for behoof of herself in liferent and his son in fee. The son having claimed legitim, the widow raised an action against him to have it declared that he had thereby renounced and forfeited the heritable estate, and that the said heritable estate belonged to her in fee-simple.

The son having stated in a minute that he did not aver that the value of the heritable estate, subject to the widow's liferent, was greater than the value of the legitim due to him, *held* (*aff.* judgment of Lord Stormonth Darling) that the widow was entitled to equitable compensation *in forma specifica* for the loss of the legitim fund, and therefore to declarator as craved.

The late Sir Charles Ross of Balnagown

who died in 1883, left a universal settlement by which he conveyed to his widow his moveable estate for her own behoof, and his fee-simple lands in trust for herself in liferent, and his son in fee.

On 15th January 1894 the testator's son Sir Charles Henry Augustus Frederick Lockhart Ross of Balnagown raised an action against the widow of the said Sir Charles Ross for payment of legitim. Both parties admitted that the amount of legitim was £16,268, and decree therefor was ultimately given, with interest at the rate of four per cent. from the date of Sir Charles' death (see *supra*, p. 607).

On 20th June 1894 Lady Ross, the testator's widow, raised the present action against Sir Charles Ross to have it found and declared that the defender "having claimed and elected to demand and receive payment of his legitim, has renounced and forfeited, or otherwise, and at all events upon his receiving payment of the sum found to be due to him in name of legitim, must renounce and forfeit all right, title, or interest competent to him in regard to" the heritable estate held by the late Sir Charles Ross in fee-simple; and to have it further found and declared that the said heritable estate, upon the defender receiving payment of the sum found due to him in name of legitim, "will be the property of the pursuer as absolute proprietrix in fee-simple, and that she will then be entitled to dispone" the said lands from herself as trustee to herself and her own heirs and assignees free from the trust.

The pursuer pleaded—"(2) The defender having elected to claim his legitim in place of his rights under his father's settlement, has forfeited his right to the unentailed lands thereby conveyed, and the same belonged to the pursuer absolutely and in fee-simple. (3) Or otherwise, and at all events upon the pursuer receiving payment of his legitim, the said lands will belong to and be the property of the pursuer absolutely and in fee-simple."

The defender pleaded that the pursuer's statements were irrelevant.

On 16th December 1895, in obedience to an interlocutor of the Lord Ordinary, the pursuer lodged a minute stating the nett capital value of the heritable estate in question to be £16,000, and the amount of legitim with interest to be £24,000.

The defender lodged a minute in answer, in which he stated that he was unable to make any admission as to the correctness of these figures, and submitted, *inter alia*, that compensation could not be given until the actual value of the heritable estate could be determined, viz., until the pursuer's death.

On 4th February 1896 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor finding that the amount of legitim with interest "exceeds the value of the fee of the said unentailed estates provided to the defender in his father's trust-disposition and settlement," and therefore finding, decerning, and declaring in terms of the conclusions of the summons.

Opinion.—. . . "The defence stated was founded on the case of *Macfarlane's Trustees* v. *Oliver*, 9 R. 1138, which settled that after the amount carved out of an estate by a claim of legitim had been completely restored to it by the application of periodical payments, there was no equitable ground for the principle of absolute forfeiture, and the claimant of legitim was entitled to the future income provided to her by the will. In such a case it is quite accurate to say that the principle is equitable compensation and not forfeiture, and the defender argued that the pursuer's case was irrelevant, because it proceeded on the basis of forfeiture. In view of this distinction I thought it material to inquire how the comparison stood between the amount of the legitim and the value of the unentailed lands under deduction of heritable burdens, and the actuarial value of the pursuer's liferent, because if the present value of the defender's fee had exceeded the legitim, it would be impossible to give decree in the absolute terms concluded for. The pursuer, in answer to my call, lodged a minute, from which it appears that the free rental of the lands is £1414, 14s. 2d., and that taking the high figure of thirty years' purchase of that rental, and making the deductions which I have mentioned, the result is a net capital value of £16,254, 18s. 1d. as against an ascertained legitim of £16,268, 18s. 9d. to which must be added a very large sum of interest. If these figures are even approximately accurate, it is clear that the remedy which the pursuer asks will still leave her a considerable loser by the defender's claim, and therefore that the distinction between forfeiture and equitable compensation (a very real one in many cases) has no practicable importance here. The situation is somewhat similar to that which occurred in the case of *Davidson's Trustees*, 9 Macph. 995, where the liferents of certain heritable subjects destined directly to the children claiming legitim were directed to be made over to the residuary legatees as forfeited interest; and I observe that Lord Cowan said—'The distinction between the legal effect of approbate and reprobate and that of equitable compensation might have come into prominence had the subjects given specifically been alleged to be of greater value than the loss suffered by the general estate through the assertion of the claims for legitim. But no case of that kind is raised under this record.'

"Now, I think I am entitled to proceed upon the figures stated by the pursuer, because the defender does not really challenge them. In his minute he evades the question of figures altogether, and falls back on the untenable proposition that the value of his right of fee cannot be ascertained till the expiry of the liferent, or, in other words, that no compensation can be given to the pursuer until she is dead. Alternatively, he makes the equally untenable suggestion that the whole calculations should be made as at the date of his father's death, instead of the date when the claim of legitim was judicially made, and he propounds a scheme whereby the pursuer is to be satisfied with a bond over the unentailed

lands payable at the first term of Whitsunday or Martinmas after her own death.

"This last proposal can hardly, I think, be taken seriously, because if anything is certain in this branch of the law it is that as the loss caused by a claim of legitim or *jus relictæ* is immediate, so the compensation must be as immediate as the nature of the surrender interest will allow.

"The defender has a present fee in these lands none the less that it is burdened with a liferent, and there is no reason why that should not be at once made over to the person who suffers present loss by his claim.

"If the defender's conventional provision had been of the nature of an annual payment there might have been a chance of the same thing happening as in *Oliver's* case. But that not being so, I do not see how any rise in the value of land or any other change of circumstances can possibly affect the question. It seems to me therefore that the pursuer is entitled to decree without further inquiry."

The defender reclaimed, and having been appointed by the Court to state in a minute "Whether he avers that the value of his interest in the heritable estate, subject to the pursuer's liferent, exceeds the value of the legitim and interest paid to him," lodged a minute to the effect that "he did not aver that the value of his interest in the heritable estate, subject to the said liferent, exceeded the value of the legitim and interest found due to him."

Argued for the defender—(1) The action was irrelevant. It proceeded upon the principle that if anyone in the defender's position chose to claim his legal right he necessarily forfeited his legal provision. There was no authority for this—*Macfarlane's Trustees* v. *Oliver*, July 20, 1882, decided that equitable compensation and not absolute forfeiture was the result of a child claiming legitim in such a case. The summons here contained nothing about equitable compensation. (2) In any event, the pursuer was not entitled to the lands *in forma specifica;* they should be sold, and then the price should be paid to her.

Argued for the pursuer—The word "forfeiture" was often loosely employed as equivalent to "equitable compensation," as was pointed out in *Macfarlane's Trustees, ut supra*, by Lord Curriehill, p. 1143, Lord M'Laren, p. 1158, Lord President Inglis, p. 1167, and Lord Shand, p. 1178. Even where there was an express exclusion of the legal provision, equitable compensation and not forfeiture had been held to apply—*Russell's Trustees* v. *Gardiners*, June 18, 1886, 13 R. 989. The reason for this looseness of terminology was that in most cases, as in the present one, the result in fact of forfeiture and of equitable compensation was the same. The defender here was bound, and had completely failed, to show that the value of the heritable estate was greater than that of the legitim fund. The pursuer was therefore entitled to her declarator, and to get the lands in fee-simple—Bell's Com. i. 141, *seq.*, referred to.

At advising—

LORD M'LAREN—After hearing counsel on the reclaiming-note we appointed the defender to state in a minute whether he averred that the value of his interest in the heritable estate, subject to the pursuer's liferent, exceeded the value of the legitim and interest. A minute has now been lodged for the defender, to the effect that he does not aver that the value of his interest in the heritable estate, subject to the said liferent, exceeds the value of the legitim and interest found due to him.

The case now stands in this position—the defender has claimed his legitim, and as a consequence of this claim, he is disentitled to assert any claim under his father's will, which would diminish the value of the interests of other beneficiaries under that will. Under the will of the late Sir Charles Ross the unentailed lands are given to his widow Lady Ross for life, and to the defender Sir Charles Ross in fee. Lady Ross under the will takes the personal estate absolutely. By his election to take legitim the defender has diminished the value of Lady Ross' interest in the personalty, and according to the established principle of equitable compensation, Lady Ross is entitled to be compensated out of the heritable estate (which the defender is not in a position to claim) for the pecuniary loss which she has sustained by and through the withdrawal of the legitim fund. The only question between the parties relates to the form in which the compensation ought to be made.

The claim of the pursuer is that the heritable estate should be declared to be her absolute property—in other words, that her liferent shall be enlarged to a right of fee.

This claim is opposed by the defender, who, as I understood, without committing himself unreservedly to an alternative proposal, suggested that the unentailed estate should be sold, and that compensation might be given out of the proceeds of sale. Now, unless there is any rule of law or equity, which prescribes that compensation to a disappointed legatee can only be given in money, the proposed sale of the estate does not commend itself to my mind as a just or expedient measure. If there were any reason to suppose that the defender had made a mistake in his choice, and that the reversion of the estate was really more valuable than the legitim, we might have allowed him to reconsider his election, because a judicial election would not, in general, become final until it had been followed by a decree transferring the fund to the party electing. It was in view of the possibility of mistake that we gave the defender an opportunity of stating in a minute, whether he now says that the right chosen is the less valuable of the two. He does not say so, and I therefore assume that the reversion of the heritable estate is of less value than the legitim fund, and that the compensation to the pursuer is incomplete. That being so, I fail to see why the pursuer should be subjected to the

risk of further loss by being compelled to submit to a forced sale of the estate. The defender can take no benefit by the proposed sale, because according to the existing conditions, the whole price must be applied for the pursuers' benefit, first, in giving her an equivalent for her life interest in the lands, and secondly, in compensating her for the withdrawal of the legitim fund.

But in putting the argument thus I have understated the pursuer's case. She is a liferenter by disposition, and cannot be compelled to renounce her liferent of the specific estate, or to accept its value in money. Consequently the hypothetical sale must be a sale of the reversion of the estate only. This of course, would be a very disadvantageous mode of realisation, and it is not certain that a purchaser could be found at all who would be willing to buy an estate burdened with a liferent.

The only alternative is that which the Lord Ordinary has approved, that Lady Ross as her husband's trustee should be empowered to convey the estate to herself beneficially, and I am of opinion that the pursuer is entitled to compensation *in forma specifica*, and that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM—I concur.

LORD KINNEAR—I am of the same opinion. Sir Charles Ross' will embraces and disposes of the legitim fund, and therefore it is an implied condition of the bequest which he makes in favour of his son that his son shall not take legitim, but that the whole legitim fund shall go to his widow in consideration of his giving to the son the fee-simple land which he was entitled to dispose of by will. And therefore if the son refuses to comply with the conditions of the settlement and demands legitim, there can be no question at all that the widow is to be compensated by taking the same amount out of the estate given to the son, since she cannot have the legitim fund which her husband intended for her. But the action is brought for the purpose of obtaining that compensation, and it appears to me that there is no relevant defence stated upon the record.

The only ground for the defence which was maintained in argument was, that the widow was not entitled to declare the forfeiture of the heritable estate, because the result of the son's claim to legitim is, according to the argument, not forfeiture of any right given to him by the will, but a right to equitable compensation to those whose interests have been disappointed by his claim. That appeared to me to be a somewhat technical construction of the words used in the summons, because the true meaning of the summons is simply to give effect to what is admittedly the right of the widow, to have handed over to her the estates given by the settlement to the son in order to make up to her for the loss she has sustained through the claim to legitim. It is perfectly true that that right is inaccurately described when it is called a forfeiture, but the error in the use of language arises very commonly, as the Lord President explained in the case of *Macfarlane*, from the condition of matters in which the claimant is placed by the demand for legitim; because, as his Lordship points out, in the great majority of cases the whole provisions of the refractory legatee are required to restore the administration of the estate against the disturbance caused by the claim for legitim; since the legatee will not in general claim legitim unless he supposes it to be more valuable than the testamentary provision, and the result accordingly, in the great majority of cases, is exactly the same as if the refractory legatee had forfeited his right, and hence the inaccurate us of the term "forfeiture."

But it appears to me that there is nothing in the use of that term to have precluded the defender in this action, if he had thought fit, from bringing forward in defence the plea which, upon the theory of his argument, would have arisen to him, and from saying, I am not bound to give up the whole of the fee-simple estates, because they are more valuable than the legitim fund. But if he is not to consent to make over the provision in his favour to the widow by way of compensation, then it lies upon him to show that he is not bound to do so because that would amount to more than the compensation due. That appears to me to be the only relevant defence he could state to this action, and he refrained from stating it.

I think the Lord Ordinary went somewhat further in his favour than he was entitled to expect when he called upon the widow to state the value of the fee-simple estates. The son is quite entitled to be fully informed as to the relative value of the legitim fund on the one hand, and of his testamentary provisions on the other, before he makes his election, but he was in quite as good a position as the widow could be for ascertaining the value which he himself was prepared to put upon the fee-simple estates. However that may be, he has now had a further opportunity of showing whether or not the estates given to him under the will are or are not more valuable than the legitim fund, and he declines to say that they are more valuable. Therefore I am unable to see that he has any relevant defence to the widow's claim.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—Clyde. Agent—Keith R. Maitland, W.S.

Counsel for the Defender—W. Campbell—Pitman. Agents—J. & F. Anderson, W.S.