I think therefore the interlocutor appealed against should be recalled and decree pronounced as concluded for.

LORD JUSTICE-CLERK — That is the opinion of the Court.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 21st May 1900: Find in fact that by letter of guarantee dated 18th, 26th, and 28th May, and 1st and 22nd June 1894 the pursuers and the defender along with Andrew M'Dowall and Robert Hutcheson, jointly and severally guaranteed to the Bank of Scotland the payment of all sums for which the United Gutta Percha and Rubber Company might become liable to the said bank not exceeding £12,500, with interest from the date or dates of advance; that on 28th January 1896 the defender and Robert Hutcheson intimated to the bank that they withdrew from the guarantee, and the bank then closed the account, which stood with interest at £13,021, 13s. 5d.; that the company went into liquidation on 20th May 1896; that after crediting all dividends received from the company's estate and securities held by them there remained due to the bank upon the said guaranteed account the sum of £4306, 17s. 11d.; that upon demand made by the bank the pursuers each paid to the bank (1) the sum of £800 on 31st March 1898, and (2) the sum of £1353, 9s. on 24th October 1898: Find in law that the pursuers are entitled to payment from the defender of one-third of the sums so paid by them with interest from the respective dates of payment aforesaid: Therefore decern against the defender in terms of the conclusions of the petition.'

Counsel for the Pursuers — Ure, Q.C. — Younger. Agent—Campbell Faill, S.S.C.

Counsel for the Defender—Salvesen, Q.C. — Cooper. Agents — Millar, Robson, & M'Lean, W.S.

Friday, November 30.

FIRST DIVISION.

M'CAULL'S TRUSTEES *v.* M'CAULL.

Succession—Conditions—Clause of Forfeiture—Effect of Parent's Repudiation of Liferent on Children's Fee—Election—Legitim.

A truster directed his trustees to divide his estate into six equal shares, and to hold one share for behoof of his son J. in liferent allenarly and his children, or other next-of-kin, in fee. The trust-deed contained the following clause — "I do hereby provide and declare that in case any of my said children shall repudiate this settlement or question or impugn the same and claim their legal provisions, or shall by any means prevent this settlement from taking effect in whole or in part, then such child or children shall forfeit all right to any share or shares of that part of my estate and effects, heritable and moveable, that I may freely dispose of by law, and they shall have right only to their legal provisions, and the share or shares of such child or children shall in that event accresce and belong or be held for behoof of my other children equally who shall abide by this settlement and accept of the provisions herein contained." J. repudiated the provisions in his favour and claimed legitim.

Held (*dub.* Lord M'Laren), on a construction of the word "share" as used by the testator throughout the settlement, that J.'s "share" included not merely the liferent given to him, but also the fee given to his issue or other next-of-kin, and that consequently J. by his repudiation forfeited not only his own right but also that of his issue or other next-of-kin.

By his trust-disposition and settlement, dated 18th November 1884, James M'Caull, who died on 20th November 1884, conveyed his whole means and estate, heritable and moveable, to trustees, directing them, *inter alia*, to divide the free residue and remainder of his means and estate into six equal shares, and to dispose of said shares as follows, viz., one share to be paid to each of his three children, Peter, Mary Ann, and James, under deduction of certain specified sums advanced by the truster during his life on account of their respective claims for legitim and shares in his estate; one share to be held by the trustees for behoof of each of his sons Alexander and Duncan, and the remaining share for behoof of his son John, and the lawful children or their lawful issue, whom failing, the other next-of-kin or representatives of each as thereinafter directed, under deduction of certain specified sums advanced by the truster to them respectively during his life to account of their claims for legitim and shares in his estate.

The sixth purpose was in the following terms:—"And with regard to the shares which my trustees are by the two immediately preceding clauses fourth and fifth directed to hold and apply for behoof of my son John and his foresaids, including the portion of any share which may accrue through any child predeceasing me without leaving lawful issue, and also the portion of any share accruing through any child repudiating this settlement, and claiming his or her legal provisions, it is hereby provided and declared that my said son John is to be entitled to receive only the free annual income and revenue thereof, and that for his liferent use allenarly; and my trustees are directed to pay the said free annual income and revenue to him accordingly at such times and in such portions as they may think fit, but my said son is to have

no right to the principal or capital of said shares, original or so accruing, or to assign, convey, or bequeath the same; and my trustees are hereby directed to hold the said principal or capital until the expiry of the liferent hereby provided to my said son, and at his death (until which event no vesting shall take place), or at my death should he predecease me, to pay or make over the said principal or capital to his lawful children then surviving, jointly with the then surviving issue, if any, of such of his children as may have died leaving issue, equally among them *per stirpes*, whom all failing, to his other next-of-kin then in life jointly with the lawful issue of any predeceaser who, had he or she survived, would have been amongst said next-of-kin, such issue succeeding equally among them to the share to which their parent would have been entitled if alive." The sixth purpose proceeded to provide in similar terms with regard to the shares directed to be held for behoof of his sons Alexander and Duncan.

The trust-disposition further contained a clause of forfeiture in the event of any of the children repudiating their provisions, which is quoted in the rubric.

Sundry other clauses contained in the trust-disposition and settlement are set forth in the opinions of the Lord President and Lord Adam *infra*.

John, who was married, but had no children, repudiated his provision, and claimed legitim.

Questions having arisen as to the effect of this repudiation, a special case was presented for the opinion and judgment of the Court. The parties to the special case were —(1) the trustees; (2) Peter M'Caull, Mary Ann M'Caull or Robertson, and James M'Caull; (3) Alexander and Duncan M'Caull; and (4) John M'Caull.

The first question of law was—"Did John M'Caull, by declining to accept the provision made for him in his father's settlement and claiming his legitim, forfeit, not only for himself but also for his issue or other next-of-kin, all further interest under the fourth, fifth, and sixth heads of the settlement?" In the view taken by the Court the other questions did not require to be decided.

Argued for the second and third parties —Although the general rule was that the repudiation by a parent did not involve forfeiture of the children's shares—*Fisher* v. *Dixon*, November 24, 1831, 10 S. 55, and July 1, 1833, 6 W. & S. 431; *Jack* v. *Mitchell*, January 21, 1879, 6 R. 543; *Snody's Trustees* v. *Gibson*, February 9, 1883, 10 R. 599—yet that rule would readily yield to any expression of an intention to the contrary—*Campbell's Trustees* v. *Campbell*, July 17, 1889, 16 R. 1007. There it had been held, on a construction of the settlement, that repudiation by a parent involved forfeiture of the children's share, and the present case was of a similar character. The word "share" was used in the other clauses of the deed to mean the right of the particular *stirps*, *i.e.*, in John's case, the right of the parent in liferent and the children in fee. There was no reason to suppose that it was used in a different sense in the clause of forfeiture. Further, on the construction contended for by the third parties, some of the beneficiaries would be in the position of receiving a liferent of a liferent. That was a complication which the truster was unlikely to have intended.

Argued for the first and fourth parties—On the authority of the cases already cited, this case fell under the general rule that children's shares were not affected by their parent's repudiation, there being no express provision to that effect.

At advising—

LORD PRESIDENT—James M'Caull, the truster, died on 20th November 1884, leaving a trust-disposition and settlement dated 18th November 1884, by which he conveyed to the first parties to the case, along with another person, now deceased, as trustees for the purposes therein mentioned, his whole means and estate, heritable and moveable.

By the fourth purpose of his trust-disposition and settlement the truster directed his trustees to divide the free residue and remainder of his estate into six equal shares, and to dispose of them as follows, viz. — one share to be paid to each of his children, Peter, Mary Ann, and James (being the parties of the second part), under deduction of certain specified sums advanced by the truster during his life to account of their respective claims for legitim and shares in his estate; one share to be held by the trustees for behoof of each of his sons Alexander and Duncan (being the parties of the third part) and the remaining share for behoof of his son John (being the party of the fourth part) and the lawful children or their lawful issue, whom failing the other next-of-kin or representatives of each as thereinafter directed, under deduction of certain specified sums advanced by the truster to them respectively during his life to account of their claims for legitim and shares in his estate.

By the fifth purpose of the trust-disposition and settlement the truster directed his trustees to divide the *cumulo* amount of the foresaid deductions into six equal shares, and to dispose thereof in the same way as was provided with regard to the six shares of residue.

By the sixth purpose of the settlement the truster directed that John should have a liferent only of the shares directed by the fourth and fifth purposes to be held for behoof of him and his foresaids, "including the portion of any share which may accrue through any child predeceasing me without leaving lawful issue and also the portion of any share accruing through any child repudiating this settlement and claiming his or her legal provisions," and that at his death (until which event it was declared that no vesting should take place), or at the truster's death, should he predecease the truster, the trustees should pay or make over the said principal or capital to his lawful children then surviving, jointly with the then surviving issue, if any, of such of

his children as might have died leaving issue, equally among them *per stirpes*, whom all failing to his other next-of-kin then in life jointly with the lawful issue of any predeceaser who, had he or she survived, would have been amongst said next-of-kin, such issue succeeding equally among them to the share to which their parent would have been entitled if alive.

The sixth purpose made similar provisions with regard to the shares directed to be held for behoof of the truster's sons, Alexander and Duncan, and their children or next-of-kin.

The truster by his trust-disposition and settlement declared that the whole liferents thereby conferred should be alimentary and free from diligence, and that the sums thereby provided to his children were in full satisfaction of legitim and all other claims competent to them through his decease; and he further declared that "in case any of my said children shall repudiate this settlement, or question or impugn the same and claim their legal provisions, or shall by any means prevent this settlement from taking effect in whole or in part, then such child or children shall forfeit all right to any share or shares of that part of my estate and effects, heritable and moveable, that I may freely dispose of by law, and they shall have right only to their legal provisions, and the share or shares of such child or children shall in that event accresce and belong or be held for behoof of my other children equally who shall abide by this settlement and accept of the provisions herein contained, the surviving issue of predeceasing children taking equally the share to which their parent if alive would have been entitled to as aforesaid; and providing and declaring that any share accrescing in virtue of this clause for behoof of my sons John, Alexander, and Duncan, shall be retained and held by my trustees for their respective behoofs, for their liferent use allenarly, and for behoof of their respective foresaids in fee in the same manner and for the same ends as are applicable to the other shares hereinbefore provided for their behoof."

The truster's estate amounted to £11,361, 2s. 4d., to one-sixth of which, or £1893, 10s. 4d., each of his children had right under his settlement. John, the fourth party, claimed his legitim, and the trustees paid to him his share of the legitim fund, and divided the residue into six equal shares, paying one share to each of Peter, Mary Ann, and James, investing one share for behoof of each of Alexander and Duncan, and setting aside the remaining one-sixth share for the representatives of John.

The first question put in the case is—"Did John M'Caull, by declining to accept the provision made for him in his father's settlement and claiming his legitim, forfeit, not only for himself but also for his issue or other next-of-kin, all further interest under the fourth, fifth, and sixth heads of the settlement?"

The second and third parties maintain that the truster's intention was, that if any child should decline to accept the provisions of the settlement and claim legitim, such child should forfeit, not only for himself or herself but also for his or her representatives, all further interest in the estate, and that therefore as John, the fourth party, claimed legitim, his representatives are not entitled to have any share of the estate set aside for them. The trustees the first parties, and John the fourth party, on the other hand, maintain that no such forfeiture is implied in the settlement.

I am of the opinion that the contention of the second and third parties is well founded, and that John by claiming legitim disentitled his representatives to any benefit which they might otherwise have taken under the settlement. In the fourth purpose the word "share" is used to designate one-sixth of the residue, six being the number of aliquot parts of the residue corresponding to the number of the truster's children, and the word appears to me to be used in the same sense in the fifth and sixth purposes. Thus in the sixth purpose the shares which the trustees are directed to hold and apply for John and his foresaids are declared to include the portions of any share which might accrue through any child predeceasing the truster without leaving lawful issue (clearly a share of capital), and also the portion of any share accruing through any child repudiating the settlement and claiming his or her legal provisions. The latter, like the former, appears to me clearly to mean a share of capital, not merely the liferent given to the repudiating child. The most important question, however, is as to the meaning of the word "share" in the clause which declares the consequence of a child repudiating the settlement and claiming his legal rights, and I think that the word "share" is used there, as in the rest of the settlement, as meaning the aliquot part of the residue directed to be held for the repudiating child and his issue or next-of-kin. The contention of the trustees and of John involves the view that the word "share" is used in two different senses in the settlement—first, as meaning an aliquot part of the residue, and secondly, in the clause of forfeiture as designating merely the life interest in the aliquot part given to John, leaving the right of his issue or next-of-kin to the fee of that part unaffected. This does not seem to me to be a natural construction of the word "share." The share "of" John mentioned in the clause of forfeiture appears to me to mean the aliquot part given to him in liferent and to his issue or representatives in fee, and if the term was to be used for the first time in an essentially different sense as designating merely John's life interest in the share, some clear evidence of the change might have been expected. The provision in this, as in the sixth purpose, that the share of the repudiating child shall accresce to the other children, naturally means the share or portion primarily given to that child—not merely the liferent of that share. If the word "share" in the clause of forfeiture meant merely the liferent in the case of John, the interest in his

share given upon his repudiation to Alexander and Duncan would be a liferent of a liferent.

The trust-disposition and settlement was made in November 1884, long after the decisions in *Fisher* v. *Dixon* and other cases of that class, and at a time when the prevalent practice of conveyancers had come to be to make repudiation by a child infer the forfeiture of any gift made by the settlement not only to him but to his children. I consider this to be a very reasonable practice, seeing that if (to take the present case) John was allowed to take his legitim, and his children were permitted to claim the fee of an equal share of the residue upon his death, John and his children collectively would obtain a larger proportion of the estate than the other children, contrary to the intention of the truster. The decision in the case of *Campbell's Trustees* v. *Campbell* (16 R. 1007) appears to me to support the views now expressed.

Other questions are put in the case, but, if the view now stated in regard to the effect of John having claimed his legitim is correct, they do not arise.

LORD ADAM—The testator directed that, if any child should claim his legal provisions, he should forfeit his right to any share or shares of the estate, and the share or shares of such child should in that event accresce to the other sisters and brothers of the forfeiting child and their heirs. One of the sons, John, has claimed his legal provisions, and has thereby forfeited any right to a share of the estate. But John's position was this, he had a liferent only of a share of the estate, the fee of the share being held by the trustees for his children; and the question arises whether John has forfeited his own liferent only, or whether by claiming his legal provisions he has also forfeited any right of his children to the fee of the share. That is the question which arises in this case. Now, it appears to me that question depends on what meaning is to be attached to the words "share or shares" of such child which are to "accresce." What did the testator mean when he used these words? Is it as your Lordship said merely the interest of John in that share, or is it not only that interest but also the fee which was given to the children? Now, that takes us back to consider the settlement generally to see what meaning the testator himself attached to the words "share of such child"—whether he meant the share itself or merely the interest in the share? Now, what the testator did with reference to the residue was this. Upon page 13 of the print there is the clause in which he divided the residue of his estate into six equal shares. One of these he gave to his son Peter under certain deductions. A second share he gave in similar terms to Mary Ann, and the third he gave to James under similar deductions, so that the whole of these shares were given to these three children. With reference to the other three shares his direction to the trustees was this:—"My trustees shall hold and apply one of said shares for behoof of my son John and his lawful children, or their lawful issue, whom failing," &c. The second share was given to his son Alexander in exactly similar terms, and the sixth he gave to his son Duncan in exactly similar terms, deductions in each case being made from the share to be paid to them. We see from a subsequent part of the deed that these shares were to be held by the trustees—in John's case for John in liferent allenarly and his children in fee. Then he goes on to direct that the sums deducted from the several shares of the children should be made into a *cumulo* sum, and that *cumulo* sum he directed to be divided and paid in the same way as the original shares. And then he goes on to what appears to me to be a very important clause, and therefore I shall read it—"It is hereby declared, with reference to the whole of the shares hereinbefore provided, that if any of my said children shall predecease me leaving lawful issue, such issue shall be entitled to the share or shares, original and accruing, which their parent would have taken by survivance;" and then comes these words, "the share of any child predeceasing me without leaving lawful issue shall be divided" in the same manner as the original shares. It will be observed that the testator, in speaking of shares, makes no distinction whatever between the shares which were to be paid to the three first children in fee and the shares which were to be held for the three last-mentioned children in liferent. He refers to the whole of these shares, and speaks of them all without distinction; and it will be observed that the words "share of any child predeceasing me" apply to the one set of shares as much as to the other, and therefore it appears to me to be clear in this part of the deed that he uses the word share of a child, equally, whether it refers to the share of a child that was to be paid in fee or the share that was given in liferent and to the child in fee. Therefore I think it is clear from this clause of the deed, that when the testator speaks of "share" he means the share itself, whether it be one in fee or whether it be one to be held by the trustees in liferent. Having done that, he goes on in the next clause to speak of the shares of the three latter children—John, Alexander, and Duncan, which just comes to this, that the share is to be held and applied by the trustees for the children in liferent allenarly, and their children in fee; and then there is this declaration, that there should be no vesting until the expiry of the liferent. He deals with each son severally and separately, but the provisions in regard to each are identical. These being the provisions of the deed, we are brought back to the forfeiture clause to see—having ascertained in what sense the testator speaks of the share of a child—if it applies to this clause. In dealing with this clause the testator says, "such child shall forfeit all right to any share or shares," and the share or shares of such child or children shall in that event accresce to the brothers and sisters and their issue. I think it is

clear that when he speaks here he imports no distinction again between the two classes of shares, whether they are to be paid in fee, or whether they are to be held by the trustees in liferent. He deals with them all in the same category, and obviously when he speaks of the share of such child as accrescing, he obviously means the share of the child, whether it be a share of the first class to be paid at once, or whether it be a share to be held by the trustees; and I think the meaning of the testator is the whole share of the son who has the liferent only, and not merely the liferent interest in it. Therefore I agree with your Lordship, and I do not think it necessary to say more about it. But as your Lordship pointed out, if we were to take the meaning that it was only the liferent interest that was to accresce, we should get into a very anomalous position—a position anything like which I do not remember ever seeing in this Court, because the result would be that all that would accresce, for example, to the younger sons, Duncan and Alexander, would be John's liferent, and all that they would get would be the liferent of a liferent, which in one case I see would mean that they would get the liferent of £17, 17s. 3d. That is a *reductio ad absurdum* which could not be the meaning of the testator, and therefore I agree with your Lordship in the result at which you have arrived.

LORD M'LAREN—There can be no doubt at this day of the principle to be applied to the determination of such cases. If the election and the consequences of the election are determined by law, then the law is, that if the children take an interest independent of that of the parent, the election of the parent in no way affects the independent right of the child; but if the child's right is dependent on that of the parent, as for instance if he takes by substitution, or if a sum is given to the parent for the maintenance of himself and his family so that the two rights are inseparable, it may be in such a case that the forfeiture of the share given to the family would involve the children in the consequences of forfeiture. But in order to avoid the consequence which has been pointed out by your Lordship—that it leads to one family getting a larger share than the other branches of the family—it has been not unusual for lawyers in framing wills to provide that anyone who claims contrary to the scope of the will shall forfeit his provisions not only for himself but also for his children or descendents.

Now when a testator uses an unusual word, or it may be a common word in an unusual sense, and thereby puts a mark upon the word—defines it inferentially as having a signification peculiar to his will—it is in the absence of any explanatory context probably quite legimate to carry that meaning into the other clauses of the will. But then the word "share" is a very common word. It may be said in wills to be *nomen generale*. I do not know any word that is more frequently used or one which is used in a more general sense, and its ordinary meaning is just the benefit that is reaped by the individual whose interest is dealt with. Although for shortness the testator in the clause of residue speaks of the portion of his estate that is given to a family as the share of his son, I have difficulty in understanding that as impressing a peculiar meaning on the word "share," or obliging us to read it in the sense of share of a family wherever the word is used again. It is just the function of a will to describe in what way a testator's estate is to be shared by relatives or persons to whom he leaves it. I think it would be quite consistent with sound construction to hold that, as no reference is made to the issue of the person who incurs a forfeiture (in the clause of forfeiture), the clause means nothing more than what the law would imply—a declaration that whoever claims contrary to the will shall take no benefit under it, and that the benefit intended for him shall pass to the other branches of the family. But then while I should probably have accepted that interpretation if I had been considering this case alone, I do not feel so confident on the subject as to induce me to dissent from the judgment proposed—there being no question of principle involved. I hope it will always be kept in view in such cases that the ambiguities of one testator are not to form a canon of construction for the ambiguities of another testator, and under that condition I am prepared to concur in the judgment proposed, which I think involves nothing more than a question of construction of a special clause in a somewhat special will. I agree with your Lordships that having decided this point it is not necessary to deal with the other questions in the case.

LORD KINNEAR, not having been present at the hearing, gave no opinion.

The Court answered the first question in the case in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First Parties—Craigie—Bartholomew. Agent—William Thomson, L.A.

Counsel for the Second Parties—Macfarlane. Agent—William Finlay, S.S.C.

Counsel for the Third Parties—Clyde—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Fourth Party—Younger. Agent—R. Barclay Alison, W.S.