should direct the expenses incurred by him to be made expenses in the liquidation.

He maintains, first, that the liquidator and his agent were not entitled to enter, so to speak, into the fruits of his labours and not pay him for them. His case is no doubt a hard one, and I am not prepared to say that there are not circumstances in which an agent in his position may not be able to make this demand with success, *e.g.*, had the defence been carried by the liquidator's agent to a successful issue I think there would be much to say for the justice of Mr Hamilton's claim. So also, possibly, if the defence had been taken up and seriously maintained though unsuccessfully. But in the present circumstances I think that the liquidator was entitled to consider the results so far of Mr Hamilton's labours, and to determine whether any benefit was to be taken by the liquidator in taking advantage of them. He might have abandoned his defence and let decree pass, and his doing so would not, I think, have given Mr Hamilton any just claim to a preference. He has done the same thing in substance, and I do not think that the form which the abandonment has taken should make any difference.

Mr Hamilton maintains, second, that he had a lien over the papers produced by him in the litigation, and that as the liquidator took possession of them when he borrowed up the process, he could only do so by virtue of the 115th section of the Companies Act 1862 without prejudice to his, Mr Hamilton's, lien.

Now, Mr Hamilton was only correspondent in the matter of certain solicitors in Hamilton. He had not the documents in his hands except for the purposes of the action. I do not think that had the agency been changed, irrespective of liquidation, he could have pleaded his lien to secure his costs to date so as to prevent the exhibition or production of the papers for the purposes for which they were sent him. But I do think that he was not bound to part with them except for such limited purpose, and that that purpose being served he was entitled to have them back. I refer to the English case of *Ross* v. *Laughton*, 1 Ves. and Breams 349, and 12 R.R. 232; and *Simmons* v. *Great Eastern Railway Company*, L.R. 3 Chan. Apps. 797; and also to the Scots case of *Finlay* v. *Syme*, 1773, M. 6250; and *Callman* v. *Bell*, 1793 M. 6255. Now the purposes of the production having been served, Mr Hamilton is, I think, entitled to have up the documents, and if the liquidator requires them he must proceed under the Act 1862, section 115.

Mr Hamilton maintains, third, that he is further entitled to the benefit of his country correspondent's lien. If he is, his interest must be protected by his correspondent.

His Lordship pronounced this interlocutor—"Finds that the liquidator of the Woodside Coal Company was entitled on entering on office to examine the two processes—*Dewar* v. *Woodside Coal Company*, and the documents produced therein—and to determine the course he should take in relation to the defences to said actions without incurring any liability to Mr Hamilton as the company's former agent in the processes, and that the course which the liquidator adopted amounting to an abandonment of the said defences, Mr Hamilton is not entitled to have the expenses incurred by the company to him made a charge in the liquidation; therefore refuses the note; but finds that Mr Hamilton had a lien for his account on the documents of the company in his hands, including those produced in the said processes, subject to the obligation to produce them in process for the purposes thereof: Finds that the purposes of these productions being now secured, they must be returned to process by the liquidator or any other having borrowed them in order that they may be restored to Mr Hamilton, and that if the liquidator requires them he must proceed against Mr Hamilton under the 115th section of the Companies Act 1862, and directs the liquidator accordingly: Finds no expenses due to or by either party to the note."

Counsel for William Hugh Hamilton—Macphail. Agent—William Hugh Hamilton, W.S.

Counsel for the Liquidator—Constable. Agents—J. & R. A. Robertson, W.S.

Wednesday, November 7.

SECOND DIVISION.

GRAY'S TRUSTEES *v.* GRAYS.

Succession—Husband and Wife—Election—Jus relictæ—Approbate and Reprobate—Equitable Compensation.

A testator provided for his widow by directing his trustees to pay her £40 for mournings and interim aliment, to give her his whole furniture for her sole and absolute use, and to hold the free annual interest or proceeds of the residue of his estate for her liferent use allenarly. He further provided that these provisions should be in full of all terce, *jus relictæ*, &c. The widow elected to claim her legal rights, and on the security of these rights the trustees advanced to her £7000. The surplus revenue of the estate set free owing to her election was accumulated until the sum advanced had been restored to the trust estate.

Held that there being no declaration of forfeiture of the testamentary provisions in the event of the widow claiming her legal rights, she was entitled to revert to the testamentary provisions.

Macfarlane's Trustees v. *Oliver*, July 20, 1882, 9 R. 1138, 19 S.L.R. 850, *followed.*

James Gray, seedsman and grain merchant, Stirling, died on 2nd May 1890 leaving a trust-disposition and settlement by which he conveyed his whole estates, heritable and moveable, in trust to Robert Walls and others, his trustees.

The testator was survived by Mrs Jessie Ross or Gray, his wife by his second marriage, and by the following children, viz.— Margaret Gray (afterwards Mrs Martin), a daughter of his first marriage; and James Gray, John Gray, Annie Russell Gray, and Peter Drummond Gray, the children of his marriage with the said Mrs Jessie Ross or Gray.

After providing for the payment of his debts and of certain legacies, the testator directed his trustees to pay to his said wife, in the event of her surviving him, the sum of £40 sterling as an allowance for mournings for herself and his family, and for the aliment and support of herself and them from the date of his decease to the first term of Whitsunday or Martinmas thereafter; to give and deliver to her for her sole and absolute use his whole household furniture, bed and table linen, china, silver plate, books, and pictures; and to hold the free annual interest or proceeds of the residue of his estate and effects for her liferent use allenarly in the event of her surviving him, but so long only as she remained his widow. On her death or second marriage he directed them to pay the residue to his lawful children who should be alive, when the youngest of them, or of the survivors or survivor of them, should attain the age of twenty-one, equally among them.

He further provided as follows:—"I declare that the provisions above written conceived in favour of my said spouse and children shall be accepted of by them, and the same are declared to be in full of all terce, *jus relictæ*, legitim, portion natural, bairns' part of gear, executry, or others whatsoever, which they or any of them can ask or demand by and through my decease in any manner of way."

The truster left heritable estate of considerable value yielding a rental of £234, 10s. a year, burdened at his death by bonds amounting to £3600. His personal estate, after payment of debts, Government duties, and funeral expenses, amounted to £21,328, of which approximately one-third or £7109 was the amount of the widow's *jus relictæ*. Certain assets amounting to £1095, provisionally treated as heritable *quoad* the widow's terce but falling for other purposes to be included in the personal estate, made the net personal estate £22,425, subject to the expenses of administering the trust.

The settlement did not empower the trustees to carry on or become partners in the business of James Gray & Company, grain merchants, of which the testator was a partner, and with the view of providing the necessary capital to enable her to retain a controlling interest in the business the widow resolved to claim her legal rights. Before so doing, the nature, extent, and probable value of her conventional provisions and legal rights respectively were fully communicated and explained to her by the trustees and their agents. After due consideration she declined to accept the provisions in her favour under said trust-disposition and settlement, and elected to take and claimed her legal rights in the testator's estate. As a considerable portion of the testator's estate could not be readily realised, and her *jus relictæ* could not then be adjusted and paid over, the trustees advanced her a sum of £8000 against and upon the security of her legal rights. To account thereof she on 1st December 1892 repaid £1000 to the trustees, and on 19th August 1893 executed in their favour a bond for the balance of £7000, and in further security granted in their favour an assignation of her whole legal rights as the testator's widow, including *jus relictæ* and terce. She, however, never received a settlement from the trustees of the amount of her legal rights beyond receiving said advance of £8000, reduced to £7000 as above stated, and in addition certain small payments, amounting in all to £21, 17s. 8d., which were made on her account by the trustees and debited against her. The said whole money transactions were effected by book entries, no cash actually passing between the trustees and the widow. She received no specific payment on account of her terce.

Since the truster's death the surplus revenue of the estate set free owing to the truster's widow having claimed her legal rights had been accumulating, so that as at 30th June 1903 not only had the said sums of £7000 and £21, 17s. 8d. paid to or on account of the widow been restored to the trust estate, but a further sum of £468, 2s. 1½d. had been accumulated.

In these circumstances a special case was brought to determine the question, *inter alia*, whether the widow was entitled to revert to and receive the conventional provisions in her favour.

The parties to the case were (1) the testator's trustees, first parties; (2) his widow, second party; and (3) his children, third parties.

The first and third parties maintained that in consequence of the widow's election to take her legal rights in lieu of the conventional provisions in her favour contained in the said settlement, which provisions were expressly declared to be in full of all terce, *jus relictæ*, &c., she forfeited all her rights and claims whatsoever under said settlement to the same effect as if she had died or married again, and that she was not entitled to revert to and enjoy the benefit of the said provisions in her favour even although full compensation to the estate might have been effected.

(These parties differed as to the period of vesting and payment of the residue, on which point the case is not reported.)

The second party maintained that she had not, by claiming her legal rights in the truster's estate, incurred an absolute forfeiture of the provisions in her favour contained in his settlement, and that as the sum paid to her and advances on her account had been made good to the trust estate she was entitled to revert to her provisions under the settlement to the same effect as if she had never claimed her legal rights. If held to be so entitled she was prepared to grant a formal renunciation of her legal rights.

The following question (the first) was, *inter alia*, submitted for the opinion and judgment of the Court—"(1) Whether the testator's widow is entitled on the sums advanced to her being repaid or restored to the trust estate to revert to the provisions in her favour under the settlement and to receive payment from the first parties of (*a*) the provision of £40 under the fifth purpose of the settlement; (*b*) the provision of furniture and others under the sixth purpose; and (*c*) the free revenue during her lifetime and viduity of the trust estate."

Argued for the second party—The rule had long been settled of giving compensation to those persons injured by an election—*Nisbet's Trustees* v. *Nisbet*, December 6, 1851, 14 D. 145. Forfeiture here would involve intestacy and benefit only the heirs *in mobilibus ab intestato*. This was not a case of forfeiture but of equitable compensation. The case was governed by *Macfarlane's Trustees* v. *Oliver*, July 20, 1882, 9 R. 1138, 19 S.L.R. 850. There, it was true, there was not as here a declaration that the conventional provisions were in full of legal rights, but the reasoning in that case applied to the present; for that condition was implied in *Macfarlane* v. *Oliver*, because of there being a universal settlement; the expression here of the condition made no difference—*Russell's Trustees* v. *Gardiners*, June 18, 1886, 13 R. 989, Lord Adam at 994, 23 S.L.R. 719; *Clark* v. *Clark's Trustees*, December 14, 1905, 13 S.L.T. 694. The object of such a clause was to protect the settlement and prevent detriment to the beneficiaries if the widow claimed her legal rights—*Naismith* v. *Boyes*, July 28, 1899, 1 F. (H.L.) 79, Lord Watson at p. 82, 36 S.L.R. 973, 25 R. 899, Lord M'Laren at p. 903, 35 S.L.R. 702—and compensation being effected, the widow's reverting to her conventional provisions would not frustrate the settlement. There was here no declaration that the widow should forfeit her conventional provisions if she elected to take her legal rights. Reference was also made to *Ross* v. *Ross*, July 15, 1896, 23 R. 1024, 33 S.L.R. 765, and to the following English authorities—*Gretton* v. *Haward*, 1819, 1 Swan. 409, note at p. 433 by reporter, 18 R.R. 95, which note is quoted in White and Tudor's Leading Cases, p. 422; *Codrington* v. *Codrington*, 1875, L.R., 7 E. & I. App. 854, at 861, 864, and 868; Williams on Executors, 10th ed. p. 1187.

Argued for the first and third parties—As the widow had elected to take her legal rights in full knowledge of the circumstances, and as her election had been partly at any rate carried into effect, she could not now revert to her conventional provisions—*Dawson's Trustees* v. *Dawson*, July 9, 1896, 23 R. 1006, Lord Kinnear at 1009, 33 S.L.R. 749. She had forfeited her testamentary provisions with the effect not of intestacy but that the liferent flew off and the whole residue including accumulations went to the children—*Alexander's Trustees*, January 15, 1870, 8 Macph. 414, 7 S.L.R. 240. The case of *Clark*, *supra*, was special, and in any case an Outer House judgment.

At advising—

Lord Kyllachy—I am of opinion that this case is ruled by the decision of the whole Court in the case of *Macfarlane's Trustees*, 9 R. 1138, and that consequently the principle to be applied is not that of forfeiture but of equitable compensation—the widow by claiming her legal rights being debarred from also claiming her conventional provisions, but, being so, only to the extent necessary to compensate out of those provisions the interests under the settlement prejudiced by her action.

It is true that there is expressed in the deed here a condition which was not expressed in the deed in the case of *Macfarlane*—a condition to the effect that the widow accepting her conventional liferent should do so in full of her legal rights. But there is no provision for the forfeiture of her conventional liferent if she should claim her legal rights, nor indeed is there any provision applicable to the event of her taking that course. On the contrary, the consequences of her doing so are left to the operation of law, and it is not I think disputed—at least it is clearly involved in the decision referred to—that in such circumstances the rule of law applicable is (what I have called for shortness) the rule of equitable compensation—a rule which is now well established both in Scotland and England and forms in questions of this class a pendant of the doctrine of election or approbate and reprobate.

The first question put to us must therefore in my opinion be answered in the affirmative. . . .

Lord Low—The first question to be determined is whether the truster's widow, by electing to take her legal rights, forfeited the provisions in her favour in her husband's trust-disposition and settlement absolutely, or only to such an extent as might be necessary to restore to the trust estate the amount withdrawn by her election.

The testamentary trustees have proceeded upon the latter assumption, and they have now, by accumulating the income which would have been drawn by the widow if she had not taken *jus relictæ*, restored the amount withdrawn from the estate. That being so, the widow claims that she is entitled to revert to the liferent provided for her by her husband.

I may say, in the first place, that I do not think that the question is affected the one way or the other by the manner in which the widow's claim for *jus relictæ* was satisfied. The important fact is that she did claim her legal rights, and it appears to me to be of no moment that the claim was satisfied by a special arrangement with the trustees.

In regard to the question whether the result of the widow's election was forfeiture or equitable compensation, it seems to me that the only difficulty arises from the fact that there is a declaration in the

settlement that the provisions therein made for wife and children are "in full of all terce, *jus relictæ*," and so forth. If it had not been for that declaration the principle laid down in *Macfarlane's Trustees* v. *Oliver* (9 R. 1138) would have been plainly applicable, and the widow would have been entitled to revert to the testamentary provisions in her favour.

It was argued, however, that the meaning and effect of that declaration was that if the widow chose to take her legal rights she was bound altogether to surrender her conventional provisions. That view receives considerable support from certain dicta of Lord President Inglis and Lord Mure in *Macfarlane's Trustees*. I think, however, that it may be doubted whether these learned Judges intended to say more than that when a testator makes a provision for a wife or child upon the condition that the beneficiary does not claim his or her legal rights, an election to take the latter extinguishes all claim to the former —a proposition which, at all events for the purposes of the present case, may be conceded.

It seems to me that the declaration with which we are dealiug does not amount to such a condition. The declaration is that the provision in favour of the wife shall be "in full" of her *jus relictæ*. I think that that is what would have been implied if it had not been expressed. If the wife had taken the provision in her favour—that is, a liferent of the residue from the date of her husband's death until her own death—of course she could not have taken her *jus relictæ*. But the converse is not expressed. It is not said that if the wife takes her *jus relictæ* that shall be in full or in satisfaction of her testamentary provisions, and the judgment in *Macfarlane's Trustees* shows that such a condition is not implied. In these circumstances it seems to me that the same considerations which led the Court in *Macfarlane's* case to hold that the beneficiary who had claimed legitim was entitled, after full compensation had been made, to revert to the testamentary provisions in her favour, are present here. If the widow is restored to her position as liferenter, the disposition of his means and estate made by the testator will receive full and precise effect. The other beneficiaries will receive what the testator provided for them—no more, but no less—and the widow will not receive a penny more than the provision in her favour, because the capital sum which she withdrew from the trust estate as *jus relictæ* has been repaid out of the income destined to her. I am therefore of opinion that the widow is entitled to revert to her testamentary provisions, and I have only to add that I think that the view which I have taken of the scope of the declaration, that the testamentary provisions should be in full of legal rights, is supported by the judgment of the First Division and of the House of Lords in *Naismith* v. *Boyes* (25 R. 899, 1 F. (H.L.) 79), where it was held that the true object and scope of such a clause was to protect the settlement.

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

LORD JUSTICE-CLERK—I have been unable to hold that there was any forfeiture by the widow in the circumstances disclosed in the case before us.

Although she undoubtedly claimed her legal rights, I cannot see that the declaration in the trust-disposition can exclude the widow from reverting to her legal rights if compensation is made. *Macfarlane's* case seems to me to be entirely in point.

The result is that the first question must be answered as proposed by Lord Kyllachy. . . .

LORD STORMONTH DARLING was absent.

The Court answered the question in the affirmative.

Counsel for the First Parties—Johnston, K.C.—Murray. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second Party—The Dean of Faculty (Campbell, K.C.) — Chree. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Third Parties—Hunter, K.C. — Orr Deas. Agents — Mitchell & Baxter, W.S.

Wednesday, November 7.

SECOND DIVISION.

[Lord Dundas, Ordinary.

DENHOLM'S TRUSTEES *v.* DENHOLM'S TRUSTEES.

Succession — Mutual Settlement—Liferent or Fee—Limited or Unlimited Right of Fee.

A husband and wife executed a mutual settlement, by which the wife, in consideration of her husband's settlement of his estate, conveyed to him, if he should survive her, which he did, her whole estate, under burden of payment of her debts and executry expenses, of certain annuities, and of maintaining and educating her children, "with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell, and dispose of my said estates, heritable and moveable, by public roup or private bargain, as he may think proper, and in general to deal and intromit therewith as fully as I could have done myself. . . ." Upon the death of the survivor of herself and her husband she conveyed to her trustees "All and sundry my said estate or such portion as may be unconsumed by my said husband. . . ." Power was reserved to the spouses to alter and revoke the settlement by mutual writing during their joint lives, with power also to the sur-