is entitled to insist in his claim at common law on repaying to the defender the sum of £8 specified in said receipt, and repayment having been made at the bar, allow the pursuer within eight days to lodge issues for the trial of the cause; reserving all questions of expenses."

Counsel for Appellant—Rhind—Watt. Agent—D. Howard Smith, Solicitor.

Counsel for Respondents—Pearson—Napier. Agents—Drummond & Reid, W.S.

Friday, June 18.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

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

Husband and Wife—Jus relictæ—*Succession—Provision to Widow—Election—Equitable Compensation.*

A testator bequeathed an annuity and the liferent of his town-house to his widow, and bequeathed the residue of his estate (after certain provisions had been satisfied) to his daughters in liferent and their children in fee, directing that the provisions for widow and children should be accepted in full of their legal rights. The widow having taken her *jus relictæ*, *held* that the case was one of election not forfeiture, that the doctrine of equitable compensation therefore applied, and that both the daughters and their children as liferenters and fiars having suffered loss the testamentary provisions made for the widow should be applied so as to compensate them for their respective interests as liferenters and fiars.

Where a widow or child rejects the provisions given in lieu of legal rights, such case is not one of proper forfeiture, and therefore the provision is not to be treated as simply a lapsed interest.

William Russell of Ardpeaton died on 29th August 1884 leaving a trust-disposition and settlement, dated 29th August 1879, by which he left his whole estate, heritable and moveable, to trustees for the purposes therein mentioned. He was survived by his wife, by one son, John James Russell, and by three daughters—Mrs Gardiner, Mrs Murray, and Mrs Howat. He *inter alia* directed his trustees to pay his widow, in addition to her marriage-contract provisions, a free liferent annuity of £900 per annum, and to allow her the free alimentary use of his house in Kew Terrace, Glasgow, with a provision that if she married again the annuity was to be reduced to the sum of £400 per annum. He directed £14,000 to be paid to his son on his attaining twenty-one, while the residue, including the capital fund and estate set aside to secure the provision to his widow, was to be held by the trustees for behoof of his daughters, equally among them in liferent, for their liferent only and their children in fee, and these provisions were "to be accepted" by the widow and children in full of their legal rights. Mrs Russell decided to take her legal rights. The *jus relictæ* was about £27,000.

The present action of multiplepoinding was raised by Colin Campbell and others (Mr Russell's trustees) for the purpose of settling how the annuity of £900 per annum, left by Mr Russell to his wife, along with the liferent of the house in Kew Terrace, were to be disposed of in the altered state of circumstances. The trustees claimed that they were bound to uplift the amount of the £900 annuity, and the rent of the house, and apply them, Mrs Russell having rejected them, in the equitable compensation of the beneficiaries who had been injured by Mrs Russell's election—that is, in making payments to the three daughters as liferenters of the residue, and in making additions to the capital of the residue which was destined to the children, and that in proportion to the loss actually sustained by the fiars and liferenters respectively. They proposed to uplift these sums at each term, and apply them in making payments at each term in proportion to the loss actually sustained by the liferenters and fiars.

The daughters maintained that in consequence of their mother having taken her legal rights the effect on the fund *in medio* was the same as her death would have been, and the amount necessary to secure the annuity to her, and the value of the house in Kew Terrace, fell into residue, and to be divided immediately among them in liferent and their children in fee.

On 19th December 1885 the Lord Ordinary pronounced this interlocutor—"Finds that in consequence of the election of Mrs Russell to claim her *jus relictæ* in place of the testamentary provisions contained in the trust-settlement of the deceased William Russell, her husband, the annuity of £900 therein provided to her, and the liferent of the house at Kew Terrace, and moveable effects also therein provided, have vested in the trustees of Mr Russell's estate in trust for the purpose of being applied under such equitable scheme of distribution as may be approved of by the Court towards the compensation of the objects of the residuary destination for the loss which they will sustain through the exercise of Mrs Russell's right of election: Finds that under the said residuary destination the testator's daughters are respectively entitled to one-third of the income of residue during their respective lives, and that in the executing of the said resulting trust it is necessary that the amount of the prospective loss of income to each daughter should be separately ascertained according to the present value thereof; and finds that each annual instalment of £900, with the liferent of said house and moveable effects, should be apportioned between the testator's three daughters (as liferenters) and the trustees as custodiers for the contingent fiars in the proportion of the losses respectively sustained by such liferenters and fiars according to a scheme to be approved by the Court after such inquiry and report as may be hereafter directed; and appoints the case to be enrolled with a view to further procedure."

Mrs Gardiner and Mrs Murray having obtained leave, reclaimed, and argued—This was really a case of forfeiture, and being so there was no room for the doctrine of equitable compensation; if the conventional provisions were not taken advantage of, then there was no room for the doctrine of equitable compensation.

Authorities—*Nisbet* v. *Nisbet*, Dec. 6, 1851, 14 D. 145; *M'Farlane* v. *Oliver*, July 20, 1882, 9 R. 1138; *Annandale* v. *Macniven*, June 9, 1847, 9 D. 1201; *Davidson's Trustees* v. *Davidson*, July 15, 1871, 9 Macph. 995.

Replied for the trustees—This was clearly a case for the application of the doctrine of equitable compensation. The widow had rejected her provisions, and these should be applied to compensate the liferenters and fiars of the residue in proportion to the loss which they had respectively sustained.

Authorities—Those cited for appellants, and *Harvey* v. *Harvey's Trustees*, Jan. 30, 1862, 1 Macph. 345.

At advising—

Lord Adam—The late Mr Russell died on 29th August 1884, leaving a trust-disposition and settlement, dated 29th August 1879, by which he left his whole estate, heritable and moveable, to trustees, for the purposes therein mentioned. After directing his trustees to pay certain small legacies and annuities, he further directed them to pay his widow a free liferent annuity of £900 per annum, and to allow her the free alimentary use of his house in Kew Terrace, but declaring that in the event of her entering into a second marriage the annuity should be reduced to the sum of £400 per annum. He then directed his trustees to make payment to his son of the sum of £14,000, and then by the seventh purpose of the trust he directed them to hold the whole residue of his estate, including therein the capital funds or estate which might be set aside to secure the provisions in favour of his wife, for behoof of his whole daughters equally among them, in liferent for their respective liferent use only, and to and for the use of their respective issue in fee; and lastly, he provided that the provisions "hereinbefore contained in favour of my said wife and daughters shall be accepted by her and them respectively, in full of all claims of terce, *jus relictæ*, legal share of moveables, legitim, portion-natural, bairns' part of share of executry, and other claim competent to her and them respectively by and through my decease or otherwise, either legally or conventionally."

The truster was survived by his wife, his son, and three daughters. The daughters are all married, one (Mrs Murray) having issue.

The widow (Mrs Russell) has claimed her *jus relictæ*, which is estimated to amount to about the sum of £27,000. The annuity of £900 per annum and the liferent of the house in Kew Terrace, left to her by the settlement, are thus set free, and the question to be decided in this case is how these are disposed of by the truster.

The Lord Ordinary is of opinion that each annual instalment of £900, with the liferent of the said house, should be apportioned between the testator's three daughters (as liferenters) and the trustees as custodiers for the contingent fiars in proportion of the losses respectively sustained by such liferenters and fiars. In coming to this conclusion he has applied to this case the doctrine of equitable compensation, and in my opinion he is right. That doctrine is, I think, so clearly established as a part of our law that I do not think it necessary to refer to the cases by which it has been established. It is that when a legacy or provision is bequeathed to a beneficiary under the condition, express or implied, that if he takes the bequest he shall surrender his legal rights, he cannot take both, he is put to his election, and if he elects to take his legal rights, then the legacy or provision specially bequeathed to him becomes free, and must be applied in compensating the interests of those prejudicially affected by the election made adversely to the will. It was not seriously disputed that in a case of proper election the doctrine of equitable compensation applied, but it was maintained that this was not a case of election, but of forfeiture, as if a legacy or provision given under a condition. In that case it was maintained that the forfeited provision, as a lapsed legacy, fell into residue, and accordingly the liferenters claim that the liferent of the whole residue, including the capital sum which might or would have been set aside to secure the widow's provisions, shall be paid to them, or otherwise, that the forfeited annuities shall be paid to them. The result of this would be that no part of the forfeited provisions would be applied in compensating the fiars. I am, however, of opinion that this is a case of election, not of forfeiture. No doubt a person claiming his legal rights is often said to forfeit his conventional provisions, but all that is meant is that he surrenders or does not take them. The distinction is, I think, very well expressed by Lord Rutherfurd Clark in the case of *Macfarlane* v. *Oliver* [*supra*]. He says—"I am of opinion that there is a real distinction between 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 on 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 a legatee in a testator's lifetime.

In this case the widow was put to her election—she might either take the special provision left to her by the settlement, or she might take her *jus relictæ*. She elected to take the latter, and thereby set free the special provision bequeathed to her by the settlement. In *Macfarlane* v. *Oliver*, from its being a universal settlement, the condition was implied that if Mrs Oliver claimed her legal rights she must surrender the special provision bequeathed to her by the settlement. I cannot see that it makes any difference that in this case the condition is expressed. In this case the provision is declared to be in full of the widow's legal rights. But as regards the interests of those prejudicially affected, that can make no difference. It does not make the bequest in any proper sense a conditional bequest. It only amounts to a declaration that both legal and conventional provisions are not to be taken—and that if the conventional bequest is taken, it is to be taken in satisfaction of her legal claims. I think the case of *Harvey* v. *Harvey's Trustees* is a clear authority against the liferenter's claims. In that case Colonel and Mrs Harvey had by marriage-contract and bond of provision destined certain provisions to their younger children unconditionally. By a subsequent bond of pro-

vision and codicils the previous deeds were narrated, and each of the younger children was provided in the life interest of a larger sum, with the fee to their children, and it was thereby declared that "it is our intention, by executing the present deed, to provide each of our four younger children, and any of our other children who may be born of our present marriage, in the sum of £20,000 sterling" (afterwards reduced to £7500) "in full of their portions and provisions respectively, any sums they may receive in virtue of the deeds before narrated being reckoned part of the said £20,000, but the whole sums hereby settled to belong to the trustees after mentioned for behoof of our younger children and their children."

Three of the younger children declined to take under this deed, and elected to take the portions to which they were entitled by the marriage-contract. The Court held that in so doing they reprobated the bond of provision and forfeited the life interest provided to them in the sums therein contained, but that their forfeiture did not apply to their children. The result was, just as here, that the liferents provided to the younger children by the bond of provision were set free, while a portion of the capital sum provided to their children was carried away. The question was, how the forfeited liferents were to be applied. The Court pronounced this interlocutor:—"Find that according to the true meaning of the bond of provision of 1839 and the codicils, and according to the implied will of Colonel and Mrs Harvie, the granters thereof, the said liferent interests of the children forfeiting as aforesaid do not fall into the residue of the estate of Colonel and Mrs Harvie . . . . but fall to the trustees under the said bond of 1839, to be administered by them for the purposes of the said bond of provision, and particularly for behoof of the parties whose interests were injuriously affected by the act of election and repudiation which occasioned the forfeiture, viz., the children existing or who may exist of the said younger children of Colonel and Mrs Harvie so forfeiting respectively, and for behoof of the parties substituted by the said bond of provision to the said younger children and their issue."

This case appears to me to be directly in point, the only difference being that the provisions which the younger children elected to take were due to them *ex contractu*, while here the widow was entitled *ex lege* to her *jus relictæ*, but I do not think that makes any difference in principle. I think this case is a direct authority to the effect that the annuity surrendered or forfeited in the sense in which it was in this case does not fall into residue, but is to be administered for behoof of the parties whose interests are injuriously affected by the act of election.

If, then, the parties whose interests are injuriously affected are to be compensated, the question is, how is this to be most equitably done? I think in this matter regard must be had to the pecuniary losses sustained respectively by the liferenters and fiars.

Both liferenters and fiars have suffered loss, and I see no equity in applying the whole of the forfeited or surrendered provision in compensating the fiars only, as they propose.

I agree with the Lord Ordinary in thinking that it should be apportioned between the liferenters and the fiars in proportion to the losses sustained by them respectively, the widow having carried off her *jus relictæ*. That there may be some difficulty or nicety in estimating their respective losses is no reason why it should not be done as accurately as may be, and I approve of the Lord Ordinary's proposed inquiry for that purpose.

Lord Mure—I am entirely of the same opinion. Assuming that the doctrine of equitable compensation ought to be applied, then I think the rules upon the subject are well laid down by the Lord Ordinary in his interlocutor, and I agree with what Lord Adam proposes, and think the qualifications which he suggested are sound, and ought to be given effect to. A good deal of argument was addressed to us on the case of *M'Farlane* v. *Oliver*, but it does not appear to me that much assistance is derived from it. I think the case referred to by Lord Adam is more in point, and I see the same rule which is sought to be applied here was applied in the case of *Davidson*.

I concur in thinking that the sum set free by Mrs Russell claiming her *jus relictæ* should be devoted to compensating the interests of those prejudicially affected by the election Mrs Russell has made.

Lord Shand—I am of the same opinion. I think that the question raised in the present case is not affected by the case either of *Annandale* on the one hand, or *M'Farlane* on the other. As to the first of these cases, when there is a postponement of the payment of provisions in order to protect a liferent, and that postponement comes to an end by renunciation, then a payment of the fund set aside for the purposes of the provision is made at once by the trustees, and the doctrine upon which such a payment is made is that the truster desired to confer a benefit upon certain persons, but subject to the existence of this liferent, and as that obstacle has been removed no reason exists for delaying the carrying out of his intention. If, however, more than the liferent had to be protected, the question would then be more difficult.

In *M'Farlane* v. *Oliver*, which was the case of a universal settlement, the condition was implied that if Mrs Oliver claimed her legal rights she would require to surrender the special provision bequeathed to her by the settlement.

In the present case there is no question of forfeiture but of election, and when as here a widow or children elect to take her or their legal rights, and thereby take away a bequest from some individual or class whom it was the intention of the testator to benefit, then the doctrine of equitable compensation ought no doubt to come in, and the fund set free by the renunciation ought to be distributed among those whose bequest has been carried off, in the proportion that each has thereby suffered.

Lord President—Lord Adam has so distinctly expressed my opinion in this case that I have nothing to add.

The Court pronounced this interlocutor:—

"Vary the interlocutor of Lord M'Laren of 19th December 1885 by deleting from it the following words, viz.—'And moveable effects also therein provided' on the tenth

line thereof; the word 'Find' on the eighteenth line, and all the words following the said word to the word 'thereof' on the twenty-seventh line; as also the words 'and moveable effects' on the twenty-ninth line thereof: *Quoad ultra* adhere to the said interlocutor, refuse the reclaiming-note, and decern."

Counsel for Mrs Gardiner and Others—Gloag—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Trustees—D.-F. Mackintosh, Q.C.—Low. Agents—D. Mackenzie, W.S.—Webster, Will, & Ritchie, S.S.C.

Saturday, June 19.

SECOND DIVISION.

LOUSON'S TRUSTEES *v.* DICKSONS.

Husband and Wife—Succession—Exclusion of Jus mariti—*Payment.*

A truster directed his trustees to invest one-half of the residue of his estate for behoof of one of his daughters, who was at the date of his will married and aged twenty, in liferent only, and her children in fee, exclusive of the *jus mariti* of her present or of any future husband. After she had reached the age of sixty she and her husband and whole surviving children called upon the trustees to pay over her share of residue. The Court (*dub.* Lord Craighill) *authorised* payment.

David Louson of Springfield, town-clerk of Arbroath, died on 11th December 1858, survived by two children, Mary Ann Louson and Mary Duncan Louson. He left a trust-disposition and settlement executed shortly after the marriage of his daughter Mary Duncan in 1844, as after stated, in the fifth purpose of which he directed his trustees to invest on good security a sum of £4000 for behoof of his daughter Mary Duncan, and for which he had become bound in his marriage-contract—"Taking the rights and securities therefor payable to themselves, in trust for behoof of the said Mary Duncan Louson in liferent, but for her liferent use allenarly, and to the child or children to be lawfully procreated of her body, equally among such children, if more than one, share and share alike, in fee, but failing of such child or children lawfully to be procreated of her body, then to her own heirs or assignees whomsoever; but under this express condition and declaration, that the interest or annual produce of the said sum of £4000 so to be invested as aforesaid shall be payable to herself, the said Mary Duncan Louson alone, exclusive of the *jus mariti* of her present or any future husband: and that no part of the said sum of £4000, nor the interest nor annual produce thereof, shall on any account be affectable by the debts or deeds, legal or voluntary, of the present husband or of any future husband of the said Mary Duncan Louson, nor by the diligence of his creditors, his right of administration in respect of the said sum of £4000, and the interest or produce thereof, being hereby expressly excluded and debarred." By the eighth purpose he directed them—"If any balance or residue of my means and estate, after being realised, shall remain after the sums above mentioned are invested, then I hereby order and direct such balance or residue to be invested for behoof of my said daughters, equally in liferent, and their children in fee, exclusive of their husbands' *jus mariti*, in the terms and under the conditions particularly above expressed."

Mary Ann Louson married a Mr Macdougall, and died on 3d June 1885. Mary Duncan Louson married James Anderson Dickson on 24th December 1844. At the date of this Special Case she was over sixty years of age, and her surviving children, one daughter and four sons, were all over twenty-one years of age, the only other children having died unmarried and intestate.

Mr and Mrs Dickson and their children maintained that they were entitled, as being the whole parties interested therein, to immediate payment of the one-half of the residue of the means and estate of the deceased David Louson provided to Mrs Dickson and her children in liferent and fee respectively, in terms of the testamentary writings, and they called on the trustees to pay over the amount to them (other than Mr Dickson), or to their nominees. The trustees maintained that they were bound to retain the amount until the death of Mrs Dickson.

In order to settle that question this Special Case was presented to the Court by the trustees of the first part, and by Mr and Mrs Anderson Dickson and their whole surviving children of the second part.

The question for the opinion of the Court was—"Are the parties of the first part bound, upon the demand of the parties of the second part, forthwith to pay over the said half of residue to the parties of the second part, or to their nominees?"

Argued for first parties—The truster had most carefully provided that his daughter's share of residue should be exclusive of the *jus mariti* of any husband she might marry. Mrs Dickson was only sixty years old. Her husband might die, and if she married again then the exclusion of her husband's *jus mariti* would have to be given effect. The truster evidently had this contingency in view. The following authorities—*Kippen* v. *Kippen's Trs.*, Nov. 24, 1871, 10 Macph. 134; *Dow* v. *Kilgour's Trs.*, Jan. 31, 1877, 4 R. 403; *M'Lean's Trs.* v. *M'Lean*, Feb. 23, 1878, 5 R. 679—were no doubt cases in which a wife in similar circumstances, as being the only person interested in the fund, had been held entitled to get it. But the principle had never been carried further than the case of a marriage-contract. They must then retain the fund till Mrs Dickson's death. Reference was also made to *Martin* v. *Bannatyne, &c.*, March 8, 1861, 23 D. 705; *Massey* v. *Scott's Trs.*, Dec. 5, 1872, 11 Macph. 173; *Allan's Trs.* v. *Allan and Others*, Dec. 12, 1872, 11 Macph. 216.

Argued for second parties—They were entitled to get the funds now, inasmuch as they were the only persons interested. The contingency of Mr Dickson dying and Mrs Dickson marrying again