ment" is a technical term which means simply the right to demand relief from a particular parish, and it is common ground that the children in question had such a right. But if there were any dispute about it, I think it is perfectly clear that that was their position, because they were destitute children, too young to support themselves, and therefore they necessarily fell upon the parish. That means that they had right to relief from some particular parish, and it is admitted in the case by both parties that that parish was the parish of Aberdeen. It is admitted that on the day when they were taken into Leith poorhouse in November 1906, all the children had a settlement in the parish of Aberdeen derived from their father. If that be so, then I take it to be settled law, settled by decisions going further back than *Beattie* v. *Adamson* and frequently followed, that the settlement of the pauper at the date when he becomes chargeable cannot be altered during chargeability. The principal point which we have to consider here, viz., whether a child's settlement can be altered during the period of its chargeability by a change in the father's settlement, arose for decision and was decided in *Beattie* v. *Adamson*, and the ground of judgment in that case appears to be directly applicable to the present. When a child—I cannot say I am quoting the exact words of Lord Justice-Clerk Inglis, because I have not the book before me, but I am quoting the sense,—when a child has acquired a settlement through its father, that becomes the child's own settlement to all intents and purposes. If that be so, no loss of settlement by the father who continues to be able-bodied can in any way affect the settlement of the child who has become a proper object of parochial relief. The decision appears to me to be directly in point. I think it is of no consequence whether the father loses his settlement in Aberdeen by voluntary change or by compulsory change, or whether he loses it at all. The question is not the father's settlement but the right of relief in the children against one parish or against the other, and on the ground established, as I think, in *Beattie* v. *Adamson*, I am for answering the first question of law put to us in the affirmative.

LORD JOHNSTON—I agree in the conclusion at which your Lordships have arrived.

LORD M'LAREN was absent.

The Court answered the first question of law in the case in the affirmative.

Counsel for First Parties—Craigie, K.C. —J. Hossell Henderson. Agents—Snody & Asher, S.S.C.

Counsel for Second Parties—Sandeman, K.C.—A. Brown. Agent—Alex Morison & Company, W.S.

Friday, January 21.

SECOND DIVISION.

MACFARLANE AND OTHERS (MACFARLANE'S TRUSTEES) *v.* MACFARLANE AND OTHERS.

Succession — Legacy — Ademption — Specific Legacy of Shares — Shares Divided by Company into Ones of Lower Denomination—Sale by Curator Bonis.

A by his trust-disposition and settlement, dated 11th February 1902, bequeathed to his mother, and to three sisters "100 £5 shares of the Empire Guarantee and Insurance Corporation Limited." By resolution of the company each of the £5 shares was in 1907 divided into five £1 shares. A's holding, which was at that time 500 £5 shares, became 2500 £1 shares, for which he received a new certificate. On 18th August 1908 B was appointed *curator bonis* to A, who at that date possessed 1750 £1 shares. On 19th November 1908 B sold the said shares, not because the money was required for the payment of A's debts nor for his maintenance, but because he considered it imprudent to hold them.

Held that the legacies were not adeemed either (1) by the sale of the shares by the *curator bonis*, or (2) by the alteration in the form thereof.

Mitchell's Trustees v. *Fergus*, July 3, 1889, 16 R. 902, 26 S.L.R. 615, *doubted.*

Duncan Macfarlane, engineer, Glasgow, and others, the trustees acting under the trust-disposition and settlement, dated 11th February 1902, of the late Alexander Thomson Macfarlane, *first parties;* Miss Marie Douglas Macfarlane, Mrs Isabella Macfarlane or M'Kellar, and Mrs Jessie Reed Macfarlane or M'Kellar, sisters of the testator, *second parties;* and the said Duncan Macfarlane as an individual and others, being the whole legatees under the trust-disposition other than the second parties, *third parties*, presented a Special Case to have decided whether a bequest in the said trust-disposition in favour of the second parties had been adeemed.

By his trust-disposition the testator, *inter alia*, directed his trustees to pay the following legacies—"To each of my mother and my three sisters, at present unmarried, 100 £5 shares of the Empire Guarantee and Insurance Corporation, Limited—my remaining shares in that corporation to be sold, and, after payment of any debts which I may owe, the proceeds to fall into residue."

The testator died on 20th November 1908, predeceased by his mother, but survived by his three sisters, who were unmarried at the date of the settlement.

The Case stated, *inter alia*—"At the date when the deceased's will was signed he held 1000 shares of £5 each fully paid of the Empire Guarantee and Insurance Corporation, Limited. From time to time his hold-

ing in that company was reduced by sales, and on 21st May 1904 had been reduced to 330 £5 shares. On 22nd December 1905 his holding was increased by 120 shares then purchased, and on 7th June 1906 it was reduced by a sale of 330 shares to 120 shares. On 3rd June 1907 his holding was 500 £5 shares, he having sold about that time 120 shares and purchased 500 shares. By a resolution of the company passed on 13th, and confirmed on 28th September 1907, each of the fully paid £5 shares was divided into five shares of £1 each fully paid. Deceased's holding was therefore converted into 2500 £1 shares fully paid, and for this holding he received a new certificate. Said converted shares were in September 1908 designated A shares. By a resolution of the company, passed on 13th September 1907, the capital of the company was increased by the creation of 400,000 new shares of £1 each. In or about November 1907 the deceased applied for and obtained an allotment of 3870 of said new shares, 2s. 6d. per share being paid thereon. Said new shares were in September 1908 designated B shares. The deceased was a director of the company, and at the date of the passing of said resolutions was quite *compos mentis*. The deceased had borrowed from one of his sisters a sum of £800, and to enable him to repay this loan he, on or about 25th June 1908, sold 750 of the said £1 fully paid shares and applied the proceeds towards repayment of the loan. He was then left with a holding of 1750 £1 fully paid shares, and 3870 £1 shares (2s. 6d. paid up) in the company.

"On 30th July 1908 a petition was presented to the Court of Session by the testator's wife . . . and others, craving that, as the testator had been for some time suffering from general paralysis accompanied by mental derangement, and was, in consequence of his condition, incapable of managing his affairs or of giving directions for their management, a *curator bonis* should be appointed to him. By act and decree pronounced in said petition, dated the 18th day of August 1908, David Taylor, C.A., Glasgow, was appointed *curator bonis* to the testator, with the usual powers, and he, having found caution for his intromissions with the funds of the ward, and having extracted his appointment as *curator bonis* foresaid, entered upon the duties of his office. In the course of his administration of the estate the *curator bonis*, on or about 19th November 1908, realised, *inter alia*, the deceased's entire holding in the Empire Guarantee and Insurance Corporation, Limited, viz., the said 1750 A £1 shares fully paid, and the said 3870 B £1 shares with 2s. 6d. per share paid up. . . . The proceeds of all the said shares were lodged in bank on deposit-receipt in name of the *curator bonis*. These shares were realised, not that the money was required for payment of the debts or for the maintenance of his ward, but because the *curator bonis* considered it imprudent to hold these shares. The *curator bonis* was not aware of the terms of the deceased's trust-disposition and settlement and codicil."

This *question of law* was submitted—

"Was the bequest by the testator to each of the second parties of 100 £5 shares of the Empire Guarantee and Insurance Corporation Limited, contained in the third purpose of his said trust-disposition and settlement, in whole or in part adeemed?"

Argued for third parties—It had been long settled that the question of intention was irrelevant as regards ademption. The sole point was whether the specific thing remained *in bonis* of the testator at the date of his death. That consideration was altogether independent of *animus adimendi*—*Anderson* v. *Thomson*, July 17, 1877, 4 R. 1101, 14 S.L.R. 654; *M'Arthur's Exrs.* v. *Guild*, 1908 S.C. 743, 45 S.L.R. 551; *M'Lean* v. *M'Lean's Executrix*, 1908 S.C. 838, 45 S.L.R. 672. *Mitchell's Trustees* v. *Fergus*, July 3, 1889, 16 R. 902, 26 S.L.R. 615, was really more a case of misdescription than ademption. If not, it was unsound. (1) The legacy was adeemed when the curator sold the shares—*Davidson's Trustees* v. *Davidson*, November 14, 1901, 4 F. 107, 39 S.L.R. 106; *Jones* v. *Green*, 1868, L.R., 5 Eq. 555. In questions of conversion intention was of the greatest importance. Cases regarding conversion, whether in testate or in intestate succession, had therefore no application. In Scotland the law of intestacy proceeded upon presumed intention. (2) The legacy was adeemed by the alteration of the £5 shares into £1 shares. This was a substantial alteration, and was not merely a question of nomenclature. There was here a real change—*Slater*, [1907], 1 Ch. 665; *Oakes*, 1852, 9 Hare 666; *in re Lane*, L.R., 14 Ch. D. 856; *in re Gray*, L.R., 36 Ch. D. 205 (*per* Kay (L.J.) at 210). (3) The testator had from time to time altered his holding, and had actually sold all the shares which belonged to him at the date of the will. There was authority for the view that that was sufficient to infer ademption—M'Laren on Wills (3rd ed.), vol. i, p. 407; *Sydney* v. *Sydney*, L.R., 17 Eq. 65.

Argued for second parties—The legacy was not adeemed. (1) Anything that a curator did was disregarded unless it could be shown that the ward if *sui juris* would have been compelled to do the same thing. No act by the curator in the administration of the estate could alter the succession unless it were inevitable—*M'Adam's Executor* v. *Souters*, December 2, 1904, 7 F. 179, 42 S.L.R. 145; *Moncreiff* v. *Milne*, July 16, 1856, 18 D. 1286 (in this case the curator had the authority of the Court for what he did); *Kennedy* v. *Kennedy*, November 15, 1843, 6 D. 40; *Macfarlane* v. *Greig*, February 26, 1895, 22 R. 405, 32 S.L.R. 299. This was an exception to the ordinary rule that the state of matters existing at the testator's death was conclusive. It was true that the cases quoted were cases of conversion, but the principle of the exception applied to ademption. It would not do to say that conversion altogether depended on intention. That was so in testate succession, but not as regards intestacy. The case of *Jones* v. *Green* (*sup. cit.*) depended upon specialties of English law. If there was a well-established rule in Scotland,

there was no reason whatever why the rules of the Court of Chancery should be adopted. But even in England a sale on behalf of a lunatic did not affect his succession, unless the sale was carried out by the Court—*Jenkins* v. *Jones*, 1866, L.R., 2 Eq. 323. (2) The alteration of the £5 shares into £1 shares did not bring about ademption, as there was really no alteration in the character of the investment. The change was nothing more than a change of name, and while probably making the shares more realisable it did not affect the interest of the shareholder. That was the distinguishing point from the cases referred to—*Oakes* v. *Oakes* (*sup. cit.*); *Mitchell's Trustees* v. *Fergus* (*sup. cit.*), *per* Lord Lee. *In re Lane* (*sup. cit.*) was not followed in *Dillon* v. *Arkins*, 17 L.R. Ir. 636. (3) The point on the testator's manipulations with his shares had really been conceded, and was not maintainable. The question was whether the bequest was in the estate at the date of the testator's death — *M'Arthur's Exrs.* v. *Guild* (*sup. cit.*); *Partridge* v. *Partridge*, Talbot's Equity Cases, p. 226; White and Tudor's Leading Cases (7th ed.) 823; *Castle* v. *Fox*, 1871, L.R., 11 Eq. 542.

At advising—

LORD DUNDAS—The first parties to this Special Case are the trustees, original and assumed, acting under the trust disposition and settlement executed in 1902 by the late Mr Macfarlane, who died on 20th November 1908. The question raised by the case is whether or not a legacy bequeathed by the settlement has been adeemed. The second parties are three sisters of the truster, who are designated as beneficiaries in the bequest, the terms of which I shall presently quote, and who argue against ademption. The third parties are the whole legatees (other than the second parties) under the settlement, and it is their interest, in the circumstances explained in the case, to maintain that the legacy in question has been adeemed.

We had a careful and interesting argument from both sides of the bar, illustrated by a considerable but judiciously selected citation of authorities. It will not, however, be necessary to refer in any detail to more than two of the cases, because I think the gist of all of them is reasonably clear, and can be shortly stated, so far as is requisite for the purposes of this decision. There is no doubt that the Roman Law recognised the intention of a testator, the *animus adimendi*, as a necessary element of ademption. It seems equally clear that our law, agreeing with that of England, does not so recognise that intention. The only questions which usually arise in a case like this are, Was there a specific legacy? and if so, Did the subject of that legacy remain as part of the testator's estate at his death? If the second of these questions is answered in the negative, the legacy will (in the general case) be held to have been adeemed, without regard to any *animus* or supposed *animus adimendi*. This was all very clearly laid down by the Judges of this Division in *Anderson* v. *Thomson* (1877, 4 R. 1101). Lord Ormidale said—"It seems to be firmly established in England, ever since the judgment of Lord Thurlow in the cases of *Ashburner* v. *M'Guire* (2 Br. C. Cases 108), and *Stanley* v. *Potter* (2 Cox 180), that the test of ademption is whether the specific thing bequeathed by a testator continued to exist at his death or had been converted into something else, and this independently altogether of the *animus adimendi*—a consideration which has been discarded on the ground that it was calculated to create confusion and uncertainty"; and he went on to point out that there were Scots cases to the same effect, and to cite instances where ademption was inferred from the voluntary payment of a bill, during the truster's life, the contents of which had been specifically bequeathed—*Jack*, 1742, M. 11,357; from the paying up of a bond under similar conditions—*Pagan*, 1838, 16 S. 383; and from the fact that a house specifically bequeathed had been purchased compulsorily during the testator's life by a railway company—*Chalmers*, 1851, 14 D. 57. The other Judges, Lord Gifford and Lord Justice-Clerk Moncreiff accepted, though with great reluctance, as clearly settled law, the opinion of Lord Thurlow that in a question of ademption the *animus adimendi* is not a matter to which the Court is to look; and the reluctance of those learned Judges emphasises the sincerity of their adhesion to the law as established. The only other case to which I think reference need be made at this stage is *M'Arthur's Exrs.* v. *Guild*, 1908 S.C. 743, a unanimous decision of Seven Judges. With the particular merits of the case we are not here concerned. It was, as the Lord President explained, sent to Seven Judges in order to test whether the decision of this Division in *Pollock's Trustees* v. *Anderson*, 4 F. 455, really conflicted with the decision of the whole Court in *Heron* v. *Espie*, 18 D. 917; and it authoritatively settled that no such conflict existed, the former being a case of ademption, the latter one of conversion. The Lord President pointed the distinction thus—"If it," *i.e.*, the sale in *Heron's* case, "had been a voluntary sale, of course the property would have been moveable, but only on the principle of conversion, which depends on the will of the owner and testator. It seems to me that the moment that you settle that intention is neither here nor there in a question of ademption, *Heron* v. *Espie* becomes really an authority not at variance with but in favour of *Pollock's Trustees* v. *Anderson*." All the Judges accepted and sanctioned the doctrine laid down in *Anderson* v. *Thomson*. In particular, the Lord President, after referring to Lord Thurlow's judgments as "the leading authority" to the effect that "the test of ademption was whether the thing remained at the testator's death," and quoting from Lord Thurlow's language, stated that "that doctrine had been fully adopted in the law of Scotland."

I now pass to the facts of the case before

us. The terms of Mr Macfarlane's bequest are as follows:—"And to each of my mother" (who it may here be noted predeceased him) "and my three sisters at present unmarried, 100 £5 shares of the Empire Guarantee and Insurance Corporation, Ltd., my remaining shares in that corporation to be sold, and after payment of any debts which I may owe, the proceeds to fall into residue." It was not seriously disputed, and indeed could not be, that this is a specific legacy; but Mr Valentine argued, upon several grounds, that it has been adeemed.

The most formidable of these grounds, to my thinking, was based upon the following facts:—On 18th August 1908 the Court (upon a petition by Mr Macfarlane's wife, presented on 30th July) appointed a *curator bonis* to him, and the curator on 19th November 1908 (the day before the ward's death) sold that gentleman's entire holding in the Empire Company, and lodged the proceeds in bank on deposit-receipt in his own name. The Case states that "these shares were realised, not that the money was required for payment of the debts or for the maintenance of the ward, but because the *curator bonis* considered it imprudent to hold these shares. The *curator bonis* was not aware of the terms of the deceased's trust-disposition and settlement." Upon these facts Mr Valentine was able to urge, with much plausibility, that the legacy was plainly adeemed, because at the truster's death there was no part of his estate corresponding to the subject of the bequest; he had no shares of any sort in the Empire Company. I think, however, that this argument, though plausible, is not sound, and that Mr Fleming's answer sufficiently disposes of it. Mr Fleming pointed out, what is indeed trite law, that no act of a *curator bonis* can avail to affect the order of his ward's succession, or its character in the distribution of it between heir and executor, unless it can be shown not only that it was a proper and necessary act of administration on the part of the curator, but that it would have been a necessary and unavoidable act on the part of the ward if *sui juris*. This doctrine is well illustrated by the cases of *Kennedy*, 1843, 6 D. 40, see especially per Lord Fullerton, p. 49, ft., and *Moncrieff*, 1856, 18 D. 1286, where the actings of curators were held not to affect the ward's succession; and by that of *M'Adam's Exr.*, 1904, 7 F. 179, where the curator's sale of the ward's heritage was held to operate conversion, because it was an absolutely necessary act in order to the maintenance of the ward. The rule and its exception are both well settled in our law; and I cannot doubt that the present case falls within the former and not the latter. It may have been, in a sense, "necessary" for the curator to sell these shares, but it was obviously not necessary in any sense for the ward to have done so if he had remained *capax*. In these circumstances, though the testator's estate at his death did not in fact include the shares in question, they must, in my judgment, be held to have formed part of it at that date, and that without in any degree impinging upon the well-established general rule of law, already alluded to, that a testator's intention is not to be looked to in a question of ademption. The sale of the shares did not arise from any such intention, nor from any act of this testator, but from the act of a third party, the *curator bonis*, exercised at the time and in the circumstances already mentioned, in the proper course of his administration, but not owing to the necessities of his ward's position. Mr Valentine's first point therefore seems to me to fail.

I refer to his next point only to dismiss it in a few sentences. It is stated in the case that "3. At the date when the deceased's will was signed he held 1000 shares of £5 each fully paid of the Empire Guarantee and Insurance Corporation, Ltd. From time to time his holding in that company was reduced by sales, and on 21st May 1904 had been reduced to 330 £5 shares. On 22nd December 1905 his holding was increased by 120 shares then purchased, and on 7th June 1906 it was reduced by a sale of 330 shares to 120 shares. On 3rd June 1907 his holding was 500 £5 shares, he having sold about that time 120 shares and purchased 500 shares." An argument appears in the printed Case to the effect that "the said bequest has been adeemed in whole or in part by the sales of his shares in the said corporation set forth in article 3 hereof, whereby his holding therein was reduced at 7th June 1906 to 120 shares." We were told that some authority exists for the argument thus presented, but it was not vigorously maintained and was ultimately withdrawn. I need therefore say nothing more about this point.

But the Case further contains some facts about the history of this Empire Corporation, upon which Mr Valentine's last argument was maintained. It appears that by a resolution of the company in 1907 each of the fully paid £5 shares was divided into five shares of £1 each fully paid. Mr Macfarlane's holding was therefore converted into 2500 £1 shares fully paid, and for this holding he received a new certificate. These converted shares were in September 1908 designated A shares in order to distinguish them from other B shares which had been created. That Mr Macfarlane became possessed of some B shares is, I think, quite irrelevant to the case, because in June 1908 he retained a holding of 1750 fully paid £1 A shares, which was more than sufficient in value to meet the bequests now under consideration. But Mr Valentine maintained that by the conversion of each of the original £5 shares into five shares of £1 the legacy was *eo ipso* adeemed, because, after conversion the testator's estate no longer consisted to any extent of "£5 shares of the Empire Guarantee and Insurance Corporation Limited." I think this argument is much too fine from the point of view of common sense, and is not at all supported by any of the decisions we were referred to. In one Scots case, indeed—

Mitchell's Trustees, 1889, 16 R. 902—ademption was negatived by this Division of the Court under circumstances much more favourable for ademption than are here present. In that case a testatrix bequeathed "the shares standing in my name in the Paisley Gas Company." Prior to the date of her will the Paisley Gas Company had ceased to exist, and the interests of its shareholders had been converted into annuities payable by the Corporation of Paisley, which had by a local Act obtained the right of supplying gas to Paisley. The language of the will was therefore at best inaccurate, but there would, no doubt, be room for a strong argument, if no further change of circumstances had occurred, to the effect that the bequest of the shares had force to carry the substituted annuities. But prior to the death of the testatrix the annuities had been redeemed by the Corporation of Paisley, and the price of her annuity had been lent to that Corporation on a mortgage over its gas undertaking. The majority of the Judges of this Division held that the legacy was not adeemed, and that the legatee was entitled to the mortgage as representing the shares. Lord Rutherfurd Clark dissented. His Lordship observed that "it is very likely that the testator intended that the party of the second part should take the money which is in question. But I do not think we are entitled to proceed on any such conjecture, however probable"; and he added, in a later passage of his opinion—"That mortgage is neither gas shares, nor has it been declared to be a statutory representative or equivalent for gas shares. It is nothing more than a security which the testator chose to take. When she parted with her shares, or rather with the annuity which was the equivalent of these shares, the subject of the legacy perished, and therefore in my opinion the legacy is adeemed." The decision, if sound, is greatly *a fortiori* of the present case. It stands recorded in the books, and has not, so far as I am aware, been the subject of argument or of judicial comment, favourable or otherwise, in any subsequent case. I confess that, with the greatest respect, I venture to doubt the soundness of the decision, because it does appear to me that the opinions expressed by the learned Judges who formed the majority are difficult to reconcile with the established rule that in a question of ademption the testator's *animus adimendi* is not a matter for the Court to look into—a rule which, as above stated, received the unanimous sanction of Seven Judges in the recent case of *M'Arthur's Executor*. But *Mitchell's* case, whether soundly decided or not, goes far beyond anything that Mr Fleming requires for the success of his argument. We have here no extinction of the original company, nor any transfer of its undertaking to a new and different one, nor any essential change in the character of the shares—the change being, as I think, one of form only, for greater convenience, I suppose, of their commercial negotiation. The five shares of £1 each are not, it seems to me, to be viewed as a surrogatum for each one share of £5, but as being substantially the same thing. I find valuable support for this view in the judgment of Turner, V.-C., in *Oakes* v. *Oakes*, 9 Hare 666, where that learned Judge held that a bequest of shares in a railway company was not revoked by the subsequent change of those shares into stock by reason of a vote of the company under the powers of their Special Act. The following passage in the Vice-Chancellor's opinion may, I think, be usefully quoted here—"The testator had this property at the time he made his will, and it has since been changed in name or form only. The question is whether a testator has at the time of his death the same thing existing, it may be in a different shape—yet substantially the same thing." This judgment of Turner, V.-C., was cited with approval by the present Master of the Rolls in the recent case of *in re Slater*, [1907] 1 Chan. 665. The decision there was in favour of ademption, but the facts of the case were widely different from those now before us, and are only interesting by way of contrast. As already said, I think the change of each of the £5 shares into five £1 shares was a change "in name or form only," and that the new shares were "substantially the same thing" as the old. I am therefore of opinion that Mr Valentine's last argument for ademption fails.

Upon the grounds which I have stated I think we ought to answer the question of law put to us in this case in the negative.

LORD ARDWALL—I agree with the opinion just delivered by Lord Dundas, but I wish to add a word upon the application to questions of ademption of the rule that a voluntary act of a *curator bonis* cannot alter the succession to his ward. It was argued for the first and third parties that this rule, though it might apply to questions involving the doctrine of conversion of heritable estate to moveable, or moveable estate to heritable, in regard to succession was not applicable to questions of ademption, and that for the reason that while the element of intention enters into questions of conversion, as was recognised in the opinions delivered in the case of *M'Arthur's Exrs.* v. *Guild*, 1908 S.C. 743, yet intention had no place, as was decided in the same case, in questions of ademption, and that accordingly it was of no consequence in such questions, of which the present is one, whether the subject of the specific bequest had been taken out of the estate of the deceased by the act of a curator or by the deceased's own act. Possibly this argument might have had some force if the cases in which the rule referred to had been applied were only cases of testate succession, in which, for instance, the testator while yet *capax* had made a will bequeathing his heritage to one set of beneficiaries and his moveables to another, and the character of some portions of the estate had been changed from heritable to moveable or *vice versa* by the act of the curator subsequent to the execution of the

will. But that is not so, because the rule has been applied indiscriminately in cases both of testate and intestate succession. Now in cases of intestate succession there can be, strictly speaking, no question of intention any more than there can be in questions of ademption. In both cases it is a question of fact. In the first case the question is, what parts of his estate were in point of fact heritable, and what parts of it were moveable, at the time of the death of the intestate? Just as in a question of ademption, the question is whether in point of fact the subject of a specific bequest was still in existence, and was *in bonis* of the testator at the time of his death or not? There is no room, therefore, for any material distinction between the two cases, and as it has been held in the one case that each part and portion of the estate, although changed by the act of the curator, still retains the character it had at the time of the ward becoming insane, so in the latter case I think it must be held that the subject of a specific bequest, though sold or otherwise disposed of by a curator, must be held to be *in bonis* of the deceased at the date of his death, and if it has been disposed of, that the legatee is entitled to its proceeds or value as a surrogatum therefor.

I am accordingly of opinion that the sale of the shares in question by the curator had not the effect of adeeming the legacy, and that the second parties are now entitled to receive the value of the shares sold by the curator as a surrogatum for their specific bequest. On the other points of the case I have nothing to add to what has been said by Lord Dundas.

The LORD JUSTICE-CLERK concurred.

LORD LOW was absent.

The Court answered the question of law in the negative.

Counsel for the First and Third Parties — Valentine. Agents — Smith & Watt, W.S.

Counsel for the Second Parties—D. P. Fleming. Agent — Andrew H. Hogg, S.S.C.

Friday, January 21.

SECOND DIVISION.

[Lord Johnston, Ordinary.

ANDERSON AND OTHERS (BINNIE'S TRUSTEES) *v.* PRENDERGAST AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance—Class Gift subject to Contingency.

A testator by his trust-disposition directed that the share of residue falling to his daughter Agnes should not be paid to her, but should be held by his trustees, the interest to be paid to Agnes, "and failing her to be paid and apportioned to her children equally, share and share alike, in liferent, . . . and to the issue of her said children in fee, but failing the issue of her said children I direct and appoint that the fee of said share falling and allotted to her shall revert and belong to my other children before named, and to the issue of those who have deceased, equally, share and share alike. . . ."

In a codicil he confirmed the destination of Agnes' share, and after narrating the liferents, continued — "and failing the children of my said daughter Agnes leaving lawful issue of their bodies, then I direct and appoint the fee of her said share . . . to be paid to the lawful issue of her said children, and that equally, share and share alike, but failing lawful issue of the children of my said daughter Agnes, I direct and appoint that the fee of the said share . . . shall revert and belong and be paid to my other children who may then be alive . . . and to the issue of such of them as may have deceased . . ."

In the same codicil he provided for the withholding of a portion of a daughter's share, she "being without lawful issue" at his decease, and its accretion to other daughters should such daughter die "not having lawful issue at the time" of her decease; and with regard to Agnes' portion of any such accretion he declared "which portion . . . as in the case of her own share of my means . . . shall . . . be retained and the interest" paid as previously stated, "and failing her children leaving lawful issue, then the fee of said portion . . . shall, as in the case of her, the said Agnes', own share of my means, . . . be allotted and paid equally among the issue of her children, and that equally, share and share alike."

The liferent conferred on Agnes' children was held to be a joint liferent.

Held that the fee did not vest in the issue of Agnes' children until the death of the last surviving liferentrix.

Carleton v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, 4 S.L.R. 226; *Cunningham* v. *Cunningham*, November 29, 1889, 17 R. 218, 27 S.L.R. 106; and *Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7, 35 S.L.R. 975, *distinguished*.

Succession — Division per stirpes or per capita.

A testator directed that the share of residue falling to his daughter Agnes should be retained by his trustees; that the interest should be paid to her, and after her death to her children, and that the fee should be paid to the issue of her children. The testator directed that in the event of any of his daughters dying without issue, one-half of the shares destined to them should be paid to his other daughters or their issue. With respect to the accrescing shares falling to his daughter Agnes,