S.L.R. 254, to which we were referred, and I think that too much was attempted to be made of the passage quoted from Lord Dunedin's opinion, viz.—"It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service it is a very strong step indeed for the Court to overrule that statement by the department." That is not to say that the Court never can and never will overrule such a statement, but merely that it would be a very strong step, and therefore a step for which the Court would require very grave justification. The Admiralty and the War Office are charged with the duty of providing for the safety of the realm, and if either say that the production of a document in their hands would be prejudicial to the public interest I think that we would naturally implicitly accept the statement. But there are distinctions between public departments. The interest of such a department as the Inland Revenue is that the public should be able to rely on all returns to them and communications made to them being treated as confidential. This also is in the public interest. But a cast-iron rule that no such document is to be demanded might work grave injustice. I think that we are entitled to expect that the responsible official has considered the particular document, and not merely that the department is acting upon a mere general office rule, and that there may always be circumstances in which the Court would in the circumstances be justified in requiring production even against the opinion of the department. This is just such a case. The document or documents called for are the returns of income tax made by one partner out of three who are interested in that income. The other two want to see the document or documents. They are really just as much the documents of the defenders who seek to recover them as they are the documents of the pursuer who made them. It is manifest that the withholding of the documents in such circumstances might create grave injustice and the production do no possible public harm. If the documents had been thought by the Court really necessary for the defenders' case I can have no doubt that the Court would properly require their production. But I understand your Lordships to consider that the documents which are in question are not really necessary to the defenders' case, and that for that reason your Lordships do not think it proper to go further in the matter.

LORD MACKENZIE—My opinion is that this Court has inherent power to order production of the documents in question. I do not think that this is such a case that the Court ought to exercise this power.

LORD SKERRINGTON concurred.

The Court disallowed the call for income tax returns.

Counsel for the Pursuer—Dean of Faculty (Clyde, K.C.)—Macquisten. Agents—Bruce & Stoddart, S.S.C.

Counsel for the Defenders—Sandeman, K.C.—MacRobert. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Compearing Havers, the Commissioners of Inland Revenue—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Thursday, June 29.

FIRST DIVISION.

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

Succession—Election—Approbate and Reprobate—Testamentary Provisions "in Full" of Legitim.

A testatrix made certain testamentary provisions in favour of her son which were declared to be "as in full of all legitim, portion-natural, bairns' part of gear, or others whatsoever which he could ask or demand by and through my decease in any manner of way." *Held* in a Court of Seven Judges (*diss.* Lord Salvesen) that the son by electing to take legitim had surrendered all right to take under the will.

Dicta in *Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, 19 S.L.R. 850, *approved.*

Gray's Trustees v. *Gray*, 1907 S.C. 54, 44 S.L.R. 39, and *Nixon's Trustees* v. *Kane*, 1915 S.C. 496, 52 S.L.R. 375, *overruled.*

Succession—Election—Equitable Compensation—Effect of Election on Rights of Other Beneficiaries Accepting Testamentary Provisions.

A testatrix divided the residue of her estate into four parts; two parts were bequeathed in liferent to her son, and after his death in liferent to his daughter, and in fee to the issue of the daughter, whom failing to certain other relatives of the testatrix; another part was bequeathed in liferent to the son's daughter and in fee to her issue, whom failing in liferent to her father, and in fee to the same relatives of the testatrix; the remaining part was bequeathed in liferent to the son's son and in fee to his issue, whom failing in liferent to his father and in fee to the same relatives of the testatrix. The son by electing to take legitim surrendered all interest under the trust. *Held* that equitable compensation fell to be made to all the beneficiaries whose interests were prejudiced by the son's election, and that the son's election had not the effect of opening immediately to his daughter the liferent to which she was entitled in succession to him, but that her right thereto was dependent on his death and her survivance.

Dr William Allen and another, testamentary trustees of the late Mrs Maria Le Berge Laurie or Rose, who died on 25th April

1913, *first parties;* Hugh Rose, only child of Mrs Rose, *second party;* Ethel Lois Laurie Rose, daughter of the second party, with his consent as her curator-at-law, *third party;* the second party as father and tutor-at-law of his pupil son Hugh Erskine Laurie Rose, *fourth party;* Mrs Zibbie de Castro Laurie or Ogilvie and others, beneficiaries under the trust in certain eventualities, *fifth parties*, brought a Special Case for the determination of the effect of the election by the second party to take legitim upon (1) his rights under Mrs Rose's settlement, and (2) the rights of the other beneficiaries under the settlement.

By her *trust-disposition and settlement* the testatrix conveyed to the trustees therein mentioned her whole estate (which for the purposes of the case was treated as entirely moveable) for, *inter alia*, the following purposes: — "(*Sixth*) I direct my trustees, after implementing or providing for the due implement of the foregoing purposes, to realise and convert into cash or otherwise ascertain the value of the whole residue and remainder of my means and estate, and (*primo*) to hold the one-half thereof for behoof of the said Hugh Rose, in liferent for his liferent use allenarly, and after his death, or after my death, if he shall predecease me, for behoof of the said Ethel Lois Laurie Rose in liferent for her liferent use allenarly and for behoof of her lawful children surviving the longest liver of me, the said Hugh Rose, and her, in such shares and proportions, and subject to such terms and conditions including, *inter alia*, the restriction of the share of any child who may survive to take a bare alimentary liferent only, and the fee to his or her children as the said Ethel Lois Laurie Rose may appoint by any writing signed by her, and failing such writing, equally in fee, and in the event of the said Ethel Lois Laurie Rose dying without leaving children or other descendants surviving to take, then and in that case (but subject always to the power hereinafter given to the said Ethel Lois Laurie Rose to confer a liferent on her husband surviving her) for behoof of (first) the children of my said brother John Laurie (excepting always the wife of my said son Hugh Rose); (second) the said William Moodie Laurie; and (third) the said Mrs Myra Le Berge Bernard or Begg, or such of them as shall be surviving at the date of my death, and at the termination of said liferents, if payable, and that equally among them share and share alike and *per capita;* (*secundo*) to hold one-fourth part of said residue and remainder for behoof of the said Ethel Lois Laurie Rose, for her liferent use allenarly, and for behoof of her lawful children surviving the longer liver of her and me, in such shares and proportions, and subject to such terms and conditions, including, *inter alia*, the restriction of the share of any child who may survive to take to a bare alimentary liferent right only and the fee to his or her children, as the said Ethel Lois Laurie Rose may appoint by any writing under her hand, and failing such writing equally in fee: And in the event of the said Ethel Lois Laurie Rose dying without leaving children or other descendants surviving to take, then and in that case (but subject always to the power hereinafter given to the said Ethel Lois Laurie Rose to confer a liferent on her husband surviving her) for behoof of the said Hugh Rose, if then surviving, for his liferent use allenarly, and for behoof of (first) the children of my said brother John Laurie (excepting always the wife of my said son Hugh Rose); (second) the said William Moodie Laurie; and (third) the said Mrs Myra Le Berge Bernard or Begg, or such of them as shall be surviving at the date of my death, and at the termination of said liferents if payable, and that equally among them, share and share alike, and *per capita:* And (*tertio*) to hold the remaining one-fourth part of said residue and remainder for behoof of Hugh Erskine Laurie Rose, son of my said son Hugh Rose, for his liferent use allenarly and for behoof of his lawful children surviving the longer liver of him and me in such shares and proportions and subject to such terms and conditions, including, *inter alia*, the restriction of the share of any child who may survive to take, to a bare alimentary liferent right only and the fee to his or her children as the said Hugh Erskine Laurie Rose may appoint by any writing under his hand, and failing such writing equally in fee: And in the event of the said Hugh Erskine Laurie Rose dying without leaving children or other descendants surviving to take, then and in that case (but subject always to the power hereinafter given to the said Hugh Erskine Laurie Rose to confer a liferent on his wife surviving him) for behoof of the said Hugh Rose if surviving for his liferent use allenarly and for behoof of (first) the children of my said brother John Laurie (excepting the wife of my said son Hugh Rose); (second) the said William Moodie Laurie; and (third) the said Mrs Myra Le Berge Bernard or Begg, or such of them as shall be surviving at the date of my death and at the termination of said liferents if payable equally among them, share and share alike, *per capita*: And it is hereby declared that in the event of the said Ethel Lois Laurie Rose dying without leaving children or other descendants surviving to take, she shall have power to confer on her husband surviving her a liferent alimentary or otherwise of the share of my estate liferented by herself at the time of her death, but that only so long as such husband shall remain unmarried, and that in the event of the said Hugh Erskine Laurie Rose dying without leaving children or other descendants surviving to take, he shall have power to confer on his widow a liferent alimentary or otherwise of the share of my estate liferented by himself at the time of his death, but that only so long as such widow shall remain unmarried: And further, that my trustees shall have power to supplement the income accruing on the respective shares of residue held for behoof of the said Ethel Lois Laurie Rose and Hugh Erskine Laurie Rose and their issue from the capital thereof, and to

encroach on and make advances from the same for the more comfortable support of the said Ethel Lois Laurie Rose and Hugh Erskine Laurie Rose, or for the maintenance, upbringing, and education of their respective children or for fitting them out in life or for any other beneficial purpose, and that at such time or times and to such extent and in such amount or amounts all as my trustees in their sole and uncontrolled discretion may in each case think proper."

The said trust-disposition and settlement also contained the following *declaration*:—"And it is hereby declared that the provisions hereinbefore expressed in favour of my said son are and shall be accepted by him as in full of all legitim, portion-natural, bairns' part of gear or others whatsoever which he could ask or demand by and through my decease in any manner of way."

The Case stated—"5. The said Mrs Maria Le Berge Laurie or Rose was survived by the said Hugh Rose, her son, and by his two children, viz., the said Ethel Lois Laurie Rose, who is in minority, having been born on 27th September 1898, and the said Hugh Erskine Laurie Rose, who is in pupillarity, having been born on 17th January 1902. The trustees were by the said trust-disposition and settlement nominated executors and also tutors and curators to such of the beneficiaries under the settlement as might be in pupillarity or minority at or after the decease of the testatrix. The trustees, while they accepted the office of trustee and executor, did not expressly accept the office of tutor and curator and have not acted as such, and the said Ethel Lois Laurie Rose and Hugh Erskine Laurie Rose have no tutor or curator other than their father the said Hugh Rose. The trustees presently acting under the said trust-disposition and settlement are the first parties to this case, the said Hugh Rose is the second party to the case, the said Ethel Lois Laurie Rose with consent of the said Hugh Rose as her curator-at-law is the third party to the case, the said Hugh Rose as tutor-at-law to his pupil son the said Hugh Erskine Laurie Rose is the fourth party to the case, and the children of the said John Laurie, Montreal (other than the wife of the said Hugh Rose), the said William Moodie Laurie, and the said Mrs Myra Le Berge Bernard or Begg, along with the husbands of such of the female beneficiaries as are married, are the fifth parties to the case.

"6. By letter dated 18th October 1913 addressed to the first parties as trustees foresaid the second party intimated that he declined to accept the provisions conceived in his favour under the said trust-disposition and settlement and elected to claim his legal rights. . . ."

The *contentions* of the parties were—(1) *Of the Second Party*—"That on a sound construction of the said trust-disposition and settlement he has not by claiming legitim from the truster's estate incurred an absolute forfeiture of the provisions in his favour contained in the said trust-disposition and settlement, and that when the trust estate has been equitably compensated for the sums now paid to him in name of legitim he is entitled to revert to the testamentary provisions to the same effect as if he had never claimed his legal rights. *Separatim*, the second party maintains that in any event he will be entitled, on the arrival of the contingencies provided for in article sixth (*secundo*) and (*tertio*), to enjoy the liferent of the shares destined to the third and fourth parties." (2) *Of the Third and Fourth Parties*—"That the testamentary provisions in favour of the said second party being by the said trust-disposition and settlement expressly declared to be, and to be accepted by said second party as, in full of all legitim, portion-natural, bairns' part of gear or others whatsoever he could ask or demand through the decease of the testatrix in any manner of way, his claim to the liferent of a specific portion of the residue is for ever barred and forfeited by his electing to take his legal right of legitim. It is further maintained on behalf of the third party that the provisions of article sixth (*primo*) of the said trust-disposition and settlement are still active as regards the residue of estate remaining after satisfaction of the second party's legitim so far as the third party and her successors are concerned, and that the provisions of the said trust-disposition and settlement suspending until the death of the second party the third party's enjoyment of the liferent of the half of the residue to be liferented by the second party have been purged by reason of the claim of legitim on the part of the second party. It is accordingly claimed on behalf of the third party that she is entitled immediately to enter into the enjoyment of the liferent of three-quarters of the net residue of the estate, being (*a*) the liferent of the half of the net residue which would otherwise have been liferented by the second party in terms of article sixth (*primo*), and (*b*) the liferent of one-quarter of the net residue to be liferented by her in terms of article sixth (*secundo*), her brother the said Hugh Erskine Laurie Rose, the fourth party, being entitled to the liferent of the fourth quarter only of the net residue in terms of article sixth (*tertio*) of said trust-disposition and settlement. On the other hand it is maintained on behalf of the fourth party that the provisions of the said trust-disposition and settlement with reference to the half of the residue of the estate of the testatrix have fallen by reason of the claim of legitim on the part of the second party, the effect of said claim being to take out of the estate the capital of the share thereof destined to the second party in liferent, whom failing to the other parties mentioned in the said trust-disposition and settlement in liferent and fee respectively. It is accordingly claimed on behalf of the fourth party that inasmuch as he would have been entitled to the liferent of one-fourth of the whole residue if no claim to legitim had been made by the second party he is entitled to the liferent of one-half of the actual net residue of the estate left after paying out the second party's legitim, his sister the said Ethel Lois Laurie Rose, the third party, being entitled to the liferent of the other half of said net residue. The

fourth party further maintains as a first alternative contention that the income of said half-share of residue which would have been payable to the second party but for his claiming legitim should be applied by the first parties towards compensating both the liferenters and fiars who are adversely affected by the second party's claim of legitim, and that in proportion to the actuarial value of their respective interests in the estate. Further, the fourth party maintains as a second alternative contention that the income of the said half-share of residue falls to be accumulated by the first parties along with the interest on said income, and applied towards making the residue of the estate up to the amount of which it consisted before the second party's legitim was paid, or at anyrate should be so accumulated and applied until the death of the second party if that event is the earlier in date, and that the fourth party is entitled to the liferent of one-fourth part of said residue when so made up by the application of the forfeited income or so much thereof as may have been made up at the death of the second party." (3) *Of the Fifth Parties* —"That the second party's claim to the liferent of any portion of the residue under article sixth (*primo*), (*secundo*), or (*tertio*) is absolutely forfeited by his electing to take his legal rights. They further claim that the income of the half-share of residue provided to the second party by article sixth (*primo*), and also in the event of the third or fourth parties predeceasing him without leaving issue, and without having exercised their respective powers to confer a liferent on the spouses surviving them, the income of the respective one-fourth shares liferented by them falls to be accumulated by the first parties along with the interest on said income, and applied towards making up the residue of the estate to the amount of which it consisted originally until full compensation has taken place."

The *questions of law* were—"(1) Has the second party, by electing to take his legal rights, incurred an absolute forfeiture of the testamentary provisions in his favour? or (2) Will the second party be entitled if and when the estate has been equitably compensated for the sums now paid in name of legitim to revert to and enjoy the said testamentary provisions? (3) Is the legal result of the second party's election to demand legitim (*a*) to give to the third party an immediate right under the will to the liferent of three-fourths of the net residue, or (*b*) to give to the third and fourth parties each the immediate liferent of one-half of the net residue, or (*c*) that the first parties must pay the income of one-quarter of the net residue to each of the third and fourth parties, the income of the remainder of the other half of the estate from which the second parties' legitim has been deducted being applied towards making up the half-share of residue to the amount of which it consisted originally, or (*d*) that the first parties must apply the income of said remaining half towards compensating rateably the interests both of the liferenters and the fiars adversely affected by the said election? (4) In the event of the preceding question being answered in the affirmative of either the alternatives (*c*) or (*d*) thereof must the said income of one-half of the net residue be so applied (*a*) only until the death of the second party if that event happens before full compensation has taken place, or (*b*) in any case until full compensation has taken place?"

On 17th March 1916 the First Division, after partly hearing the case, appointed it to be argued on the first and second questions before Seven Judges.

Argued for the second party—The declaration to the effect that the testamentary provisions in favour of the second party should be accepted by him in full of legitim did not make the bequests in his favour conditional upon his not electing to claim legitim, but made forfeiture of legitim the result of his electing to claim his testamentary rights. The presumption was against forfeiture—*Cox* v. *Bockett*, 1865, 35 Beav. 48—which should therefore be in express terms, and in this case where, if there was forfeiture at all, it was merely to be implied from words of ambiguous meaning, the construction for which the second party contended must be favoured. The effect of the clause was therefore merely to suspend the second party's rights under the settlement until, if ever, the effects of his election to take legitim had been equitably compensated, when his rights under the settlement would revive. In *Naismith* v. *Boyes*, 1899, 1 F. (H.L.) 79, *per* Lord Chancellor Halsbury at p. 79, and Lord Watson at pp. 80 and 82, 36 S.L.R. 973, and in *Moon* v. *Moon's Trustees*, 1909 S.C. 185, 46 S.L.R. 165, clauses in similar terms were similarly construed. The *dicta* in *Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, *per* Lord M'Laren and Lord Rutherfurd Clark at p. 1156, 19 S.L.R. 850; in *Russell's Trustees* v. *Gardiners*, 1886, 13 R. 989, *per* Lord Adam (Lord President Inglis concurring) at p. 993, and Lord Shand at p. 996, 23 S.L.R. 719; and in *Naismith* v. *Boyes* (*cit.*), were in favour of the second party, with the exception of Lord Mure's opinion in *Macfarlane's Trustees* v. *Oliver* (*cit.*) at p. 1176. So also was M'Laren on Wills and Succession i, 255. *Gray's Trustees* v. *Gray*, 1907 S.C. 54, 14 S.L.R. 39, followed in *Nixon's Trustees* v. *Kane*, 1915 S.C. 496, 52 S.L.R. 375, was an express decision in favour of the second party's contention, so was, in the Outer House, *Clark* v. *Clark's Trustees*, 1905, 13 S.L.T. 694. *Gray's Trustees* v. *Gray* (*cit.*) was doubted in *Jacks' Trustees* v. *Jacks*, 1913 S.C. 815, *per* Lord Kinnear at p. 825, and Lord Johnston at p. 831, 50 S.L.R. 536, but these opinions were *obiter*, and proceeded on an insufficient citation of authority, *Naismith* v. *Boyes* (*cit.*) and *Russell's Trustees* v. *Gardiners* (*cit.*) not being cited. *Macfarlane's Trustees* v. *Oliver* (*cit.*) was in any event not an express authority, for the words were different from those in the present case. The contention of the second party had been laid down and followed as the law, and to depart from it now would have disastrous results in practice, where in such cases the prime requisite was to have a definite rule to follow. The

first question should therefore be answered in the negative.

Argued for the third, fourth, and fifth parties — In the conflicting state of the authorities the question must be decided on principle, and the leading rule was that effect must be given to the testator's intention. The testator must be assumed to be testing in the knowledge that she could not dispose of legitim, and the words "as in full" indicated that she intended in offering a testamentary equivalent for legitim to attach to her offer a condition to the effect that if one equivalent was taken the other could not be taken. If the second party's contention were adopted he would not take under the will in full of legitim, for he had already got it, but in addition to it. Further, in this view the words were not mere surplusage, but had a meaning designed to effect a definite object. Moreover, the intention of the testatrix was that the second party should accept the testamentary provisions; in claiming legitim he had run counter to her intention, and the *onus* was on him to show he could get more than it was her intention he should get. *Macfarlane's Trustees* v. *Oliver* (*cit.*) was in favour of these parties, Lord President Inglis and Lord Mure expressly, and Lord M'Laren —in whose opinion Lord Rutherfurd Clark concurred — impliedly, adopted this construction in their reasoning — M'Laren on Wills and Successions, i, 259, 260. In *Russell's Trustees* v. *Gardiners* (*cit.*) the question was how were the interests of other legatees damaged by the election of one to take legitim to be repaired out of the fund thus set free. The question of the reprobator's right to claim again under the settlement was not raised, and the Judges who decided that case, having recently decided *Macfarlane's Trustees* v. *Oliver* (*cit.*), obviously considered they were deciding another point, and were not in any conflict with the latter case. *Naismith* v. *Boyes* (*cit.*) was not in point, for the question there was whether such a clause as the present barred a claim by the reprobator on funds which had fallen into intestacy, *per* Lord Watson at p. 82. *Gray's Trustees* v. *Gray* (*cit.*) followed in *Nixon's Trustees* v. *Kane* (*cit.*), proceeded on the erroneous view that the question had already been decided in *Macfarlane's Trustees* v. *Oliver* (*cit.*), and should be overruled. The effect of *Macfarlane's Trustees* v. *Oliver* was correctly stated in *Jacks' Trustees* v. *Jacks* by Lord Kinnear and Lord Johnston That was in favour of these parties, and so was *Bonhotes* v. *Mitchell's Trustees*, 1885, 12 R. 984, *per* Lord Craighill at p. 989, 22 S.L.R. 648; *Collier* v. *Collier*, 1833, 11 S. 912, *per* Lord Cringletie at p. 914, and *Breadalbane's Trustees* v. *Duke and Duchess of Buckingham*, 1840, 2 D. 731, *per* Lord Fullerton at p. 745. The first question should be answered in the affirmative.

At advising (on 25th May 1916)—

LORD DUNDAS—The only issue remitted for determination by this bench of seven judges is that raised by the first and second questions in the Special Case (they are not, I think, happily phrased), which may be stated thus — whether or not the second party, by electing to claim his legal rights, must be held to have completely and finally lost all beneficial right and interest in the conventional provisions conceived in his favour by his mother's trust-settlement? That settlement declares "that the provisions hereinbefore expressed in favour of my said son are and shall be accepted by him as in full of all legitim, portion-natural, bairns' part of gear, or others whatsoever which he could ask or demand by and through my decease in any manner of way." The question therefore at this stage of the case is truly one of construction and intention, and is not directly concerned with equitable compensation, or the mode in which such compensation if it falls to be made at all should be provided for the benefit of those beneficiaries whose interests are prejudiced by the withdrawal of the second party's legitim from the capital of the trust estate. Upon the issue raised for our determination my answer is in the affirmative. I should be disposed to this view as a matter of construction and apart from any authority, because I think that where a provision is made and accepted as in full of legitim that must necessarily mean that if legitim be claimed it can only be upon a complete and final surrender by the claimant of the conventional provision. I think that the claimant's beneficial right to the provision must be extinguished by the demand for legitim, not suspended or postponed. But there is in my opinion ample authority to support the view which I take. In the well-known case of *Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, 19 S.L.R. 850, the propositions I have enunciated are clearly laid down by several of the learned judges, particularly by Lord President Inglis (p. 1167), Lord Mure (p. 1176), Lords M'Laren and Rutherfurd Clark (p. 1159), and Lord Fraser (p. 1163). Lord Mure in especial, after describing three different classes of settlement, the second class being those "in which the testamentary provisions are expressly declared to be in satisfaction of all legal rights," says—"As regards the two first of these classes of cases, the law is, I apprehend quite settled, to the effect that the beneficiary electing to take his legal rights as against the will is held to have forfeited everything the will gave him beyond the amount of these rights." In describing the law as "quite settled" his lordship may probably have had in view, *inter alia*, the weighty opinion of Lord Fullerton (along with five other judges) in *Breadalbane's Trustees*, 1840, 2 D. 731, at p. 745. I cannot accept the suggestion that the learned judges' expressions of opinion in *Macfarlane's Trustees* (*cit.*) were merely *obiter*. It appears from what was said in *Jacks' Trustees*, 1913 S.C. 815, 50 S.L.R. 536, by Lord Kinnear (at p. 824), who took part as one of the judges in the decision of *Macfarlane's Trustees* (*cit.*), and by Lord Johnston (at p. 831), who reported the case, that the doctrine I have referred to was the basis of the opinions delivered by the learned judges. Lord Kinnear states that "the

vital point in *Macfarlane's Trustees* (*cit.*) . . . was this, that there was no express condition in the will that the provision given to a child should be taken in full of legitim, or under a condition of any declaration of forfeiture." He adds—"I have no doubt that the majority of the judges consulted proceeded upon that ground, that they were not dealing with any expressed condition that a legatee should not take legitim, but only with the implied condition which arose from the mere fact of the testator having included his whole estate in his will." One can well appreciate that there may be a vital distinction between the effect on the one hand of the mere implication of law that no one may claim both legal rights and conventional provisions, and that on the other hand of a clause expressly declaring that the provisions are to be in full (or in satisfaction or in lieu) of legal rights. In the latter case I apprehend that if legitim be claimed it can only be upon a complete surrender by the claimant of all his beneficial interest in the conventional provisions; whereas in the former it may be possible for one who has claimed legitim to come back, after complete compensation has been made to those who suffered by the payment of the legitim, and claim some further benefit from the conventional provisions of the settlement. It is with the latter case we have here to deal; it was with the former that the Court was concerned in *Macfarlane's Trustees* (*cit.*). If this distinction is duly kept in view I think that the decision of the Second Division in *Gray's Trustees*, 1907 S.C. 54, 44 S.L.R. 39, was erroneous and ought to be overruled. I need not say that I regard with unfeigned respect the opinions of Lord Kyllachy and Lord Low, but I cannot help thinking that the decision in *Gray's Trustees* (*cit.*) did not "follow" *Macfarlane's Trustees* (*cit.*) as it professed to do, but diverged from the principles which were intended to be laid down in that case. In *Nixon's Trustees*, 1915 S.C. 496, 52 S.L.R. 375, the Second Division merely followed *Gray's Trustees* (*cit.*), doubts as to the soundness of which had been expressed by Lord Kinnear and Lord Johnston in *Jacks' Trustees* (*cit.*); and if *Gray's Trustees* be overruled, as I think it should be, the decision in *Nixon's Trustees* (*cit.*) will necessarily follow suit. A recent judgment by Lord Hunter—*Laurence* v. *Laurence's Trustees*, March 17, 1916—was brought to our notice, in which, while following (as he was bound to do) *Gray's Trustees* and *Nixon's Trustees*, the learned judge expressed—rightly as I think—his individual dissatisfaction with these judgments. I do not think that any difficulty here arises from the case of *Russell's Trustees*, 1886, 13 R. 989, 23 S.L.R. 719, which was decided by the First Division, affirming Lord M'Laren, Ordinary, about four years after *Macfarlane's Trustees* (*cit.*), all five judges having been among the majority who decided that case. In *Russell's* case (*cit.*) the question was different from that which arose in *Macfarlane's Trustees* (*cit.*), and different also from that now before us. By the truster's settlement the provision made for his widow—an annuity of £900—was declared to be in satisfaction of her *jus relictæ*. She claimed *jus relictæ* and received £27,000, and a question arose as to how the annuity of £900 should be disposed of. It was argued on the one hand that there was a proper case of forfeiture, and that the provision became a lapsed interest, just as if the widow had predeceased the truster. On the other hand it was contended—and the Court sustained the contention—that the provision fell to be applied in compensating the interests of those prejudicially affected by the payment of the *jus relictæ*. It seems to me idle to maintain that the learned judges, especially the Lord President and Lord Mure, tacitly departed in *Russell's Trustees* (*cit.*) from the views they had enunciated four years earlier in *Macfarlane's Trustees* (*cit.*). There is, I think, no discrepancy between the two judgments. Lord Adam, who gave the leading opinion, pointed out that in *Russell's Trustees* (*cit.*) there was—what there was not in *Macfarlane's Trustees* (*cit.*)—an express declaration that the provision to the widow was to be in satisfaction of legal rights, but that "as regards the interests of those prejudicially affected, that can make no difference." Lord Mure observed that the Court could not get much assistance from *Macfarlane's* case (*cit.*), "for the real controversy there was whether the parties who had brought about the defeat of the settlement could claim anything under it after full compensation had been made for the loss thereby occasioned, or whether the fund then remaining fell into residue. But there is no question of that kind here." I ought in conclusion to notice the important case of *Naismith*, 1899, 1 F. (H.L.) 79, 36 S.L.R. 973, which was referred to in the argument. It does not appear to me to have any direct bearing upon the present question, for all that was there decided, upon the terms of the instrument before the House, was that the widow, who had accepted certain provisions made for her in full of *jus relictæ*, &c., was nevertheless entitled to claim her legal share of a fund afterwards emerging as intestate estate of the deceased.

If the questions as stated in the case are to be answered categorically, our reply to the first would have to be in the affirmative and to the second in the negative; but a preferable course would, I think, be to answer both questions by a finding that the second party by electing to claim his legal rights has completely and finally lost all beneficial right and interest in the conventional provisions conceived in his favour by his mother's trust-settlement.

LORD JUSTICE-CLERK—I had written an opinion in this case, but having had an opportunity of reading the opinion which Lord Dundas has just read I find it so entirely expresses my opinion that I have nothing to add.

LORD JOHNSTON—The case of *Macfarlane's Trustees* v. *Oliver* (1882, 9 R. 1138, 19 S.L.R. 850), established by a judgment of the Whole Court that where under a general settlement of a parent's estate a provision is made for a child whose legitim is not

aliunde excluded, and where the settlement contains neither an express declaration of forfeiture nor a clause of satisfaction, then the action of the child in claiming legitim will not infer forfeiture of the testamentary provision, but only equitable compensation to those prejudiced by the claim, thus admitting the child to the benefit or enjoyment of the testamentary provision after such compensation has been effected. The same would *pari ratione* necessarily hold in the case of a widow claiming her legal rights. What may be called the rule of *Macfarlane's Trustees* v. *Oliver*, whether the decision is sound or not, has been accepted since its date in 1882 as a guide in conveyancing practice, on which the profession was entitled to rely and has relied ever since. As a decision of the Whole Court it is binding in this Court, and as a decision establishing a rule of conveyancing practice it is not likely now to be disturbed by the House of Lords.

But a judgment has been recently pronounced in the Second Division of the Court in *Gray's Trustees* v. *Gray* (1907 S.C. 54, 44 S.L.R. 39), and followed by them in *Nixon's Trustees* v. *Kane* (1915 S.C. 496, 52 S.L.R. 375), which, if allowed to stand, would establish the same rule of conveyancing where the settlement though not containing an express declaration of forfeiture does contain an express clause of satisfaction. The soundness of the decision in *Gray's Trustees* v. *Gray* has been questioned in *Jacks' Trustees* v. *Jacks* in the First Division of the Court, and the present case has been argued before a bench of seven judges in order that a rule of conveyancing practice in this matter may also be settled on which the profession may be able to rely, so far at least as this Court can settle it.

The only son of the testatrix, Hugh Rose, receives under her settlement a liferent of half the residue of her estate with destination-over of the fee, in terms to which it is not necessary further to advert, but under the express declaration "that the provisions hereinbefore expressed in favour of my said son are and shall be accepted by him as in full of all legitim, portion-natural, bairns' part of gear, or others whatsoever which he could ask or demand by and through my decease in any manner of way." He has, notwithstanding, claimed and taken his legitim and though on the principle of equitable compensation admitting that he must allow the income of the one-half of the residue destined to him to be accumulated to replace the legitim which he has claimed and so withdrawn from the estate, he yet maintains that when that replacement is effected he is entitled to revert to his provision of liferent.

The first two questions put to the Court in this special case bring up for decision in alternative form the general question to which I have above adverted. I have had the advantage of a perusal of the opinion just delivered by my brother Lord Dundas, and I desire to say that I so unqualifiedly accept it in all its terms, including the proposed mode of disposing of the questions put to us, that I do not think that I should add anything were it not that I am one of the two judges who in *Jacks' Trustees* case (1913 S.C. 815, 50 S.L.R. 536) intimated doubts of the soundness of the decision in the case of *Gray's Trustees*, and that my learned brother who participated in those doubts is no longer a member of this Court.

I think that the most satisfactory way of approaching this general question is to consider—1st. What conclusion would naturally and reasonably be come to as to the testator's intention, for I conceive it is a *quæstio voluntatis* were the Court untrammelled by prior decision; 2nd. How the matter is affected by the judgment in *Macfarlane's Trustees* v. *Oliver*; and 3rd. Whether the judgment of the Court in *Gray's Trustees* v. *Gray* can be supported if it conflict with the conclusions to be arrived at from the first two considerations.

1st. Regarding the question as one (p. 745) "of intention to be determined by the import of that settlement, construed according to the usual rules"—to adopt the initial words of Lord Fullerton's opinion in *Breadalbane's Trustees* (1840, 2 D. 731)—it appears to me that the very terms of such a provision as we are here dealing with involve that the bequest is conditional, and while they are consistent with the intention that the right should be satisfied by the provision, are inconsistent with the intention that the right should be exigible and yet the provision be merely suspended or postponed and after a period come into beneficial enjoyment. The settlement says that the provision is to be accepted in satisfaction of legitim. On the contention of the legatee the provision is not accepted in satisfaction of the legitim, but the legitim is claimed and taken, and then not the whole but a part of the provision is claimed in addition. But this part can no more be taken except as in satisfaction of legitim than can the whole provision without denying effect to the intention of the testator. As Lord Fullerton further said in the passage referred to above—"Whether the case be put on the technical ground of approbate and reprobate, or the more general ground of the implied intention of the truster, the consequence is the same."

2nd. The case of *Macfarlane's Trustees* v. *Oliver* was, as I understood at the time, and on careful reconsideration of the whole opinions I see no reason to think that I was wrong, presented to the Court on the footing that the law was settled in the case where a provision is given expressly in satisfaction of legal rights, and that the only question presented to the Court was whether the case where, the settlement being general, a provision is given *without* such express declaration of satisfaction, could be distinguished. Whether rightly or wrongly it was so distinguished. That I am only stating now what at any rate was undoubtedly the understanding of the college of reporters then, is shown by the terms of the general rubric which prefaces the special rubric in the report of the case. It says—"Where under a general settle-

ment of a father's estate a provision is expressly given to a child in satisfaction of legitim, legitim cannot be claimed either in whole or in part without a complete surrender of the provision. But where the provision is not stated to be in full of legitim, and there is no express condition or declaration of forfeiture, the child's claiming and receiving legitim will not infer entire forfeiture of the testamentary provision, but only equitable compensation to those prejudiced by his claim." For this statement of the law of the case I find ample justification in the judgments delivered. Of the eight judges in the majority who held that the distinction might be drawn, the Lord President (Inglis) at pp. 1166-7, Lord Mure at p. 1176, Lords Rutherfurd Clark and M'Laren at p. 1159, Lords Adam and Kinnear at p. 1161, amplified by Lord Kinnear in what he says in *Jacks' Trustees'* case, all concur in treating it expressly as settled law that where in a general settlement a provision is made subject to an express condition of satisfaction of legal rights, legitim cannot, as put in the rubric, be claimed without a complete surrender of the provision, and proceed to distinguish where the matter of satisfaction is left to implication. Lords Young and Shand, the remaining Judges of the majority, from the form which their opinions took did not find themselves required to express themselves on the point. The same general view of the law was necessarily implied in the judgment of the five Judges of the minority. But Lord Fraser, concurred with by the Lord Justice-Clerk (Moncreiff), says emphatically (at p. 1163), "It is not disputed that if the liferent which was given to her (Mrs Oliver) of one-half of her father's estate had been bequeathed upon the express condition that she must take it in lieu of legitim her present claim would be inadmissible. Now starting from this point it remains to be considered whether the case does not raise an implied condition as effectually leading to the same conclusion." This emphatic statement of Lord Fraser, uncontradicted, nay endorsed, justifies me in saying that the subsumption of the case presented to the Court, and of the judgment upon it, was that where there is an express clause of satisfaction the law is settled, and that the question submitted was merely whether there was possibility of distinction where satisfaction is only to be implied and is not expressed. Lord Deas (at p. 1175) and Lords Craighill and Lee (at p. 1155) express entire agreement with this part of Lord Fraser's opinion.

That the learned Judges who in 1882 formed the Court were not mistaken in assuming a settled law on the subject is, were it necessary, amply proved by the reference made by Lord Dundas to the case of *Breadalbane's Trustees*, 1840, 2 D. 731, which was also a judgment of the whole Court.

Accordingly I cannot do otherwise than conclude that if the decision in *Gray's Trustees* is sound it has unsettled a rule of conveyancing established long before the judgment in *Macfarlane's Trustees'* case, assumed as settled by the Whole Court in that case, and relied upon by the profession both before and since. It would, I think, be a misfortune if that result should follow the sustaining of the judgment in *Gray's Trustees.*

3rd. But it is only proper to give some consideration to the judgment in *Gray's Trustees*, for the eminent judges who there delivered opinions show that they were discriminating from *Macfarlane's Trustees.* They were not, however, carrying the rule of *Macfarlane's Trustees* a step further forward, but in the exceptional position of carrying it a step further back. They do so on the ground, as expressed by Lord Kyllachy, that though there was in the deed they were considering a condition not expressed in *Macfarlane's Trustees*, to the effect that the widow accepting her conventional liferent should do so in full of her legal rights, there was no declaration of forfeiture of her conventional liferent if she should claim her legal rights, nor indeed any provision applicable in the event of her taking that course. But was such a provision necessary? If the conventional provision can only be taken on condition of accepting it in full satisfaction of legal rights it is surely a necessary implication—I think myself an express declaration—that the benefit of the provision cannot be taken except on condition of paying the price.

In conclusion, I should like to add some words on two aspects of the question. I must admit that I have always doubted, and still doubt, the soundness of the majority judgment in *Macfarlane's Trustees.* I think the lucid reasoning of Lord Fraser in dissenting is absolutely convincing. But the judgment is a binding precedent, and specially binding if one decision of the Whole Court could be more binding than another because it is pronounced in a matter of conveyancing. Notwithstanding, I venture to make brief reference to two matters which enter the judgment of the majority in *Macfarlane's Trustees*, because they affect the question which we have now before us just as much as they did that in *Macfarlane's Trustees*, viz.:—

First—I except to the view that the testator's intention is satisfied provided in the long run the pecuniary result of a beneficiary's action in claiming a legal right is the same as it would have been to all concerned had the testator's intention had immediate effect as he contemplated. It seems to me that this is a strange mode of applying the doctrine of election, more expressively styled in Scotland "approbate and reprobate." The beneficiary does not elect between two pecuniary benefits, a conventional and a legal one. He elects to stand by or reject the settlement. He cannot be allowed at the same time both to reprobate and approbate the settlement. Now if he is to approbate he must approbate the settlement in all its parts; he cannot be heard to say to other beneficiaries whose interests have been disturbed by his reprobation "It is true that you might have been largely disappointed by my action—

it is true further that the interest intended for you by the truster has been interfered with, as for years you have been getting termly half a loaf where the testator intended you to be getting a whole one—but as I have had an exceptionally long life things have righted themselves, and the trustees are able to make good to you in the end all arrears with interest. In the long last on an accounting you are not damnified." I cannot conceive anyone holding that that result would be in accordance with the testator's will in either *Macfarlane's Trustees*' case or this, but that he intended his will to take effect in all its parts, not merely of amount but of time.

Second—I question whether there is justification for the distinction drawn by Lord Rutherfurd Clark at 9 R. 1157 between forfeiture on the one side and election coupled with equitable compensation on the other. This and some other parts of his Lordship's judgment I confess I have some difficulty in understanding. Surely before there can be either forfeiture or equitable compensation there must be election. Moreover I doubt whether it is a necessary part of the doctrine of election, or approbate and reprobate, that there can be no equitable compensation when there is forfeiture. That there can be none seems to be involved in the judgment of the Lord President (Inglis). I am disposed to think that it arises from regarding the matter from a wrong standpoint. Compensation is not an equity accorded to the beneficiary claiming against a settlement. It is an equity accorded to the beneficiary who has suffered by the reprobatory act of another, and as at present advised I am unable to see why it should not be accorded where the forfeiture or surrender is *in toto* as where it is *pro tanto* merely. All that would then remain in this case would be to determine what shall be done with the proportion of the provision which is not required for equitable compensation. But I am content to concur in limiting the present judgment as proposed by Lord Dundas.

LORD SALVESEN—On the abstract question whether the case of *Gray's Trustees* v. *Gray*, 1907 S.C. 54, 44 S.L.R. 39, was rightly decided I am unable to concur in the judgment proposed by Lord Dundas. The decision in the case of *Macfarlane's Trustees*, 1882, 9 R. 1138, 19 S.L.R. 850, being binding upon us, it seems to me that the judgment of the Second Divison in *Gray's* case was the logical outcome of that decision. I agree with every word of the opinions of Lord Kyllachy and Lord Low, who had fully before them all the authorities which have been cited to us, and I am content to adopt these opinions as expressing my own view. In the case of a general settlement if a beneficiary accepts the benefits provided for him by the testator he cannot make a claim for his legal rights. His acceptance of the conventional provisions necessarily implies that he does so in full satisfaction of his legal rights. Why it should make a difference when the testator has expressed a condition which is always implied passes my comprehension, and I am left entirely unconvinced by your Lordship's reasoning. I fully admit that there are dicta by some of the eminent Judges who constituted the majority in *Macfarlane's* case to the opposite effect, but they were entirely *obiter*, as the deed there in question did not contain the clause expressed in the deed with which we are dealing. At the same time I do not regret that your Lordships have been able to reach a different conclusion, for I think it is well not to push the doctrine of equitable compensation, as it has been called, any further than we are compelled to do by the decision in *Macfarlane's* case. That doctrine was borrowed from the English law, which is often less logical than the law of Scotland, and appears to me to be quite inconsistent with the well-settled doctrine of approbate and reprobate. Had I been a party to the decision in *Macfarlane's* case I should have sided with the minority, and my reasons would have been those which were expressed by Lord Fraser. It is too late now, after that decision has stood for thirty-four years, to go back upon it, but it is at all events a satisfaction that according to your Lordship's decision its application will be confined to that comparatively small class of deeds where provisions are given to a widow or children without expressly stating that they are in full of the beneficiaries' legal rights.

LORD SKERRINGTON—I agree with Lord Dundas.

LORD CULLEN—I concur in the conclusion at which the majority of your Lordships have arrived.

On a due construction of this settlement it is clear that the estate which the testatrix intended to make the subject of her testamentary dispositions was her whole estate, including the legitim fund. It was not, however, within her own power so to test on that fund. Accordingly she makes her son an offer in the settlement to the effect that if he will renounce his claim for legitim and allow the legitim fund to be subjected to her testamentary dispositions he will be entitled to certain liferent provisions. Her son has rejected this offer by claiming and taking legitim. It follows that he cannot claim the conventional provisions. It is admitted, indeed, that he cannot claim these provisions as a whole. But he contends that he retains right to claim a possible eventual part thereof. If this were so it could only be because, on a due construction of the testatrix's words, that part is to be held as not affected by the condition—renunciation of legitim—subject to which the remainder of the conventional provisions was offered to him. I see no warrant for this construction. The condition in my opinion affects the conventional provisions in whole and in part.

This view does not seem to me to conflict with the case of *Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, 19 S.L.R. 850. The ratio of the decision there was that the condition to be held implied as affecting the

conventional provision of liferent was only that there should not be double payment to the legitim creditor. Accordingly when the amount withdrawn from the estate in name of legitim had been restored through an impounding of the fruits of the conventional provision and a surplus of that provision had emerged, it was held that the child could claim it, her claim therefor being consistent with the said implied condition. Here we have to go, not on an implied condition excluding double payment, but on a clause in the settlement whereby the testatrix expressly conditions the gift of the conventional provisions, in whole and in part, on a renunciation of the legitim claim.

LORD PRESIDENT—I have had an opportunity of reading and considering the opinion delivered by Lord Dundas, with which I agree in all points. In the case of *Breadalbane Trustees* v. *Duke and Duchess of Buckingham*, 1840, 2 D. 731, it appears to me that the principle involved was finally and authoritatively laid down. And the opinion of Lord Mure in the case of *Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, 19 S.L.R. 850, contains, I think, a full and accurate statement of the application of the principle to such cases as the one now before us. We shall therefore pronounce a finding in the terms suggested by Lord Dundas.

The Court answered the first question in the affirmative, and the second question in the negative.

The Case was thereafter debated on the remaining questions.

Argued for the third party—The effect of the second party's election was to leave the settlement operative only upon one-half of the estate upon which it originally operated. The third party had a liferent of one-quarter of that residue, and as regards half of that residue a liferent postponed to the liferent in favour of the second party. By his election this liferent in favour of the second party disappeared, and the postponed liferent in favour of the third party now became immediately payable. The fate of the forfeited liferent depended on the intention or presumed intention of the testatrix, and this contention was consistent therewith, for it was obvious that the testatrix intended the third party to have this liferent when the second party could no longer take it. The testatrix indicated what was to be done with the liferent in one case in which the second party was unable to take it, *i.e.*, in the case of his death, and it was reasonable to suppose that she intended, or would have intended had she contemplated the contingency, a similar fate for it in other cases in which the second party was unable to take it, *i.e.*, where his election of legitim deprived him of all right under the will—*Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, *per* Lord M'Laren at p. 1159, 19 S.L.R. 850. *Russell's Trustees* v. *Gardiners*, 1886, 13 R. 989, 23 S.L.R. 719, was distinguished, for there the widow who claimed her legal rights had a testamentary provision which was a charge upon the whole estate. Here the forfeited liferent was a charge upon only one-half the estate, and its sole effect was to postpone the liferent in favour of the third party. *Alexander's Trustees* v. *Waters and Others*, 1870, 8 Macph. 414, *per* Lord Cowan at p. 415, 7 S.L.R. 240, following *Annandale* v. *Macniven*, 1847, 9 D. 1201, was in favour of this contention. *Nisbet's Trustees* v. *Nisbet*, 1851, 14 D. 145, was not in point, for it turned on the particular terms of the deed. To adopt a method of accumulation would be unjust to the third party, for it would operate against her and in favour of the fiars.

Argued for the fourth party—The contention of the third party operated unjustly as against the fourth party, for the third party, if that contention were adopted, would get more than the testatrix gave her, *i.e.*, immediate payment of the liferent, and while she lived the damage to the fourth party's rights caused by the act of the second party would not be in the course of being made good. The decision in *Russell's Trustees* (*cit.*) negatived the contention of the third party, and the cases of *Alexander* and *Annandale* (*cit.*) were authorities for acceleration of payment when a postponing right disappeared, only when no other interests were adversely affected by acceleration, which was not the case here. In such a case as the present the implied will of the testator was the criterion—*Harvey's Trustees* v. *Harvey's Trustees*, 1862, 1 Macph. 345, *per* Lord Ardmillan at p. 355; *Nisbet's Trustees* v. *Nisbet* (*cit.*), *per* Lord Fullerton at p. 151. These were authorities for dividing the forfeited liferent equally between the third and fourth parties. Question 3 (*b*) ought to be answered in the affirmative. But alternatively, if this contention were wrong, then all the injured interests must be compensated, *i.e.*, by taking the income of one-half of the residue remaining and apportioning it each year as between capital and income—*Davidson's Trustees* v. *Davidson*, 1871, 9 Macph. 995, 8 S.L.R. 646.

Argued for the fifth parties—The fifth parties adopted the argument of the fourth party in so far as it opposed the contention of the third party and in so far as it was in favour of compensation to all the injured interests—*Macfarlane's Trustees* v. *Oliver* (*cit.*), *per* Lord M'Laren at p. 1157; *Davidson's Trustees* v. *Davidson* (*cit.*), *per* the Lord Justice-Clerk (Moncreiff) at p. 1064. The fourth party's contention *quoad ultra* was wrong, for it amounted to asking the Court to make a new will for the testatrix. The cases of *Harvey's Trustees* (*cit.*) and *Nisbet's Trustees* were really in favour of the fifth parties. The actuarial method of division suggested in the case of *Russell's Trustees* (*cit.*) was impossible here, because of the third party's power to confer a liferent, and because the third parties had no existing right to a liferent *quoad* the forfeited provision, but her right only emerged on the second party's death. Questions 3 (*c*) and 4 (*a*) should be answered in the affirmative.

At advising—

LORD JOHNSTON—At a previous stage of this case, after consulting with three Judges of the other Division of the Court, we decided that Hugh Rose, the only son of the testatrix, by electing to claim legitim from his mother's estate had completely and finally lost all beneficial right and interest in the conventional provisions conceived in his favour by his mother's trust-settlement, in respect that that settlement contained an express declaration that the provisions thereby conferred should be accepted by Hugh Rose in full of all legitim or other which he could ask or demand by or through the death of the testatrix. The question so decided was, as stated by Lord Dundas "truly one of construction and intention" and "not directly concerned with equitable compensation, or the mode in which such compensation if it falls to be made at all should be provided for the benefit of those beneficiaries whose interests are prejudiced by the withdrawal" of Hugh Rose's legitim "from the capital of the trust estate."

We are now called on to determine those points with which our former judgment was not directly concerned. And they must be taken separately and *seriatim*.

The first is—Given that Hugh Rose has lost all beneficial right and interest in his conventional provision, does equitable compensation fall to be made? and on this we have heard argument. I desire at the outset to say that I regard the question before us as limited to the case in which the settlement contains no express clause of forfeiture, but only one of what is termed satisfaction. I reserve my opinion on the question of the effect of an express clause of forfeiture in any of the forms which it commonly takes. There are expressions to be found in the cases which would imply an *ipso facto* conflict between forfeiture and equitable compensation. I think that it is open to question whether this can be stated as a general rule, and is not dependent upon circumstances, including the terms of the particular settlement involved.

The practical situation is this, and in some respects it is a very clear cut one. The general scheme of Mrs Rose's settlement was the division of the residue of her estate into four parts. Two parts, or one-half, of the residue were to be liferented by her son Hugh Rose, and after his death to be liferented by his daughter Ethel Rose, with destination of the fee to her issue, whom failing with destination-over to certain of Mrs Rose's relatives. Another part, or one-fourth, of the residue was to be liferented by the granddaughter Ethel Rose immediately, with destination of the fee to her issue and, failing her without issue, to be liferented by her father the said Hugh Rose, with destination-over to the same relatives of Mrs Rose. The remaining part, or one-fourth, of the residue was similarly to be liferented by Hugh Rose's son Hugh Erskine Laurie Rose, with destination of the fee to his issue, and failing him without issue to be liferented by his father the said Hugh Rose, with destination-over to the same relatives of Mrs Rose.

As Hugh Rose was an only child and Mrs Rose was a widow, his claim of legitim carried off one-half the estate (which has been treated as entirely moveable), or precisely the amount which he would otherwise have liferented. It is obvious therefore that if there is no equitable compensation Mrs Rose's testamentary intentions will only take effect to the extent of exactly one-half of what she meant to provide to her granddaughter and grandson and the destinees-over after expiry of these liferents. As Hugh Rose was an only child he was also his mother's sole heir *in mobilibus ab intestato*. Ethel and Hugh Erskine Laurie Rose are in minority and pupillarity respectively, and are Hugh Rose's only children.

The question I am now considering is raised in this way—On behalf of Hugh Rose's daughter Ethel it is maintained that, her father having forfeited all right and interest in his conventional provision under his mother's settlement, it is as if he had predeceased his mother or as if his name was expunged from the settlement, with the result that she is immediately entitled to the beneficial enjoyment of the liferent which he has so forfeited, and to which in succession she is instituted to him. This contention is met on behalf of her brother Hugh Erskine and by the conditional institutes in the fee, who maintain that equitable compensation falls to be made out of Hugh Rose's conventional liferent of one-half of the estate so as to restore all those beneficiaries whose interests are prejudiced by the withdrawal from the capital of the estate of Hugh Rose's legitim.

Hugh Rose himself puts forward no claim as heir *ab intestato* to the lapsed liferent as intestate succession of his mother. But the competition between Ethel Rose on the one hand and her brother and the conditional fiars on the other is sufficient to raise, though more indirectly than would a claim by the heir *ab intestato*, the question whether Hugh Rose's repudiation of his mother's settlement involves equitable compensation to the whole body of those whose interests are prejudiced by it.

I think that that question must be answered in the affirmative. We have already had to construe the declaration of satisfaction in the settlement. So far as it goes it contains no express words of forfeiture, and our judgment avoids the use of the expression "forfeit." Yet I cannot find any practical distinction between the word "lose," which is adopted, or between another euphemism which is sometimes found, viz., "surrender," and the term "forfeit" when used with reference to a case such as the present. Lord Dundas in pronouncing the leading judgment on the earlier branch of the case expresses himself thus, "I think that where a provision is made and accepted as in full of legitim that must necessarily mean that, if legitim be claimed it can only be upon a complete and final *surrender* by the claimant of the conventional provision." Lord Mure, on the other

hand, in *Macfarlane's Trustees*, 1882, 9 R. 1138 at p. 1176, 19 S.L.R. 850, apprehends it to be quite settled "that the beneficiary electing to take his legal rights as against the will is held to have *forfeited* everything the will gave him beyond the amount of those rights." While I think that to lose and to forfeit a provision have precisely the same meaning and effect, it may indeed be said that there is a certain distinction between "surrender" and "forfeit." But I think that it will be found to be, in effective result, a distinction without a difference. They describe, from different points of view, the situation produced by election. From the point of view of the beneficiary electing to reprobate, the effect is forfeiture. From that of the estate or of the interests prejudiced, the effect is surrender. They are therefore but two sides of the same shield. And here may be noticed also the two conceptions which have been presented of the theory of equitable compensation—the one which bases it on the implied will of the testator, the other which bases it on equitable considerations merely, and hence the term equitable compensation borrowed by us from England. They also are, I think, really one and the same thing. For the equity which leads to compensation is not to be found in anything abstract, but merely in implying the will of the testator.

The point at issue is nowhere more concisely or more completely resolved than by Lord Eldon in the leading case of *Ker* v. *Wauchope*, 1819, 1 Bligh's App. 1. The noble and learned Lord first says (p. 21)—"It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A, and gives A's estate to B, courts of equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift." When it is considered that this in very simple language really describes what Mrs Rose did in settling her estate, viz., make provision in favour of her son Hugh while disposing of his estate of legitim as if it was her own, it is seen that this language exactly describes the principle of our former judgment. Lord Eldon then adds (p. 25)—"In our Courts we have engrafted upon this primary doctrine of election the equity as it may be termed of *compensation*. Suppose a testator gives his estate to A and directs that the estate of A, or any part of it, should be given to B. If the devisee will not comply with the provision of the will the Courts of equity hold that another condition is to be implied as arising out of the will and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A in consideration of his giving his estate to B, if A refuses to comply with the will B shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him." Here he equally defines the principle on which, according to the implied intention of the testator, that share of her estate which is forfeited or surrendered by the beneficiary who refuses to comply with the will is at least primarily to be applied. The representative *ab intestato* does not take it as a lapsed succession. And therefore the abstention of Hugh Rose from making any claim as heir *ab intestato* is intelligible. But the question who do take depends upon the provisions of the testator's settlement. Few such are so simple as that figured by Lord Eldon. Here we have an unusually complex settlement, but that does not alter the principle which the Court must apply. The claim made on behalf of Ethel Rose is on a par with that of the heir *ab intestato*, for it amounts to a claim that the surrender of the beneficiary refusing to comply with the will opens, not indeed a legal, but a conventional, succession dependent on his death, to the exclusion of equitable compensation to the beneficiaries disappointed. I find precise authority for the disposal of this branch of the case in that of *Russell*, 1886, 13 R. 989, 23 S.L.R. 719, in which the judgment of Lord Adam deals with the question in such manner as to call for nothing in supplement. Other authorities might be cited but it is unnecessary.

If the claim on behalf of Ethel Rose is rejected there falls to be considered, second, how the surrendered liferent of Hugh Rose is to be applied. But we do not think that the case contains material for the disposal of that question nor have we had a serious argument upon it. All that we can do at present is, instead of answering the third and fourth questions, to find that the liferent in succession to the second party of one-half of the estate of the testatrix liferented by him does not open to the third party immediately by reason of his claim of legitim, but is dependent on his death and her survivance.

But I may be permitted to point out to the parties that while personally I am extremely doubtful of the equity in this case of making compensation on the basis of actuarial calculation as suggested by Lord M'Laren in *Russell's* case, it seems to me that it is rendered impossible in the present case by the complicated nature of the settlement, and particularly by the fact that there is given, expectant on the death of Hugh Rose, not a simple liferent to Ethel and fee to her children, whom failing to destinees-over, but such liferent and fee clogged by two things—(1st) a power to the trustees to supplement the income accruing to Ethel Rose out of capital—a power more likely to be exercised now that the liferent is diminished by the election of Hugh Rose—and (2nd) a power to her, failing children, to provide a possible husband with a liferent interposed between her own and the destina-

tion-over of the fee. This would appear to make any actuarial calculation impossible.

I think that the Inner House in *Russell's* case (*cit.*) made it clear that equitable compensation cannot be applied in any fixed manner but as may be most reasonable in the circumstances of each case. I suggested at the hearing of the case that the result desired might possibly be best attained by retaining the residue undivided, adding year by year one-half the income derived from the surrender of Hugh Rose to the fund and paying the two remaining quarters of the income to each of Ethel and Hugh Erskine Rose, or applying it for their behoof. Year by year as the principal is being restored the income would be improving, and the interests of the liferenter whose liferent is postponed, as well as of the fiars and of the liferenters in immediate possession, might prove to be as equitably regarded as circumstances admit. I think that where a bequest is surrendered in such circumstances as to involve equitable compensation it is surrendered not to or for the benefit of any individual beneficiary directly but to the uses of the settlement generally. Mathematical accuracy in its distribution or application is impossible. Without committing myself to more than a suggestion for the parties' consideration I am disposed to think that this method would be found to come more near to the implied will of the testator at any rate than any attempted actuarial calculation could in the circumstances of the will attain.

LORD PRESIDENT—I also agree with the views expressed by Lord Johnston in the opinion he has read as to how the case should be disposed of, but I do not feel that I am competent to offer any opinion upon the question of how equitable compensation is to be made.

We shall make a finding as suggested by his Lordship.

LORD MACKENZIE—I do not think there is any difference of opinion regarding the manner in which the question now raised in the case should be dealt with. We have not now before us the question how equitable compensation is to be made, but as at present advised I am unable to see how the interlocutor which we shall pronounce could be given effect to without calling in the assistance of an actuary.

LORD SKERRINGTON—I agree with your Lordships. In the circumstances of this particular will the surrendered benefit must go to give equitable compensation, but as to how that compensation is to be made I offer no opinion.

The Court found the liferent in succession to the second party of one-half of the whole estate of the testator liferented by him did not open to the third party immediately by reason of the second party's claim of legitim, but was dependent on his death and her survivance.

Counsel for the First and Second Parties—The Solicitor-General (Morison, K.C.)—Lippe. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Third Party—A. O. M. Mackenzie, K.C.—Macquisten. Agents—Wallace & Begg, W.S.

Counsel for the Fourth Party—C. H. Brown. Agents—Fyfe, Ireland, & Co., W.S.

Counsel for the Fifth Parties—Wark. Agents—Laing & Motherwell, W.S.

Thursday, June 15.

SECOND DIVISION.

R. & J. SCOTT *v.* GERRARD.

Contract — Arbitration — Applicability of Arbitration Clause to Dispute when Contract has been Declared at an End — Clause.

A building contract which contained a clause "that all disputes and differences whatsoever that may arise between the parties from the date of the subscription of this contract by the parties until the whole work shall be fully completed, the last instalment paid to the contractors, and the work taken off their hands, shall be and are hereby referred to the decision of the said G. W.," *i.e.*, the architect "whose decision shall be final"—conditioned that on the work not being satisfactorily proceeded with "the architect shall be at liberty to declare the contract at an end, and the proprietors shall be at liberty thereupon to proceed with and finish the same at the expense of the contractors, or, at their expense, to contract with other persons to finish the same."

The architect having declared the contract at an end, the contractors having claimed for the work done, and the owners replying that they had been put to greater expense than the value of that work, *held* (1) (*diss.* Lord Salvesen) that the contract was not rescinded in its entirety, the arbitration clause remaining in force, and (2) that the arbitration clause was not merely executorial but covered the question between the parties, and action *sisted.*

Arbitration — Arbiter — Disqualification — Bias.

The contractors under a building contract which had been declared at an end by the architect, sued for the value of the work done, and pleaded that the architect had disqualified himself by his actings from being arbiter under the arbitration clause. They averred — "Throughout the contract the pursuers were constantly hampered by the architect failing to provide them with detailed drawings of the work, and this failure caused much delay to the pursuers. It is believed and averred that in consequence of the pursuers' repeated requests that detailed drawings should be provided more expeditiously, for