referred to, to which, however, he is unable in the circumstances to grant a title. The present petition has been brought to have the dissolution of the old company declared void, with a view to the liquidator of the old company, who happens to survive, granting such formal titles to the property as may be requisite. The petition is an application to the *nobile officium* of the Court in respect that section 223 of the Companies Act of 1908 cannot be taken advantage of. In the recent case of *Macdonald's Curator Bonis* (*supra*, p. 207) we had to consider whether the circumstances involved in that case entitled us to exercise our *nobile officium*. The case was one in which section 223 would have provided relief if the application had been made within the period limited by the section. Relief by resort to the *nobile officium* was refused on the grounds explained in the judgment. I see no difference between the circumstances of this case and the circumstances of the case of *Macdonald's Curator Bonis* which is in any way material. It is true that in *Macdonald's* case there had been no agreement to make over the properties to any third party before dissolution took place. In the present case there was such an agreement, but it was not followed by any conveyance of the property. I cannot see that the circumstance that the old company had incurred an obligation which it failed to implement makes any material difference. As was said in *Macdonald's* case, there is no reason why we should exercise the *nobile officium* when the ordinary law applying to caduciary property is available to the parties. It may be that by resorting to their rights under the ordinary law they may be unable to obtain a title to this property as perfect as they could have wished, or as perfect as it might have been if they had timeously availed themselves of section 223 of the statute. But the ordinary law does provide a remedy to them, and that being so there is no sufficient ground for invoking the *nobile officium*. I think the present case is ruled by *Macdonald* and that the application should be refused.

LORDS SKERRINGTON, CULLEN, and SANDS concurred.

The Court refused the petition.

Counsel for Petitioners — D. Jamieson. Agents — Fraser, Stodart, & Ballingall, W.S.

Thursday, March 13.

FIRST DIVISION.

HANNAH'S TRUSTEES *v.* HANNAH.

Succession — Settlement — Approbate and Reprobate — Clause of Forfeiture—Right of Children Claiming Legal Rights to Found on Clause of Forfeiture to Exclusion of their Own Issue—Clause Read as Inoperative.

By his trust-disposition and settlement a testator left the liferent of his estate to his widow and the fee to the children who survived him, in equal shares, payable on their attaining majority, with a destination-over in favour of the issue of children who predeceased the period of division, viz., the death of the widow. He further declared that the provisions to his wife and children were to be accepted by them as in full satisfaction of their legal rights, and that if any of them should claim their legal rights "he or she shall forfeit all his or her right, interest, or benefit under these presents; and further, all right, interest, and benefit under these presents which would otherwise have been taken by the issue of any child claiming legitim shall also be forfeited; all of which forfeited rights, interests, and benefits shall thereupon accresce to the other beneficiaries or beneficiary accepting these presents."

On testator's death his widow and each of his two surviving children elected to claim their legal rights and thereby forfeited their provisions under the trust settlement. *Held* that as the forfeiture clause was in favour of children who did not repudiate, and as no such children were in existence, it did not take effect, and that accordingly the remainder of the trust estate after payment of the legal rights did not fall into intestacy, but fell to be protected by the trust for behoof of the children's issue.

Gillies v. *Gillies' Trustees*, 1881, 8 R. 505, 18 S.L.R. 323, *followed*.

Mrs Mary Isabella Brown or Hannah and others, the testamentary trustees of James Hannah, tweed manufacturer, Hawick, *first parties*, Hector Hannah and Andrew Brown Hannah, the testator's two surviving sons, *second parties*, and Olive Hannah, pupil child of and residing with Andrew Brown Hannah, *third party*, presented a Special Case for the opinion and judgment of the Court.

The testator died on 22nd July 1920 leaving a trust-disposition and settlement dated 24th December 1903. A *curator ad litem* was appointed to the third party.

The Case stated—"2. The testator was survived by his widow the said Mary Isabella Brown or Hannah and two sons, Hector Hannah and Andrew Brown Hannah, both of whom are over twenty-one years of age. The said two sons are the second parties. The said Andrew Brown Hannah is married and has a daughter Olive Hannah, who is in pupilarity and who is the third party to the case. The said Hector Hannah is married and has no family. 3. By the said trust-disposition and settlement the testator directed the trustee to pay to his wife during her lifetime (but subject to the obligation upon her to aliment and educate the children) the annual interest and revenue of the whole residue of his estate with a discretionary power to encroach upon capital, and subject to the declaration that the widow's right should cease upon her remarriage. 4. The testator further provided that on the death or second marriage of his wife, should she be the survivor, or at his

own death should she predecease him, his trustees should realise and pay over his whole means and estate to the children who survived him in equal proportions, share and share alike, payable on their respectively attaining twenty-one years of age, declaring that should any of his 'children predecease the foresaid period of division leaving lawful issue, such issue should be entitled equally among them to the shares original and accrescing which their parents would have taken by survivance, and the share of any child dying without leaving lawful issue shall be divided among the surviving children and the issue of such children as may have died leaving such issue in equal shares *per stirpes*.' 5. The testator further provided and declared that the provisions in favour of his wife and children should be accepted by them as in lieu and in full satisfaction of terce, *jus relictæ*, and legitim, 'and that in the event of any of them claiming his or her legal rights or any of them in my estate he or she shall forfeit all his or her right, interest, and benefit under these presents; and further, all right, interest, and benefit under these presents which would otherwise have been taken by the issue of any child claiming legitim shall also be forfeited—all of which forfeited rights, interests, and benefits shall thereupon accresce to the other beneficiaries or beneficiary accepting these presents and the provisions herein contained in the same manner for the same interests of fee, liferent, or otherwise, and upon the same conditions as the other provisions in their favour. . .' 6. The testator left moveable estate valued at £3767, 0s. 9d., and heritage consisting of a house at 48 Weensland Road, Hawick, valued at £510, burdened with a bond and disposition in security for £280. 7. The widow and the second parties elected to claim their legal rights and renounced the conventional provisions under said trust-disposition and settlement. The sums due in name of legal rights were adjusted at the following figures —(*a*) to the widow £900, 15s. 6d., and (*b*) to each of the sons £555, 13s. 5d. By deed of discharge dated 18th and registered in the Books of Council and Session 24th May 1922 the widow and the two sons discharged their legal rights, reserving any claims competent to them as regards the portion of the testator's estate remaining in the hands of the trustees. The said remaining portion consists of moveable estate valued at £1508, 12s., subject to expenses. 8. The second parties have called upon the first parties to pay over the balance of the estate to them as the truster's heirs *in mobilibus*, and questions have arisen as to the meaning and effect of the said trust-disposition and settlement and particularly as to the rights of the second parties and the third party in the balance remaining in the hands of the first parties in view of the renunciation by the testator's widow and by each of the second parties of their conventional provisions under said trust-disposition and settlement."

The *question of law* was as follows—"Are the first parties bound to denude themselves now of the balance of the trust estate in favour of the second parties as the testator's heirs *ab intestato?*"

Argued for the first and third parties—The second parties having claimed their legal rights thereby repudiated the settlement and were barred from founding on the forfeiture clause—*Gillies* v. *Gillies' Trustees*, 1861, 8 R. 505, 18 S.L.R. 323. Further, a forfeiture clause had to be read in the light of the purpose for which it was made. Here the purpose was to transfer the shares of the repudiating beneficiaries to the beneficiaries who accepted the settlement. As in fact there were no accepting beneficiaries the purpose failed, and the clause should be treated as inoperative—*Wilson* v. *Gibson*, 1840, 2 D. 1236, Lord Cunninghame at 1242, Lord Moncreiff at 1246. The period of vesting had not been accelerated by the widow's repudiation—*Muirhead* v. *Muirhead*, 1890, 17 R. (H.L.) 45, 27 S.L.R. 917.

Argued for the second parties—The present case was distinguishable from that of *Gillies*. In *Gillies* the liferent only was given to testator's child whilst the fee went to her issue; here the fee was to go to testator's children with merely a destination-over in favour of grandchildren. Further, the effect of the widow's repudiation of the liferent was to accelerate the period of vesting—*Alexander's Trustees*, 1870, 8 Macph. 414; *Russell's Trustees* v. *Gardiner*, 1886, 3 R. 989, 23 S.L.R. 719; *Latta* v. *Muirhead*, 1887, 15 R. 254, 25 S.L.R. 204. The following cases were also cited:—*Campbell's Trustees* v. *Campbell*, 1889, 16 R. 1007, Lord Lee at 1012, 26 S.L.R. 699; *Rose's Trustees* v. *Rose*, 1916 S.C. 827, 53 S.L.R. 630; *Wingate* v. *Wingate's Trustees*, 1921 S.C. 857, 58 S.L.R. 604; *Naismith* v. *Boyes*, 1899, 1 F. (H.L.) 79, 36 S.L.R. 973; *M'Caull's Trustees* v. *M'Caull*, 1900, 3 F. 222, 38 S.L.R. 778.

LORD PRESIDENT (CLYDE)—The testator died in 1920 survived by his widow and by two sons, both of whom are over twenty-one years of age, and one of whom is married and has a pupil daughter. By his settlement the testator left the liferent of his estate to his widow and the fee to "the children who survived him," that is, his two sons, in equal proportions, payable on their attaining twenty-one years of age. These provisions were followed by a declaration that if any of the children (in other words either of the sons) predecease the "period of division" (which parties are agreed means the death of the widow) leaving lawful issue, such issue should be "entitled equally among them to the shares, original and accrescing, which their parents would have taken by survivance." It was further declared that the provisions to the wife and the two sons were to be accepted by them "as in lieu and in full satisfaction of their claims to terce, *jus relictæ*, and legitim."

In point of fact the sons claimed their legal rights, as also did their mother, and the effect of these claims, coupled with the declaration just recited, was that they discharged once and for all their right to the conventional provisions of the settlement. The sufficiency of words such as are con-

tained in the declaration to produce that result was affirmed in the recent case of *Wingate* (1921 S.C. 857), which followed the first part of the case of *Rose's Trustees*, 1916 S.C. 827.

The testator's settlement, however, does not leave the matter there. It goes on to provide that if the widow or any of the children claim their legal rights "he or she shall forfeit all his or her right, interest, and benefit under these presents; and further, all right, interest, and benefit under these presents which would otherwise have been taken by the issue of any child claiming legitim shall also be forfeited — all of which forfeited rights, interests, and benefits shall thereupon accresce to the other beneficiaries or beneficiary accepting these presents." As, however, all the beneficiaries had repudiated their conventional provisions (or had had them repudiated on their behalf) there was no one who could benefit by this forfeiture. The testator's sons accordingly claim that the balance of the estate fell into intestacy, and maintain that it should now be divided between them.

The question of the effect of a forfeiture clause of this kind was the subject of consideration in the case of *Gillies* v. *Gillies's Trustees*, 8 R. 405. It was there decided, in circumstances very similar to those of the present case, that where the testator's sole surviving child, a daughter, had claimed legitim — thereby finally discharging the whole conventional provisions of the settlement in favour of children—an added clause of forfeiture (applying to the interests both of children and of children's issue) in favour of other children who elected to abide by the settlement failed of effect, on the ground that there were no such children, and that accordingly the daughter's rights as heir *ab intestato* were liable to exclusion by her issue should she have any. No challenge of this decision has been made in the present case, and it is therefore one which it is proper for us to follow in practically identical circumstances. The clause of forfeiture must therefore be left out of account, and the question decided as if the testator had contented himself with the declaration that the conventional provisions he left to his children should be in full discharge of their rights of legitim. In short, the rights of the testator's sons' issue who may survive the period of division must be protected by the trust.

In these circumstances it is impossible that any immediate division of the estate should take place, or that effect can be given to the argument that a case of intestacy has occurred, bringing the estate to the two sons as heirs *ab intestato* of their father, for nobody can tell until the testator's widow dies whether there may not be in existence either the present grandchild or future grandchildren whose rights under the settlement remain unaffected. It seems to me therefore that we have no alternative but to answer the question of law in the negative.

LORD SKERRINGTON — I think that the case is ruled by the authority of the decision in the case of *Gillies* (8 R. 505), and I concur in the judgment which your Lordship proposes.

LORD CULLEN—I also agree with the conclusion to which your Lordship has come that the case is ruled by the decision in the case of *Gillies*, 8 R. 505. Mr Burnet advanced a separate argument to the effect that the period of vesting has been accelerated by the widow having claimed her legal rights and surrendered her liferent, but I am afraid that that argument is sufficiently met by the decision in the case of *Muirhead*, 17 R. (H.L.) 45.

LORD SANDS—I agree that this case is covered by the case of *Gillies*, 8 R. 505.

The Court answered the question of law in the negative.

Counsel for First and Third Parties — Cooper. Agents—Macpherson & Mackay, W.S.

Counsel for Second Parties — Burnet. Agent—W. C. Dick, S.S.C.

Saturday, March 15.

SECOND DIVISION.

INLAND REVENUE *v.* HAY.

Revenue—Income Tax—Super Tax—Deductions — Interest on Advances — Advances and Rate of Interest Fluctuating in Amount — "Yearly Interest" — Income Tax Act 1918 (8 and 9 *Geo. V, cap.* 40), *sec.* 27 (1).

The Income Tax Act 1918, sec. 27 (1) enacts—"Any person who claims exemption, abatement, or relief under the preceding provisions of this part of this Act, shall . . . deliver to the assessor of the parish in which he resides a notice of his claim, together with a declaration and statement in the prescribed form signed by him, setting forth—"(*a*) All the particular sources from which his income arises, and the particular amount arising from each source; (*b*) all particulars of any yearly interest or other annual payments reserved or charged thereon, whereby his income is or may be diminished, . . ."

A landed proprietor obtained advances from his solicitors in connection with the purchase and sale of some estates. The advances continued in existence for a period of years, although the actual amount of the advances varied. The solicitors charged interest upon the advances at the rate charged by the Scottish banks on overdraft accounts, the rate fluctuating with the bank rate. This was matter of agreement between the parties, although the agreement was not reduced to writing. The borrower's income was collected by the solicitors, and reductions of the advances were made out of this income from time