slur cast upon his professional character, and to keep the Clayton estate in the family. Being frustrated in this object for the present, he had abandoned the action, and should therefore be held liable in the full expenses. Reference was made to the cases of *Lyell* v. *Gardyne*, 20th Nov. 1867, 6 Macph. 42, and *M'Bride* v. *Williams*, 22d May 1869, 7 Macph. 790.

GORDON, D.-F., ASHER and CAMPBELL SMITH, for the pursuer, vindicated his good faith in bringing the action, and contended that no expenses should be given. They referred to the cases of *Miller's Trustee* v. *Shield*, 31 Jan. 1863, 1 Macph. 380; *Neville* v. *Clark*, 6 Feb. 1864, 2 Macph. 625; *Burns* v. *Allan & Co.*, 20th Dec. 1864, 3 Macph. 269; *Stewart* v. *Caledonian Rail. Co.*, 4 Feb. 1870, 8 Macph. 486.

At advising—

LORD PRESIDENT—The Court are of opinion that the defenders must have full costs. They do not wish to disturb the ordinary rule that, where there are two jury trials, the party who is ultimately successful is not entitled to expenses in the first trial in which he has not been successful. But this is a very special case, and the Court being of opinion that there were no grounds for alleging insanity in the deceased, and that the action ought never to have been brought, consider that the defenders should get their expenses.

Agents for Pursuer—Murdoch, Boyd & Co., S.S.C.

Agents for Defenders—Macrae & Flett, W.S.

Saturday, July 15.

SECOND DIVISION.

M'WATT AND ANOTHER (DAVIDSON'S TRUSTEES) *v.* DAVIDSON AND OTHERS.

Mortis causa *Settlement—Liferent and Fee—Provision to Children—Legacy.*

(1) A testator executed a *mortis causa* deed of settlement, by which he conveyed certain leasehold subjects to his children in liferent for their respective liferent uses allenarly, and certain of his grandchilden in fee, and the remainder of his property to trustees for certain purposes. Three of the children forfeited their liferent interests by claiming legitim, contrary to the scope of their father's settlement. *Held* (aff. judgment of Lord Gifford) that the interests thus set free did not form intestate succession, or enlarge the right of the fiars, but fell to be conveyed to the trustees for behoof of the residuary legatees who were injured by the repudiation of the settlement.

(2) Circumstances in which a legacy was held to have lapsed into residue.

(3) A testator directed his trustees immediately after the death of his wife, to whom he left an annuity, to convert into cash any part of his estate remaining unrealised, and that the whole residue should as far as possible then be divided among his whole grandchildren then surviving, *per capita*, share and share alike, "declaring that the interest of my said residuary legatees shall become vested at the period of my death, but the shares falling to them shall only be payable on their reaching the period of twenty-one years of age respectively; and declaring further that until that time shall arrive the interest of their several shares shall be expended for their support and education, as to my said trustees may seem best at the time." *Held* (*rev.* judgment of Lord Gifford) that a grandchild born after the testator's death, but in the lifetime of his widow, was not entitled to participate in the residue.

1. On 30th December 1867 James Davidson, merchant in Rothes, and distiller at Macallan, executed a deed of settlement, which proceeded on the narrative that he had resolved to settle his affairs in order to prevent all disputes after his death. The deed consisted of a direct conveyance of five leasehold subjects to certain parties in liferent and fee respectively, in the terms stated below, and a conveyance of the remainder of his whole means and estate to trustees for the purposes therein mentioned. The narrative to the conveyance of the leasehold properties was as follows:—"Considering that I am possessed of certain heritable subjects situated in the village of Rothes, on which dwelling-houses have been erected by me and my predecessors therein, and which are held by me in virtue of certain leases from the Earl of Seafield, have therefore, for the love and favour which I have and bear to the persons afternamed and designed, but with and under the liferent, reservation, power, and faculty after expressed, assigned, conveyed, and made over, as I do hereby assign, convey, and make over, to the said parties the heritable subjects hereinafter specially conveyed to them, as follows, *videlicet*." The conveyances which gave rise to the questions discussed in this case were the second, third ,and fifth, which were in the following terms:—"*Secondly*, I do hereby assign, convey, and make over to James Davidson, my son, presently residing in Rothes, during all the days of his lifetime, but for his liferent use allenarly, whom failing, or at his death, to his nearest heirs whomsoever, in fee, all and whole that tenement of ground in New Street of Rothes, with the houses built thereon, presently occupied by himself, marked number 34 on a plan of the new town or village of Rothes drawn by George Brown, land-surveyor. *Thirdly*, I do hereby assign, convey, and make over to my daughter Agnes Davidson or Falconer, wife of William Falconer, at present residing in Aberdeen, during all the days of her lifetime, but for her liferent use allenarly, and expressly excluding the *jus mariti* or right of administration of the said William Falconer, or of any future husband the said Agnes Davidson or Falconer may marry, either as to the subjects themselves, or the rents or yearly profits thereof, and at her death to her eldest son, whom failing her eldest daughter, and whom failing her nearest heirs and assignees in fee, all and whole that tenement of ground in New Street of Rothes, marked No. 61 on the said plan. . . *Fifthly*, I do hereby assign, convey, and make over to and in favour of Helen Mantach, daughter of William Mantach, in Burnside Street of Rothes, as long as she remains single and of good character, during all the days of her lifetime, for her liferent use allenarly, and after her death or marriage; or in the other event foresaid to my daughter Elspet Davidson or Mackintosh, wife of William Mackintosh, now in Australia, during all the days of her lifetime, for her liferent use allenarly, whom failing, or at her death, to James MacIntosh, her eldest son, his heirs and assignees, all and whole my

right and interest in and to all and whole that one tenement in Burnside Street of Rothes, marked No. 7 on said plan."

The settlement then proceeded as follows:—"And in regard to the disposal and management of my other heritable and moveable estate after my decease, I do hereby give, grant, dispone, assign, convey, and make over from me, my heirs and successors, to and in favour of the Rev. Alexander MacWatt, minister of the Free Church of Scotland at Rothes, William Sharp, merchant in Rothes, and the said George Davidson, my son, and the acceptors or acceptor, survivors or survivor of them, and to such other person or persons as I may hereafter nominate and appoint by any writing under my hand, or as may be assumed by my said trustees in terms of law, a majority, should there be three or more trustees existing at any time, being always a quorum; and to their or his assignees, all and sundry lands and heritages, debts heritable or moveable, sums of money, stock-in-trade, household furniture, goods, gear, and effects, and in general my whole means, estate and effects, heritable and moveable, real and personal, presently pertaining and belonging, or which shall pertain, belong, and be resting-owing to me at the period of my death, excepting always the leasehold tenements in Rothes hereinbefore specially conveyed and assigned, with the whole writs and evidents, vouchers and instructions of my said heritable and moveable estate and effects hereby generally conveyed. And I bind and oblige me and my heirs, executors, and successors, to grant all necessary deeds and writings in favour of my said trustees, and the acceptors and acceptor, survivors and survivor of them, or the other trustees hereafter to be named by me, or assumed as aforesaid, and their or his foresaids, for implementing and fulfilling the above general disposition of my heritable and moveable means and estate."

The purposes of the trust were the payment of the truster's lawful debts, &c.; the conveyance of his furniture, and an annuity of £30 to his wife; an annuity of £10 to Helen Mantach; and the payment of certain legacies. The fifth purpose was as follows:—"*Fifthly*, I hereby direct and appoint my said trustees and executors, at expiry of twelve months after my death, to make payment of the following legacies to the persons aftermamed and designed, *videlicet*,—To the said George Davidson, my son, the sum of £400 sterling; to my daughter, Margaret Davidson or Sharp, wife of James Sharp, mason in Rothes, the sum of £400 sterling; to my daughter, Agnes Davidson or Falconer, wife of William Falconer, now or formerly residing in Aberdeen, the sum of £400 sterling; to my daughter, Elspet Davidson or MacIntosh, wife of William MacIntosh, now or formerly in Australia, the sum of £400 sterling, providing the said Elspet Davidson or MacIntosh shall return to Rothes and engage to reside there within a period of six years after my death, and in the event of her failing to do so, she shall *ipso facto* amit and forfeit the said legacy, and in that event the said legacy shall fall and pertain to my residuary legatees, and be divided among them in manner after-specified; and I direct my trustees to invest the sum of £300 sterling on such security, heritable or moveable, as they may consider best, and pay over the interest thereof to James Davidson, my son, half-yearly, during his life, as an alimentary provision, exclusive of his creditors, and after his death I direct the interest to be paid to his lawful children until they respectively attain the years of majority, when the capital shall be divided among them, but in the event of his dying without lawful issue, I direct the said sum of £300 to fall into the residue of my estate, and to be divided among my residuary legatees, in manner after-mentioned." Certain legacies were also left to some of the testator's grandchildren; and the whole grandchildren were constituted residuary legatees, in terms to be subsequently adverted to, as giving rise to a separate discussion between the grandchildren.

The testator died on 18th December 1868, survived by his widow Helen Findlay or Davidson, by his son James Davidson, and by his three daughters—Agnes Davidson or Falconer, Margaret Davidson or Sharp, and Elspet Davidson or Mackintosh; and also by the legatees other than his son George Davidson, who predeceased him.

On their father's death James Davidson, Mrs Falconer and Mrs Mackintosh claimed legitim as their legal right, in addition to the liferents provided to them by the deed of settlement. In consequence of the conflicting claims thus arising, the trustees raised this action of multiplepoinding, in which all the parties entitled to participate in the succession were called as defenders. The summons concluded that it ought and should be found "that the pursuers are only liable in once and single payment and delivery of the estate and effects which belonged to the said deceased James Davidson, *in so far as the same fall under the trust*," &c. Doubts having been expressed by the Lord Ordinary whether under this conclusion the liferents formed part of the fund *in medio*, two summonses of declarator, one at the instance of James Davidson, as heir-at-law, and the other at the instance of the residuary legatees, were raised, and of consent held as repeated in the action of multiplepoinding.

In the multiplepoinding James Davidson, Mrs Falconer, and Mrs Mackintosh claimed together three-fourths of the one-third of the truster's estate, which constituted legitim. James Davidson also claimed, both in the multiplepoinding and in the action of declarator at his instance, the leasehold subjects destined to him in liferent, and also the rents and produce during the lives of his sisters of the subjects destined to them respectively in liferent. The residuary legatees, on the other hand, claimed, both in the multiplepoinding and in the action of declarator at their instance, that the interest of the repudiating children in the leasehold subjects in question should be assigned by them to the trustees for the behoof of the residuary legatees. A claim was also made by William Falconer junior and James Mackintosh, the fiars of the subjects destined in liferent to their mothers, to be allowed to hold these subjects free from the burden of their mothers' forfeited liferents, and under no liability to account to the trustees for the value thereof.

2. The testator James Davidson directed his trustees, twelve months after his death, to make payment to his son George of a legacy of £400. George having predeceased him, he executed a holograph codicil in the following terms:—"As my son George Davidson is now dead, and as I had laid past for his portion the sum of £400 sterling, to be paid to him twelve months after my death, I now leave the said sum of £400 to my lawful grandchildren, to be paid to them in terms of my will." A subsequent holograph codicil was in these terms:—"As my son George's natural child,

Thomas Davidson, is left without any protection, it is my will that he shall rank on the remainder of my estate along with my lawful grandchildren." By the will itself the whole grandchildren had been appointed residuary legatees. Under these circumstances, the question arose in the multiplepoinding, whether Thomas Davidson was entitled to share equally with the lawful grandchildren in the legacy of £400.

3. The residuary clause was in the following terms:—"And in regard to the residue and remainder of my said means and estate, heritable and moveable, I hereby direct and appoint, that immediately after my wife's death, any part thereof remaining unrealized shall be converted into cash, and the whole residue, including the sums which may fall into the same in the events respectively above-specified, shall, as far as possible, then be divided among my whole grandchildren then surviving, *per capita*, share and share alike, whom I hereby nominate and appoint to be my residuary legatees, declaring that the interest of my said residuary legatees shall become vested at the period of my death, but the shares falling to them shall only be payable on their reaching the period of twenty-one years of age respectively; and declaring further, that until that time shall arrive the interest of their several shares shall be expended for their support and education, as to my said trustees may seem best at the time, and may be paid to their parents or lawful guardians for that purpose." Twelve grandchildren, including the illegitimate grandchild Thomas Davidson, were in existence at the testator's death. Eighteen months after his death another grandchild, named Alfred Henry Falconer, was born, and a claim was made on his behalf to share in the residue, on the ground that all grandchildren born before the death of the testator's widow were, on a sound construction of the above clause, entitled to participate in the residue.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 23d February* 1871.—The Lord Ordinary having heard parties' procurators, and considered the closed record in these conjoined actions of multiplepoinding and declarator, with the productions and whole process: Finds (1) that the claimants James Davidson, Agnes Davidson or Falconer, and Elspet Davidson or Mackintosh, three of the children of the deceased James Davidson, merchant in Rothes, the truster, and William Falconer and William Mackintosh, husbands of the said Agnes Davidson or Falconer and Elspet Davidson or Mackintosh, for their interests respectively, are entitled to claim legitim out of the free moveable estate of the said deceased James Davidson: Finds (2) that they have elected to claim legitim, and are entitled to be ranked and preferred therefor accordingly, as the amount thereof may be hereafter ascertained: Finds (3) that in consequence of the said claim of legitim the said James Davidson, Agnes Davidson or Falconer, and Elspet Davidson or Mackintosh, and the said William Falconer and William Mackintosh, for their interests, are not entitled to claim any right or interest whatever, or any provision under or in virtue of the deed of settlement and codicils of the said deceased James Davidson: Finds (4) that the whole special provisions made or conceived in favour of the said parties in the said deed of settlement and codicils and the whole beneficiary rights and interests which the said parties or any of them might have claimed under or in virtue of the said deed of settlement and codicils, must be held to belong to and to inure for the benefit of the residuary legatees, who, under the said deed of settlement and codicils, are entitled to the free residue of the estate of the said deceased James Davidson, and whose residuary interests are prejudiced or diminished by the claim of legitim made by the said three children of the said deceased James Davidson, or by those in their right: In particular, finds (5) that the right of liferent or of fee in the heritable or leasehold subjects in Rothes, respectively provided by the said deed of settlement to the said James Davidson, Agnes Davidson or Falconer, and Elspet Davidson or Mackintosh, do not fall into intestacy, and do not belong to the heir-at-law of the said deceased James Davidson, and that the said heir-at-law is not entitled to take up the same as heir-at-law of his said father: Farther, finds (6) that any right of liferent provided by the said deed of settlement in favour of the said James Davidson, Agnes Davidson or Falconer, and Elspet Davidson or Mackintosh, in the heritable or leasehold subjects in Rothes respectively, does not expire or become unavailing, and does not enlarge the rights of the parties to whom the fee of the said subjects is destined, but, on the contrary, belongs to and falls to be assigned to or made available for behoof of the said residuary legatees, under the said deed of settlement and codicils: Therefore, in the action of declarator at the instance of the said James Davidson, the summons in which is signeted 31st January 1871, assoilzies the defenders from the whole conclusions thereof, and decerns; and in the action of declarator at the instance of Davidson Sharp and others, the summons in which is signeted 7th February 1871, finds, decerns, and declares in terms of the whole conclusions thereof: Finds (7) that, according to the true conception and meaning of the said deed of settlement and codicils, the sum of £400 mentioned in the codicil of 17th July 1868, really forms part of the general residue of the estate of the said deceased James Davidson, and falls to be divided along with the said residue; and therefore finds (8) that the claimant Thomas Davidson, natural son of the deceased George Davidson, is entitled to an equal share of the said sum of £400 along with the other residuary legatees, the said £400 being merged in and forming part of the general residue: Finds (9) that the grandchildren of the testator entitled to participate in the residue include not only the whole grandchildren alive at the testator's death, but also all grandchildren who may be born after the testator's death, and before the decease of his wife Mrs Helen Findlay or Davidson; and therefore finds (10) that the claimant Alfred Falconer, child of William Falconer and of Agnes Davidson or Falconer, who was born on 8th July 1870, being eighteen months after the death of the said deceased James Davidson, the testator, is entitled to a share of the residue of the said deceased James Davidson's estate, along with the testator's other grandchildren born previous to his decease, or who may be born during his widow's survivance, including in their number the said Thomas Davidson, the natural son of the said deceased George Davidson, and decerns: And with these findings appoints the cause to be enrolled for further procedure, and reserves in the meantime all questions of expenses.

"*Note.*—Since the record was closed in the ori-

ginal action of multiplepoinding it was found necessary, in order to exhaust the questions raised between the parties, to bring two supplemental actions of declarator. These actions have now been brought, and of consent have been conjoined with or held as repeated in the original action of multiplepoinding, so that in one or other of the conjoined actions the import and effect of Mr James Davidson's settlement and codicils may be conclusively determined.

"The questions raised on record and in the three conjoined actions are numerous, and some of them attended with much nicety. Much of the difficulty has arisen from three of the children of the testator having repudiated the provisions made for them in the deed, and having claimed their legitim; but other difficulties arise upon the construction of the deed of settlement and codicils themselves.

"The Lord Ordinary will endeavour very shortly to explain the view which he takes of the settlement and codicils as affected by the special circumstances which have occurred.

"(1) In the first place, the settlements or testamentary deeds of the late James Davidson constitute a universal settlement of his whole estate and effects. It was not his intention to die intestate to any extent, or to leave any part of his property, heritable or moveable, undisposed of. It is important to keep this in mind, in reference to some of the claims, which are founded upon the plea that intestacy has arisen in consequence of the failure of some of the special provisions. There is every presumption against intestacy where a testator has endeavoured to dispose of his whole property; and a residuary legatee will always be preferred *in dubio* to an heir-at-law, or to the next of kin.

"(2) The Lord Ordinary is disposed to attach little importance to the mere form of the settlement. He prefers to regard the substance rather than the form.

"For example, the testator, instead of conveying his whole estate, heritable and moveable, to trustees, with directions to them to give or make over special subjects to favoured children, has chosen directly to convey the special subjects to the preferred legatees. And then, in conveying the residue over to trustees, he has excepted from the conveyance the subjects conveyed to the special legatees. This peculiarity was strongly insisted on as limiting the general conveyance of residue. It was urged that the residuary legatees do not get the whole residue of Mr Davidson's estate—they only get that portion of his estate which is not specially conveyed to special legatees or special disponees; and if by any chance the special disponee fails (it was argued, with much force) that the special bequest or provision must fall into intestacy, as there are no words to carry it to the residuary legatee.

"Now, without denying that there is much force in this argument, the Lord Ordinary does not think it applicable to the present case. If the failure of the special bequest had arisen merely from the death of the special disponee, there would be much force in refusing to allow this circumstance *per se* to enlarge the provisions of the residuary legatees, although even in such case the principle would seem to apply that a residuary legatee is a more favoured person than the heir *ab intestato*, at least wherever there is a universal settlement. But when the failure of the special legatee arises from his own act in repudiating the provision and claiming a part of the residue in name of legitim, there arises the very strongest equity to compel him whose act diminishes the residue to make compensation to the sufferers.

"(3) And thus arises what is called equitable compensation, which is a broad general principle applicable to every variety of case, and having for its object the carrying out of the testator's intentions as far as possible, indirectly, where the exact fulfilment of his will becomes impossible.

"This principle is altogether independent of the form of the deed. It is of no consequence whether there be one deed of settlement or several, whether there be a general conveyance to trustees or separate conveyances to separate legatees; wherever the interest of a beneficiary is diminished by reason of some other beneficiary exercising a right of election, then the rejected right left unclaimed, on account of the election, goes not to the heir-at-law, but to the legatee whose interests have been injured.

"This principle has been recognised in a great variety of cases—See *Fisher* v. *Dixon*, 2 D. 1121, 6th April 1843, 2 Bell (H. L.), 63; *Henderson* v. *Henderson*, 1782, Morison, 8191. See also *Kerr* v. *Wauchope*, 5th May 1819, 1 Bligh, 1; *Annandale* v. *Macniven*, 9th June 1847, 9 D. 1201; *Muir's Trustees* v. *Muir*, 8 Macpherson, 53; *Nisbet's Trustees* v. *Nisbet*, 5th December 1851, 14 D. 145; *Breadalbanes* v. *Pringle*, 15th June 1841, 3 D. 357; *M'Innes* v. *Macalister*, 29th June 1827, 5 S. 801 (new ed.); *Peat* v. *Peat*, 14th February 1839, 1 D. 508.

"With these preliminary observations, the Lord Ordinary will notice very shortly the various claims disposed of by the findings and decernitures in the preceding interlocutor.

"(1) Three of the testator's children have repudiated the settlement and claimed legitim. There are statements upon record that these children, or some of them, have homologated the settlement by entering upon possession of the subjects specially bequeathed to them, or by otherwise taking benefit under the settlement. No plea of homologation, however, was stated by any of the competing claimants—no proof was asked by any party, and it was conceded in debate that no case of homologation could be successfully established. A very short interval elapsed between the testator's death and the assertion of the claim to legitim—apparently only a few months—and it may well be doubted whether there is even any relevant statement of homologation. At all events, and in absence of any plea or of any demand for evidence, the Lord Ordinary has thought it right at once to dispose of the claims for legitim by finding the children who have claimed legitim entitled thereto.

"As the fund *in medio* has not been adjusted, the amount of the legitim must stand over for after ascertainment.

"(2) It follows that the children who have claimed, and who have been found entitled to their legitim, forfeit all right to claim any interest or benefit whatever under their father's deed of settlement and codicil. It has been already explained that the deed and codicils form a universal settlement of the testator's whole estate and effects, and the doctrine of approbate and reprobate directly applies. The children who defeat the settlement and reprobate it by claiming their legitim cannot at the same time approbate it by taking any right under it.

"(3) This raises the question, Whether the forfeiture of the rights of the children who claim legitim lets in to any extent the rights and interests of the heir-at-law—in other words, whether such forfeiture produces to any extent intestacy. As already explained, the Lord Ordinary thinks it does not, and he has adverted to the principle which he thinks must govern cases like the present, that is, the principle of equitable compensation. The heir-at-law is himself one of the children who repudiate the settlement and claim legitim, and it would be most unjust if his repudiation, which bars him from claiming under the deed, should open his rights as heir-at-law. Still farther, as any heir-at-law claiming legitim is bound to collate the heritage as in a question with other children, this furnishes an additional ground for excluding the claims of James Davidson as heir-at-law.

"The rights of the heir-at-law are directly raised and set forth in the separate action of declarator at his instance, which forms one of the present conjoined actions. The Lord Ordinary has disposed of the heir's claims by pronouncing *absolvitor* in this action of declarator. The heir's claim for legitim will fall to be sustained when its amount is ascertained, but *quoad ultra*, his claims in the multiplepoinding, in the Lord Ordinary's view, fall to be repelled.

"(4) The next alternative view which was presented was, that the liferent provisions in the leasehold subjects destined to the children who have claimed legitim, must be held simply to have come to an end, so as to enlarge the right of the fiars in the same way as if the liferenters were naturally dead. It was urged that as liferent is a mere burden upon the fee, the effect of the liferent terminating or ceasing to be claimable from whatever cause, is simply and necessarily to enlarge the right of the fiar by extinguishing the burden to which that fee was subject.

"The Lord Ordinary cannot assent to this view. On the contrary, he holds that in the present case the rights of liferent and fee, when destined to different persons, constitute separate and different estates, which must be dealt with differently, according to the position of the liferenters and fiars respectively, just as much as if the provisions had been of separate legacies or of separate subjects. Thus, a liferenter who, by claiming legitim, forfeits his liferent provision, forfeits it not to the fiar, who is no way affected by the claim of legitim, and whose right ought not to be enlarged thereby, but to the residuary legatees, who alone are affected and injured by the claims of legitim. Here the true principle is that of equitable compensation, to which reference has already been made. The forfeited liferent must, in one shape or other, be made over to the residuary legatees whose shares have been diminished by the claims of legitim, and that as compensation *pro tanto* to them for the injury which they have suffered.

"The Lord Ordinary has given effect to this view, by pronouncing decree in terms of the conclusions in the separate action of declarator at the instance of some of the residuary legatees against the disponees in the special subjects.

"If conveyances are necessary, the Lord Ordinary thinks that the children receiving legitim would be bound to grant such conveyances, or otherwise the subjects might be adjudged. Probably, however, under the decree now pronounced, the rights of the residuary legatees will be made effectual.

"(5) A question of some difficulty in the construction of the settlement and codicils has been raised on record in reference to the £400 originally intended for the testator's son George Davidson.

"George Davidson predeceased his father, the testator, and the testator thereupon, by codicil dated 17th July 1868, provided that the sum of £400 which he had laid past as George's portion should go 'to his (the testator's) lawful grandchildren,' to be paid to them in terms of his will. Now, by the will the testator's lawful grandchildren were his residuary legatees, each entitled to an equal share of the residue, payable in manner provided by the deed. The effect of the codicil of 17th July 1868, therefore, was simply to make the £400 a part of the residue, and divisible along therewith.

"Then comes the next codicil of 16th November 1868, being four months later, by which the testator provides that Thomas Davidson, the natural child of his deceased son George, 'shall rank on the remainder of my estate along with my lawful grandchildren.' The question is, whether 'the remainder of my estate' includes the £400 mentioned in the preceding codicil, and whether Thomas Davidson, the natural grandchild, is to have a share of that sum as well as of the general residue of the estate.

"The Lord Ordinary is of opinion that the £400 is to be treated in exactly the same way as general residue, and that Thomas Davidson, George's natural child, is to have a share of it as well as of the other residuary estate. He thinks that the codicil of 16th November 1868 was intended to put, and actually put, Thomas Davidson in precisely the same position as the testator's lawful grandchildren. No real distinction was intended to be made between the £400 and the general residue. There was no separate term of vesting, no separate term of payment, no separate conditions of any kind. The codicil of 17th July 1868, in substance, merely declares the £400 a part of residue, and in that codicil it is confined to 'lawful grandchildren' merely because at that time lawful grandchildren were the only residuary legatees. No reason can be given why the testator, in including Thomas Davidson as a grandchild, should contemplate a different rule of division of the £400 from the division of the rest of the residue.

"(6) The only other question which the Lord Ordinary has thought it right to determine at present is the vesting of the residue, including all the compensation which the residue will receive in lieu *pro tanto* of the legitim which will be taken therefrom, and the extent of the class or parties in whom the residue vests.

"The terms of the deed as to vesting of the residue are somewhat inconsistent, and the question raised, whether grandchildren of the testator born after his death are or are not to share in the residue, is a question of great importance and of great difficulty.

"On the whole, the Lord Ordinary is of opinion that the grandchildren who are called as residuary legatees are not only the grandchildren alive at the date of the testator's death, but also all grandchildren who may be born previous to the death of the testator's widow, which is made the period of division.

"The words of the deed containing the direct

bequest are clear enough. The trustees are directed 'immediately after my wife's death to realise the residue, which shall then' (that is on his wife's death) 'be divided among my whole grandchildren then surviving *per capita*.' Here the period of division is expressly made the date of Mrs Davidson's death, and the survivance of the grandchildren at that date is made a condition of their receiving payment. So far it would be clear enough that grandchildren born before the widow's death, and surviving at that date, would be included in the class to whom the residue is destined.

"But then the deed goes on to provide that 'the interest of my said residuary legatees shall become vested at the period of my death,' but shall only be payable at the majority of the residuary legatees respectively, and the interest accruing before the term of payment is to be expended for their support and education.

"It is this provision which creates the difficulty, and the Lord Ordinary thinks that the two clauses of the bequest can only be reconciled by holding that the vesting *a morte testatoris* took effect in the grandchildren as a class, those alive at the testator's death taking not only for themselves, but also for such other grandchildren as might be born before the death of the widow. There are trustees in the present case, so that all difficulty about the fee being *in pendente* is avoided.

"In this way all the grandchildren alive at the period of division will take although born after the testator's death. Then, under the clause of vesting, the shares of grandchildren who may die during the widow's survivance will go to their representatives as having been vested interests. This view is not without difficulty, but it is thought that any other view does greater violence to the terms of the deed.

"On this point reference may be made to the case of *Wood* v. *Wood*, 18th January 1861, 23 D. 338; *Mackenzie* v. *Holt's Legatees*, 1781, Mor. 6602; *M'Courtie* v. *Blackie*, 15th January 1812, Hume, 270; *Grant* v. *Fyfe*, 22d May 1810, F.C.; *M'Dougall* v. *M'Dougall*, 6th February 1866, 4 Macpherson, 372; *Watson* v. *Macdougall*, 4th June 1856, 18 D. 971; *Douglas* v. *Douglas*, 31st March 1864, 2 Macpherson, 1008; see also Jarman on Wills, ii, 142.

"There are a great many other questions of lesser moment arising in the competition, but as the fund *in medio* has not yet been ascertained, the Lord Ordinary thinks it safer not to attempt disposing of them at present. Some of these questions may possibly require investigation or probation, as, for example, the question, what sums, if any, are to be imputed to account of legitim. All these questions the Lord Ordinary intends to leave open. The points decided in the above interlocutor undoubtedly comprehend the most important questions raised in the case, and it is thought that little difficulty will arise in extricating the distribution and winding up of the estate if these points are once settled."

As this interlocutor was not a final judgment, permission was granted by the Lord Ordinary to reclaim against it; and accordingly James Davidson presented a reclaiming note, under which all the findings of the Lord Ordinary, except the first three, which were not disputed, were brought under the review of the Court.

The question regarding the forfeited liferents was first discussed.

The SOLICITOR-GENERAL and Mr M'LAREN, for James Davidson, the heir-at-law, argued, that the liferents having been forfeited by the application of the principle of approbate and reprobate, and the liferented subjects having been expressly excepted from the conveyance to the trustees, the liferents were thus undisposed of, and must therefore fall to the heir *ab intestato*. The residuary legatees were entitled only to the residue of the estate conveyed to the trustees, so that even although they were injured by the claim for legitim, they could not call on the heir-at-law to convey what was excepted from the trust-conveyance. The heir simply refused to look at the deed, and fell back on his legal rights. He was entitled to claim both legitim and undisposed of heritage, on condition that he should collate the latter (as he was willing to do) with the other children taking legitim. The direct conveyance of the subjects in question took this case out of the category of those relied on by the Lord Ordinary. The principle applicable was not the English principle of equitable compensation, but the Scotch doctrine of approbate and reprobate, which might in some cases lead to a different result. Authorities—*Ker* v. *Wauchope*, 5th May 1819, 1 Bligh 1; *Nisbet's Trustees* v. *Nisbet*, 5th December 1851, 14 D. 145; Jarman on Wills, vol. i., p. 417.

Mr BEGG, for William Falconer junior and James Mackintosh, the respective fiars of two of the subjects in question, adopted the previous argument in so far as it excluded the claim of the residuary legatees; but he argued that a person could not die intestate *quoad* a liferent. A liferent of a heritable subject was merely a burden or personal servitude on the fee, so that the effect of the liferents being no longer claimable by the repudiating children, was merely to open up at once the right of the fiars. A distinction was to be drawn between the *quasi* usufruct of a sum of money and the liferent of a heritable subject directly conveyed to one person in liferent and another in fee. The latter had never yet been held within the scope of the doctrine of equitable compensation. It made a great difference to the fiar who it was that liferented an heritable subject; and in this case the fiars would be injured by the substitution of the residuary legatees in room of their parents. Authorities—Erskine II. 9, 39; Stair II. 6; *Fisher* v. *Dixon*, 24th November 1831, 10 S. 61; *Annandale* v. *Macniven*, 9th June 1847, 9 D. 1201.

Mr SHAND and Mr KEIR argued that the principle of equitable compensation was independent of the form of a settlement, provided it was a total settlement. In the previous cases, no doubt, there had been a conveyance of the entire estate to trustees; but that was never regarded as a circumstance affecting the application of the principle. Authorities—*Ker* v. *Wauchope*; *Annandale* v. *Macniven*; *Nisbet's Trustees* v. *Nisbet*, *ut supra*; *Breadalbane* v. *Pringle*, 15th June 1841, 3 D. 357; *M'Innes* v. *Macalister*, 29th June 1827, 5 S. 801 (N.E.); *Peat* v. *Peat*, 14th February 1839, 1 D. 508.

This question having been taken to avizandum, at advising—

LORD JUSTICE-CLERK—The principle has been well settled in the law of Scotland, and has been confirmed and given effect to by many decisions, that when a beneficiary under a general settlement disposing of his whole succession claims his legal rights, and thereby is excluded from what the settlement provided for him, his share accrues to those who suffer by the claim. This doctrine was

applied in the cases of *Peat* in 1839, and that of *Nisbet*, in two separate aspects in which the question may arise. In the case of *Peat* the widow claimed her legal provision, and, on the principle of approbate and reprobate, she was held to have lost her right to a liferent provided for her by the settlement, which the Court held to accrue not to the fiars, but to the residuary legatees who were injured by the widow's claim. In the case of *Nisbet*, on the other hand, the settlement itself created and declared the forfeiture, which applied not only to the beneficiary who might quarrel the settlement, but to his children also, and annulled and revoked the provision in their favour in the event of the deed being challenged. But there also, although the provision in favour of the children of the beneficiary who challenged was entirely annulled, the Court held that the benefit of their share went to those who were injured, and not to the heir at law.

With one exception the present case is precisely that of *Peat*. There is here a general settlement, comprising the *universitas* of the testator's estate, by which life interests are bestowed on three of the children who have claimed their *legitim*, and are therefore excluded from taking their liferent right on the principle of approbate and reprobate. One of these children is himself the heir at law, and he claims the three unaccepted liferents. They are also claimed by the fiars as liberating the fee destined to them. And they are claimed by the residuary legatees on the ground that they alone suffer by the claim for *legitim*.

The only distinction between the cases, and the feature which gives some interest to the present question, is, that in the present case, although the settlement is general, the conveyance to the trustees is limited, and does not include either the liferent or the fee of the subjects in question, which are specially conveyed to the liferenters and fiars. It is maintained for the heir at law that the trustees have thus no title on which they can vindicate these liferents, and that the beneficiaries under the trust have as little; and that he, as heir at law, is entitled to take them as undisposed of.

I do not, however, think that this element in the case before us presents the slightest difficulty. The conveyance to the children who have claimed *legitim* is not rendered null by the claim having been made. The effect of the claim of *legitim* is to enable those who have an interest to maintain the settlement, and who suffer by the reprobatory act, to prevent those who have made the claim from also availing themselves of the provision under the settlement. But the heir at law, who is excluded by the settlement, is not injured by the reprobatory act. It is immaterial to him whether the funds in the hands of the trustees are applied to pay the *legitim* or to pay the residuary legatees. It lies solely with those who are interested to enforce the principle of approbate and reprobate; and if the residuary legatees have no interest in this fund, no other party seems to have a right to disturb the liferenters. In no view, as far as I can see, could the heir at law have come in. The case appears to be entirely ruled by that of *Peat*, in which Lord Mackenzie expressly states his opinion that although the residuary legatees had the right to exclude the widow from taking her liferent after claiming her legal provisions, on the doctrine of approbate and reprobate, that right would not have been competent to the fiars, who had lost nothing; and the case of the heir, who was excluded altogether, would have been of course stronger.

As the conveyance to the liferenters, therefore, was merely qualified by the equitable operation of the principle of approbate and reprobate, which is only open to those who take under the deed and suffer by the claim for *legitim*, their title is quite good to exclude the heir, and to fortify any deeds of assignation or conveyance which they may be bound to grant. In *Peat's* case Lord Mackenzie said that if any conveyance had been required the widow might have been ordained to grant it. That is the course which I think should be followed here. I think the claim for *legitim*, which disturbs the testator's settlement, carries with it as a consequence, if not as a condition, an obligation to communicate to those who are injured by it such right as the claimant might have taken by the settlement.

The argument for the heir might be logically more plausible, although not with any substantial variation in its effect, in such a case as that of *Nisbet*, in which a special forfeiture was provided against beneficiaries who had themselves done no act against the settlement. There, by the limits of the settlement, the grant was annulled and revoked by the occurrence of the resolutive condition, but the Court held, notwithstanding, that the parties injured by the partial reduction of the settlement *ex capite lecti* were entitled to the benefit of the forfeiture; and that on the ground that the settlement imported a contingent destination in their favour if the forfeiture took effect. The fact that the property was in form vested in the trustees gave facilities for applying this principle, but did not affect the principle itself, which would equally have applied had no trust intervened. How the title in such a case should be completed we need not consider in the view which I take of this case, because the liferenters are bound and are *in titulo* to convey. It is enough to say that as the right in such a case is clear, the law will find the means of enforcing it.

The other Judges concurred.

LORD COWAN was of opinion that the principle underlying the doctrine of approbate and reprobate was compensation for the injury inflicted, and not absolute forfeiture.

LORD BENHOLME and LORD NEAVES, on the other hand, were of opinion that the principle applicable to cases of this nature is the principle of *surrogatum*, so that the party injured by the repudiation of a settlement is entitled to the whole benefit conferred by the deed on the party repudiating, even although that benefit may be greater in value than the injury inflicted by the repudiation.

The remaining questions were subsequently discussed.

Mr SHAND and Mr BEGG, for the grandchildren born in the testator's lifetime, objected to the claim of Alfred Henry Falconer. The testator having fixed the period of vesting at the time of his death, grandchildren subsequently born could not take anything. Even in the ordinary case the members of a favoured class must be ascertained as at the testator's death. As the grandchildren were fiars *per capita*, there could be here no vesting

in a class for behoof of all who survived the period of distribution. The case of *Muir's Trustees* showed that vesting might take place in the grandchildren existing at the testator's death subject to a condition of survivorship. Authorities—*Baldwin* v. *Karver*, 1 Cowper's Queen's Bench Reports, p. 312; *Maxwell* v. *Wyllie*, 25th May 1837, 15 S. 1005; *Nimmo* v. *Murray*, 3d June 1864, 2 Macph. 1144; *Macdougall* v. *Macdougall*, 6th February 1866, 4 Macph. 372, and 6 Macph. (H.L.) 18; *Muir's Trustees*, 23d Oct. 1869, 8 Macph. 53.

Mr M'Laren and Mr Harper, for Alfred Henry Falconer, argued that it was the obvious intention of the testator to include all the grandchildren born before his widow's death. Such vesting as here took place was only in the grandchildren as a class, and the members of the class must be ascertained at the period of distribution. Authorities—*Wood* v. *Wood*, 18th January 1861, 23 D. 338; *Croom's Trustees* v. *Adams*, 30th November 1859, 22 D. 45.

The case was again taken to avizandum. At advising the opinion of the Court was delivered by—

Lord Cowan—Two questions remain for decision under the Reclaiming Note, the first as to the special legacy of £400, and the second as to the time when the residue of the estate is to be held to have vested in the residuary legatees.

On the first of these questions I concur in the view taken by the Lord Ordinary, and for the reasons succinctly stated in the note to his interlocutor. I cannot hold the intention of the testator to have been to keep up the £400 after the death of his son George Davidson, as a special legacy in favour of his lawful grandchildren. The effect of the codicil, dated in July 1868, which was written by the testator himself, was, I think, to leave the sum to fall into the general residue destined to his lawful grandchildren by his settlement, just as some other special legacies are appointed to do on the failure of the legatees. And the effect of the next codicil, dated November 1868, declaring that Thomas, the natural son of his deceased son George, should rank on the residue or remainder of the trust-estate along with his lawful grandchildren, was to place all of them on a footing of equality.

The second question is attended with more difficulty, and as to it I have arrived at a different conclusion from the Lord Ordinary.

The whole clause requires to be taken into view, that effect may be given to the several provisions it contains declaratory of the testator's intention; and the terms employed are to be construed according to their fair and usual import. Farther, where the testator has himself fixed the period of vesting by the terms of his deed, effect must be given to his declared intention in that respect, unless there be some clear declaration that the words employed are not to have their ordinary meaning and legal effect. In the clause for construction it appears to me (1) that we have a clear declaration of the testator's will that the beneficial interest conferred on his grandchildren shall be held to vest as at the date of his (the testator's) death; (2) that the beneficial interest, thus vested in his grandchildren, is subject to the condition that only those of them who survived the testator's widow should be entitled to share in the division of the estate then appointed to be made; and (3) that meanwhile,—between the period of vesting or the testator's death, and the period of division on the death of the widow,—the surplus income of the estate should be applied for the education and maintenance of the grandchildren, while in nonage.

The declaration of the testator as to vesting is expressed in terms which admit of no dubiety whatever. As at the period of his death, the interest conferred on his grandchildren is to vest in them—*i.e.* by necessary implication, in his grandchildren then existing, and consequently excluding *post nati*. No others could take vested interests but the individuals in existence at the death of the testator. And this result is corroborated, and indeed is alone consistent with the provision as to the disposal of the income of the trust-estate for the education and support of the grandchildren until the widow's death, when it is provided the estate should be divisible amongst the survivors of them. This is not a case where a liferent right is conferred upon the widow, entitling her to the whole annual proceeds of the estate. She had right only to a small annuity out of the annual proceeds. There was thus an annual surplus of income in the hands of the trustees, and the deed provides that such surplus shall from the period of the testator's death (as I read the deed), until the capital become payable to them on their arriving respectively at the age of twenty-one,—should the widow's death have then occurred,—be employed for behoof of the grandchildren. The words are—"declaring that, until that time shall arrive, the interest of their several *shares* shall be expended for their support and education," as the trustees might think best at the time, "and may be paid to their parents or lawful guardians for that purpose." This declaration as to the employment of the interest on the several shares to be taken by the grandchildren was obviously intended to take effect as from the testator's death. There is no declaration in the deed as to accumulation of the surplus interest during the widow's survivance; and yet, were the period of vesting to be held other than the testator's death, there would necessarily be such accumulation of interest, so long as she survived, in the hands of the trustees. Were the vesting to be regarded as postponed till her death this would be the inevitable result; and it might be that by her survivance until the grandchildren became of age no purpose would be effected by this anxious clause as to their education during their nonage, and prior to their obtaining payment of their shares of the capital. The true reading of the provision, in strict consistency with the declaration that the beneficial interests of the grandchildren were to vest at the testator's death, is that until their shares became payable on their majority, the income annually accruing from the trust-estate should be employed for the support and education of those grandchildren, among the survivors of whom, after his wife's death, the estate was appointed to be divided.

The period of vesting being thus fixed, the legal result, no doubt, is that *post nati* must be excluded from any share of the succession. This is a consequence which resulted in several of the cases referred to by the Lord Ordinary. The case of *Wood* v. *Wood*, 18th January 1861, and the decisions therein referred to, may be taken as illustrative of the rule—children born after the period of vesting being held excluded from the succession. But I may further observe that the period of vesting

contended for by the parties opposing the view now stated would not secure a division of the testator's estate among all the grandchildren who may hereafter be born. It would benefit only those *post nati* born before his wife's predecease; but as regards those born subsequently to her death, they would be excluded from the succession,—their birth being subsequent to the period of vesting, according to that view of the settlement.

Neither can I think it at all inconsistent with principle or authority that, although the testator's death be viewed as the period of vesting to the effect of fixing the grandchildren's right to the interest of their several shares during their non-age, the ultimate division of the capital should be confined to those of them alive at the wife's death, and the issue of such as may predecease taking *vi legis* as in right of their parents. The direction of the testator to this effect is clear, and must receive effect as qualifying that other declaration, that the right of the grandchildren should vest at his death. There is no incompatability in giving full effect to the intention of the testator, so explicitly declared as regards both of these matters. And the case of *Croom's Trustees*, 30th November 1859, referred to in the discussion, has an important bearing on this part of the argument.

On the whole, I am of opinion that the interlocutor on this point should be recalled.

The LORD JUSTICE-CLERK, LORD BENHOLME, and LORD NEAVES, concurred.

Agents—Morton, Whitehead & Greig, W. S.; Gibson-Craig, Dalziel & Brodies, W.S.; Renton & Gray, S.S.C.; H. & A. Inglis, W.S.; Ronald & Ritchie, S.S.C.; and Millar, Allardice & Robson, W.S.

COURT OF JUSTICIARY.

Saturday, July 15.

(Before Lords Justice-Clerk, Cowan, and Neaves.)

THOMSON, PETITIONER.

Bail—Forgery—5 and 6 Will. IV, c. 73. In an application by a panel, charged with the crime of forgery, to be admitted to bail—*held* that under § 2 of the Act 1835 the Court have a discretionary power to admit to bail, provided they are satisfied that such a proceeding is consistent with the ends of justice; and that it need not be shewn that the proceeding is essential to the ends of justice.

A petition was presented to the High Court of Justiciary by William Hamilton Thomson, Sheriff-Substitute of Inverness, presently a prisoner in the prison of Edinburgh upon a charge of forgery, praying their Lordships "to admit the petitioner to the privilege of bail, in terms of the Acts of Parliament thereanent." The reason stated by the petitioner in support of this application was, that his trial had been postponed from July 10th to August 17th to enable him to procure the evidence of two men, of the names of Grant and Davis, one of whom, he alleged, committed the forgeries in question; and that were he admitted to the privilege of bail he could render material assistance in tracing the above-named persons; and generally, in establishing his defence.

WATSON and MACINTOSH, for the petitioner, argued that under the common law any panel not accused of a capital crime was entitled to the privilege of bail, within certain restricted rates. Forgery was undoubtedly a capital crime down to 1832. In that year an Act was passed abolishing capital punishments for forgery. From that year down to 1835 forgery was on the same footing as any other crime to which an arbitrary punishment was attached. But in 1835 the statute 5 and 6 Will. IV, c. 73, was passed, which provides that no person committed to trial for forgery should be entitled to insist on liberation on bail, but that it should be in the power of the High Court to admit such persons to bail, provided it should appear to the Court that it was not inconsistent with the ends of justice to do so. It was clear, therefore, that Mr Thomson could not insist upon bail as a matter of right. But, on the other hand, the Court had the power, in their discretion, to admit him to bail, and it was contemplated by the statute that bail should be granted, unless it was made out by the Crown that the granting bail would defeat the ends of justice. Was there anything in this case which would render it inconsistent with the ends of justice to grant this application? On the contrary, there were circumstances here which rendered the application peculiarly appropriate. The social position of the panel was indeed peculiar, but that could only affect the amount of the bail required,—not debar him from the privilege altogether. The amount of the forgeries was not exceptionally large; while the nature of the defence was a peculiar one, and one which rendered it especially necessary that the panel should be at liberty before his trial. The success of the defence depended upon the tracing of two men, Davis and Grant, and as these were only known to Mr Thomson, it was evident that the efforts of those engaged in tracing them would be much retarded by Mr Thomson's being detained in prison, and the investigation could not proceed with that dispatch which was necessary if the defence was to be verified.

LANCASTER, A.-D., and BALFOUR, A.-D., for the Crown, opposed the application, on the ground that granting bail, in the circumstances of this case, might, and in all probability would, defeat the ends of justice. On the legal position of the case they differed from the view taken by the petitioner. Prior to 1832 forgery was a capital crime. The Act of that year rendered it no longer so, but the consequences of this soon impressed upon the mind of the Legislature the necessity of passing a farther statute on the subject of bail. The effect of that Act of 1835 was just to make forgery stand, as regarded the matter of bail, exactly in the position of a capital crime. It has always been in the power of this Court to grant bail in all cases, even in capital charges, but this power was one of a most exceptional kind, and only to be exercised in most extraordinary circumstances, where it was essential to the cause of justice that the panel be at liberty before standing his trial. They had searched the records of the Crown Office, and had not found any case of the Court granting bail, either in a capital charge or in forgery—the Crown opposing the application. There was no special ground in the present case for granting the application. And in a case of this kind they thought they were entitled to say that the decision of the Crown was entitled to the greatest possible respect and consideration from the Court, in dealing with such an application. They had carefully investigated the case, and they had arrived at the determination to refuse bail, actuated by nothing else