tained through the agency of the pursuer, the defenders should be assoilzied." On 29th October 1914 the Lord Ordinary (ANDERSON) sustained this plea, and assoilzied the defenders from the conclusions of the summons. The pursuer reclaimed, and the defenders were sequestrated in December 1914. The Court thereafter ordered intimation to be made to their trustee, who declined to sist himself as a party to the action.

The pursuer moved the Court in Single Bills to ordain the defenders to find caution.

Argued for the pursuer and reclaimer—The defenders should be ordained to find caution. This was not the case of a private trust deed, where the Court would not interfere, but of a sequestration which had been expressly distinguished as regards the requirements of finding caution—*Johnstone* v. *Henderson*, 1906, 8 F. 689, 43 S.L.R. 486; *Allan and Others (Smith's Trustees)* v. *M'Cheyne*, 1879, 16 S.L.R. 592; *Stevenson* v. *Lee*, 1886, 13 R. 913, 23 S.L.R. 649.

Argued for the defenders and respondents—The rule was clearly established that a bankrupt defender was not bound to find caution—*Taylor* v. *Rothwell and Others*, 1833, 6 W. and S. 301; *Ferguson* v. *Leslie*, 1873, 11 S.L.R. 16; Mackay's Manual, p. 169. There was no case where a successful defender had been called upon to find caution.

LORD JUSTICE-CLERK — In this case it seems to me that nothing has been stated that should take the case out of the scope of what was said in *Taylor's* case. The defenders have been successful in their defence, and have been assoilzied with expenses; and now the pursuer—he being the reclaimer, seeking to overturn the judgment of the Lord Ordinary—asks that they should be ordained to find caution because they have become bankrupt since the date of the Lord Ordinary's interlocutor. I think on the authorities we ought not to grant this motion.

LORD DUNDAS concurred.

LORD SALVESEN—I am quite of the same opinion. I think it is only in very exceptional cases indeed that a defender is ordained by the Court to find caution simply on the ground that he has become bankrupt and has a trustee administering his estates. But I know of no case where a successful defender has been ordained in the Inner House to find caution, and I should be very slow indeed to assist in establishing such a precedent.

LORD GUTHRIE—If the rule in *Taylor* is invariable, Mr Morton must fail; but even if it lays down only the usual practice he has suggested no circumstances whatever to take this case out of the usual practice.

The Court refused the motion.

Counsel for the Pursuer and Reclaimer—Morton. Agent—J. M'Kie Thomson, S.S.C.

Counsel for the Defenders and Respondents—Mackenzie Stuart. Agents—Balfour & Manson, S.S.C.

Friday, November 12.

FIRST DIVISION.

BROWN'S TRUSTEES *v.* GREGSON.

Succession—Election—Legitim — Will and Codicil—Clause of Forfeiture—Effect of Parent's Repudiation of Liferent on Gift of Fee to Children—Disposal of the Liferent.

A testator divided the whole residue of his estate amongst his seven children in equal shares, declaring the said bequests in each case to be in full of legitim, with a clause that if any of the children "shall repudiate this settlement and claim their legal rights . . ., then such child or children shall forfeit all right to any share . . ., and the share or shares of such child or children shall accresce and belong equally to my other children and their issue." By codicil he directed his trustees, instead of making over her share of residue to one of his daughters, to hold it and to pay her the income, "or in their discretion to pay and apply the said income or so much thereof as they may consider necessary for her behoof," and on her death to divide the share, with "any accumulations of income thereon," amongst her children then alive and the issue of predeceasers, and failing them his own children then alive and the issue of predeceasers. The daughter, who survived the testator and had two children alive, claimed legitim. *Held* (1) that the daughter's election to claim legitim did not affect the gift of the fee to the children, as it was independent of the bequest to the mother; and (2) that the income of the share during the daughter's life was carried by the destination in the forfeiture clause to the testator's other children, the direction to accumulate never having come into force owing to the repudiation of the liferent.

Robert Charles Brown of Sundaywell, in the county of Dumfries, and others, the trustees presently acting under the trust-disposition and settlement of the late James Brown, Esq., of Barlay, in the county of Kirkcudbright, dated 5th March 1901, and with several codicils registered in the Books of Council and Session, 18th March 1910, *first parties;* Anita Mary Angelica Latham Gregson, a minor, daughter of William Brice Gregson, residing at Tilton Catsfield, Battle, Sussex, with consent and concurrence of the said William Brice Gregson, as curator-at-law of his said daughter, and the said William Brice Gregson, as tutor-at-law of Edith Mary Evelyn Gelson Gregson, his daughter, a pupil, *second parties;* and Miss Christina Isabella Brown, care of Messrs J. & J. Turnbull, W.S., 58 Frederick Street, Edinburgh; the said Robert Charles Brown; Mrs Eliza Beatrice Brown or Maclachlan, wife of Norman Maclachlan, residing at Ardmeallie, Rothiemay; Mrs Jane Rosalind Dudgeon Brown or Davidson, wife of Leybourne Davidson, residing at York House,

Cullen; James Austin Brown, Estancia "Los Robles," Los Cardos, Argentine Republic; and Oswald Stanley Brown, East Tinwald, Lochmaben; the said Elizabeth Beatrice Brown or Maclachlan, and Jane Rosalind Dudgeon Brown or Davidson, acting with the consent and concurrence of their respective husbands as their curators and administrators - in - law, *third parties*, brought a Special Case in the Court of Session dealing with a share of residue of the testator's estate, the disposal of which, owing to Mrs Gregson, the mother of the second parties, having claimed legitim, was in doubt.

The Case set forth—"1. The deceased James Brown of Barlay, in the county of Kirkcudbright, died on 12th March 1910, domiciled in Scotland, survived by seven children, namely, Christina Isabella Brown, Mary Brown or Gregson, Robert Charles Brown, Elizabeth Beatrice Brown or Maclachlan, Jane Rosalind Dudgeon Brown or Davidson, James Austin Brown, and Oswald Stanley Brown. Mrs Gregson is the wife of William Brice Gregson; they have lawful issue living, *videlicet*, the said Anita Mary Angelica Latham Gregson, born 12th September 1899, and Edith Mary Evelyn Gelson Gregson, born 4th June 1907. . . .

"4. The fourth purpose of the *trust-disposition and settlement*, so far as not superseded by the failure of the third purpose, is in the following terms—'I leave and bequeath the whole residue of my estate, means, and effects hereby conveyed equally among all my children who shall survive me, . . . declaring that if any child shall predecease me leaving lawful issue, such issue shall be entitled equally among them to the share which their deceased parent would have taken had he or she survived me; and I declare . . . that the provisions above written, conceived in favour of my children, shall be accepted by them in full of legitim, portion natural, bairns' part of gear, executry or others whatsoever, which they or any of them can ask or demand by or through my decease, or in any other manner of way; and if any of them shall repudiate this settlement and claim their legal rights, or shall in any way prevent this settlement taking effect, then such child or children shall forfeit all right to any share of that part of my estate, means, and effects which I may dispose of by law, and they shall have right only to their respective legal provisions, and the share or shares of such child or children shall in that event accresce and belong equally to my other children or their issue.' . . .

"6. The said *codicil*, dated 20th November 1901, is in the following terms:—'I direct my trustees instead of paying and making over to my daughter Mrs Mary Brown or Gregson the share of residue of my estate, means, and effects bequeathed to her in the fourth purpose of said trust-disposition and settlement, to hold the said share and invest it in their own names for her behoof, and to pay the free income thereof to my said daughter during her life, or in their discretion to pay and apply the said income, or so much thereof as they may consider necessary for her behoof, and said income shall, if paid to my said daughter, be payable on her own receipt without the consent of her husband, and it shall be an alimentary provision and not affectable by her debts or deeds or the diligence of her creditors, or by the debts or deeds or diligence of the creditors of her husband: And on the death of my said daughter the share of residue retained as aforesaid, and any accumulations of income thereon in the hands of my trustees, shall be equally divided among the children of my said daughter then alive, and the issue of any who may have predeceased *per stirpes*, and failing issue of my said daughter it shall be divided equally among my own children then alive and the issue of any who may have predeceased *per stirpes*.'

"7. . . . Mrs Gregson intimated to the first parties that she declined to accept the provisions made in her favour by the said trust-disposition and settlement and codicil, and claimed her legitim out of the truster's moveable estate. . . . The consequence of Mrs Gregson having claimed her legal rights was to withdraw one-seventh of the amount of her legitim from each of the shares of the moveable estate. . . .

"8. The second parties *contend* that the election by Mrs Gregson to claim her legal rights did not involve forfeiture by her children of the provisions in their favour contained in the codicil of date 20th November 1901. They accordingly maintain that the first parties are bound, after having made payment to Mrs Gregson of her legitim, to divide the residue of the estate, including the proceeds of the Scotch heritage, . . . into seven shares, . . . to retain the capital of one of the said shares, hereinafter called 'Mrs Gregson's share,' during Mrs Gregson's lifetime, and to divide the income accruing thereon between that share and the shares of the third parties in the proportions by which the same respectively have been diminished by Mrs Gregson's election to claim her said legal rights, accumulating the portion of income falling to Mrs Gregson's share during Mrs Gregson's lifetime until the amount withdrawn from the said share in consequence of her claiming her said legal rights shall have been restored by way of equitable compensation, or at any rate so long as the law permits accumulation to be made.

"9. The third parties contend that Mrs Gregson's children have lost all rights under the said trust-disposition and settlement and relative codicil dated 20th November 1901 in consequence of Mrs Gregson having repudiated the conventional provisions in her favour and claimed her legal rights. The third parties accordingly maintain that they are entitled to immediate payment equally among them of the capital of Mrs Gregson's share with any interest which has accrued thereon. In the event of the Court holding that the provision in favour of the second parties under the said codicil has not been forfeited, the third parties contend with reference to the income accruing on Mrs Gregson's share that they are entitled during her lifetime to receive payment of

the whole of the said income equally among them. Alternatively the third parties maintain that the first parties are bound during Mrs Gregson's lifetime to divide the income of her share annually into seven equal parts, and to pay six of those parts to and among the third parties, and to accumulate the remaining one-seventh part with the capital of Mrs Gregson's share, all until the amounts withdrawn from the shares in consequence of the payment to Mrs Gregson of her legal rights shall respectively be restored by way of equitable compensation. . . ."

The *questions of law* were, *inter alia*—"1. Did the election by Mrs Gregson to claim her legal rights involve forfeiture by her children of the provisions in their favour contained in the codicil of date 20th November 1901? 2. In the event of the first question being answered in the affirmative, are the first parties bound to make immediate payment to the third parties equally among them of the capital of Mrs Gregson's share, with any interest accrued thereon? 3. In the event of the first question being answered in the negative—(*a*) Are the first parties bound during the lifetime of Mrs Gregson to pay over to the third parties equally among them the interest accruing on Mrs Gregson's share? or (*b*) Are they bound annually during Mrs Gregson's lifetime to pay six-sevenths of the income of the said share to and among the third parties, and to accumulate one-seventh of said income with the capital of Mrs Gregson's share until the shares of the third parties and Mrs Gregson's share respectively are compensated for the sums by which they have been diminished through Mrs Gregson's election to claim her legal rights? or (*c*) Are they bound to divide the income accruing on Mrs Gregson's share between that share and the shares of the third parties in the proportions by which the same have respectively been diminished through Mrs Gregson's election to claim her legal rights, paying to the third parties their respective portions of such income, and accumulating the portion thereof falling to Mrs Gregson's share during Mrs Gregson's lifetime until the amount withdrawn from the said shares respectively shall have been restored by way of equitable compensation?"

Argued for the third parties—The effect of the codicil read along with the will was to give Mrs Gregson's children a right which was conditional upon her acceptance of the liferent provision. This alone was consistent with the testator's intention, which was to provide for equal division of his estate amongst his children. Mrs Gregson's election to take legitim involved forfeiture of her rights under the will and codicil, and therewith forfeiture of her children's rights—*Campbell's Trustees* v. *Campbell*, 1889, 16 R. 1007, 26 S.L.R. 699. If, however, Mrs Gregson's election did not affect her children, she had forfeited her right to receive income, and there could be no accumulation of income by the trustees, as their title to accumulate never became operative when Mrs Gregson elected to take legitim, and the income of Mrs Gregson's share went to the third parties under the forfeiture clause.

Argued for the second parties—The gift of the fee to Mrs Gregson's children was independent of the gift of the liferent to her, and her election to take legitim did not affect their right—*Fisher* v. *Dixon*, 1831, 10 S. 55, 1833, 6 W. & S. 431; *M'Caull's Trustees* v. *M'Caull*, 1900, 3 F. 222, 38 S.L.R. 107; *Snody's Trustees* v. *Gibson's Trustees*, 1883, 10 R. 599, 20 S.L.R. 392; *Jack's Trustees* v. *Marshall*, 1879, 6 R. 543, 16 S.L.R. 326. Mrs Gregson forfeited not a liferent but so much of the income of one-seventh of the estate as the trustees chose to give her. It was impossible to say or value what that was, and consequently what passed to the third parties under the forfeiture clause. But the forfeiture clause and equitable compensation were inoperative, as the testator directed that if the trustees did not pay the income to Mrs Gregson they were to accumulate it, and they were bound so to do. *Campbell's Trustees* v. *Campbell, cit. sup.*, was inapplicable, as the terms of the deed were different. [Counsel on both sides admitted that, if there was forfeiture, no question of equitable compensation could arise.]

At advising—

LORD PRESIDENT—The testator by his trust-disposition and settlement bequeathed to his daughter Mrs Gregson a share of the residue of his estate equal to that which he gave to each of her brothers and sisters, and he declared that this provision was in full of legitim. Subsequently he made a codicil by which he revoked that bequest and substituted for it a bequest of the income of the share, and he directed his trustees to pay the capital to the children of Mrs Gregson who might be alive at the date of her death, and failing children the bequest was to go to his own children and the issue of any predeceasing child.

Now Mrs Gregson, not unnaturally, repudiated the provision made for her in her father's testamentary writing and claimed legitim, which was paid to her; and I think there is no doubt that in consequence of her repudiation she forfeited the provision made for her by her father.

The main question we have to decide is whether the forfeiture of her bequest extended to her children, and whether they too must be held to have forfeited the bequest of capital in their favour in consequence of their mother's repudiation of the provision made for her. Now the testator does not say that they are so to forfeit, and testators, as we are aware, not infrequently do say so.

I am of opinion that the forfeiture by the mother does not involve the forfeiture by the children of the bequest, and for the simple reason that the bequest to the children is separate and distinct and in no way conditioned upon anything that the mother either does or omits to do. Indeed, I say of the testamentary writings before us as a very eminent Judge (Lord Fullerton) in the case of *Fisher* v. *Dixon*, 1831, 10 S. 55, said of the testamentary writings there

under construction—"The effect of the deeds clearly is to create two distinct and independent rights—that of liferent in favour of the daughters, and that of fee in favour of the children of these daughters. . . . Now I conceive that it would be outstepping the limits of legitimate construction to connect with the surrender of legitim, not only the provisions of liferent created in favour of the daughters who had a right of legitim, but the provision of fee in favour of the children who had no such right, so as to raise by implication a condition affecting the bequest to the children."

In the words of Lord Meadowbank in the same case I say that "if I find that" the words of the testamentary writings before us "distinctly and unequivocally bear the construction of two separate provisions, the one a liferent grant with a condition annexed, and the other a right of fee quite unfettered by any condition, I cannot avoid sustaining the claim of the grandchildren."

Indeed, this case appears to me to be a typical case for the application of the principle laid down in *Fisher* v. *Dixon*. And that principle I find nowhere so fully and clearly stated as in the opinion of Lord M'Laren in the case of *M'Caull's Trustees* v. *M'Caull*, (1900) 3 F. 222, 38 S.L.R. 107, where he said (p. 229)—"There can be no doubt at this date of the principle to be applied to the determination of such cases. If the election and the consequences of election are determined by law, then the law is, that if the children take an interest independent of that of their parent, the election of the parent in no way affects the independent right of the child; but if the child's right is dependent upon that of the parent, as, for instance, if he takes by substitution, or if a sum is given to the parent for the maintenance of himself and his family, so that the two rights are inseparable, it may be that in such a case the forfeiture of a share given to the family would involve the children in the consequences of the forfeiture."

That principle, I think, is clearly applicable in the present case, and accordingly I am of opinion that the forfeiture of the mother's bequest, in consequence of her repudiation of the testamentary provision made for her, does not involve the forfeiture by the children of the separate and independent bequest in their favour.

The only question that remains for consideration is, where does the bequest which the mother has forfeited now go? For guidance I think we must turn to the terms of the settlement, which appear to me to be clear and distinct—If any of the children "shall repudiate this settlement and claim their legal rights, or shall in any way prevent this settlement taking effect, then such child or children shall forfeit all right to any share of that part of my estate, means, and effects which I may dispose of by law, and shall have right only to their respective legal provisions, and the share or shares of such child or children shall in that event accresce and belong equally to my other children or their issue."

Now reading the will and the codicil together, as I must do, as forming part of the testator's testamentary settlement, I think these words, "any share of that part of my estate which I may dispose of by law," quite aptly describes the benefit which any one of his children might reap under this settlement, and not inaptly describes the share of income which was bequeathed to Mrs Gregson in substitution for the bequest of capital contained in the settlement. And if that be so, then it seems to me plain that the testator has directed that this share of income should pass to and equally among his other children or their issue.

I disregard the discretionary power conferred upon the trustees by the codicil to accumulate. That power, of course, cannot now be exercised, and I am not entitled, I think, to assume that it would have been exercised.

Accordingly I propose to your Lordships that we should answer the first question put to us in the negative. The second question is superseded if the answer to the first question put is, as I think it ought to be, in the negative; and the third question, subsection (*a*), ought, I think, to be answered in the affirmative. I find it unnecessary to consider or to answer any of the subsequent questions put in this case, because if there is forfeiture it was conceded, I think, that there was no room for the application of the doctrine of equitable compensation. And in so far as relates to the Argentine property, the case seems to me not to have been correctly stated, and it certainly was not seriously argued. I give my opinion, therefore, on the footing that no answer is returned regarding the Argentine property.

LORD JOHNSTON—Mr James Brown, the truster, intended originally to give the residue of his estate, consisting of heritage in Scotland and in the Argentine, and of moveables, as a mixed estate, to those of his seven children who should survive him and the issue of predeceasers equally. And the division was to be, his wife having predeceased him, as at his death. The seven children all survived. This original intention he carried out by his trust-disposition and settlement, by which he declared this provision in full satisfaction of legal rights. But he also supplemented this declaration by a further declaration that "if any of them" (his children) "shall repudiate this settlement and claim their legal rights, or shall in any way prevent this settlement taking effect, then such child or children shall forfeit all right to any share of that part of my estate, means, and effects which I may dispose of by law, and they shall have right only to their respective legal provisions, and the share or shares of such child or children shall in that event accresce and belong equally to my other children or their issue."

So far as heritage in Scotland was concerned, no difficulty apparently arose, as the heir allowed it to go as part of the general estate.

So far as heritage in the Argentine was concerned, difficulty did arise, as the settlement was held inhabile to carry it—we are

not told for what reason—and the Argentine heritage came to vest as *ab intestato* in the seven children equally, and I understand that it has been realised and the proceeds divided among Mr Brown's seven children.

It is in the circumstances difficult to explain the object and effect of the clause of satisfaction and forfeiture, unless it was to secure that none of the heritage either in this country or the Argentine should be carried outside the operation of the settlement, for clearly no child would elect to take a share of legitim, that is, a seventh share of half of the moveables, rather than a seventh share of the whole moveable estate.

But Mr Brown thought proper to restrict his daughter Mrs Gregson by codicil to a liferent of her share, and to give the fee thereof to her children who should survive her, and the issue of predeceasers equally with a destination-over, not as in the settlement in the event of forfeiture to his other children, but to those of them who might survive Mrs Gregson and the issue of predeceasers. The codicil is a complete partial settlement of a definite portion of the testator's estate. It uses the terms "share of residue of my estate, means, and effects bequeathed to" Mrs Gregson *designative* merely to describe the fund dealt with, directs his trustees to hold and invest it in their own names for her behoof and to pay her the free income during her life, "or, in their discretion, to pay and apply the said income, or so much thereof as they may consider necessary, for her behoof" as an alimentary provision, and then provides that on her death "the share of residue retained as aforesaid, and any accumulations of income thereon" in the hands of the trustees should be equally divided among Mrs Gregson's children and the destinees-over in the manner I have already stated.

Mrs Gregson has repudiated the settlement, and taken her share of the Argentine heritage or its proceeds and her share of the legitim fund.

I concur in your Lordship's opinion that Mrs Gregson's reversion to her legal rights does not involve any forfeiture by her children of the testator's provision or bequest to them. The case is not distinguishable from *Fisher* v. *Dixon*, 6 W. & S. 431; *Jack* v. *Marshall*, 1879, 6 R. 543, 16 S.L.R. 326; and *Snody's Trustees*, 1883, 10 R. 599, 20 S.L.R. 392; while it is distinguishable from *Campbell's Trustees*, 1889, 16 R. 1007, 26 S.L.R. 699. I do not think it necessary to consider the case of *M'Caull's Trustees*, 3 F. 229, 38 S.L.R. 107, which is the only authority which might have created difficulty, because the terms of the deed and the circumstances are not identical. I agree therefore that the first query should be answered in the negative.

I experience, however, more difficulty than does your Lordship in determining what is to be done meanwhile with the income of the seventh share of what remains of the estate after Mrs Gregson had been satisfied, and which must, during her life, be retained by the trustees for her children or the destinees-over, whichever may ultimately come to take. It is, I understand, your Lordship's opinion that as Mrs Gregson has repudiated the settlement this income is forfeited and carried by the express destination of the original settlement at once to Mrs Gregson's brothers and sisters. I doubt whether this was the testator's intention, and his intention as evinced in his settlement and codicil read in combination must prevail.

Had there been a declaration of forfeiture, without a destination-over on the forfeiture, there would, I think, have been a case for equitable compensation, and in this equitable compensation the issue of Mrs Gregson would have shared as in the case of *Snody's Trustees*. But the testator has, by the destination-over in his original settlement, avoided the necessity of recourse to equitable compensation so far as that deed operates. My difficulty in following your Lordship arises from my doubt whether it was the testator's intention that the destination-over or forfeiture should follow through into the codicil which, as I have said, is a disposition complete in itself of a definite part of the estate, and that for the reasons, first, that what is maintained to accresce, viz., the income of Mrs Gregson's children's share of the estate, is not, in any view, the share of Mrs Gregson who forfeits. I accept that she does forfeit her claim to income. To that extent the declaration of forfeiture in the settlement continues of effect notwithstanding the change made by the codicil; though had the latter stood alone it would, I think, have been implied. But her claim to income was to income of one-seventh of the estate. What is maintained to accresce is the income of one-seventh of the estate after it is reduced by what Mrs Gregson has taken as her legal right. That is quite a different thing. On the one hand it is less, and on the other it includes something taken from each of Mrs Gregson's six brothers and sisters. And second, and more particularly, because just as the settlement is complete and provides a destination-over, which meets the case contemplated, viz., a bequest of the capital of residue to seven children, so the codicil is complete, and provides for the case which it contemplates, viz., a qualified liferent and fee, by the disposal of any accumulation of income on the fund to be retained for the children of Mrs Gregson in fee. The codicil does not direct accumulation. But it gives a direction from which possible resulting accumulation must be inferred, and it says that not only the share of residue retained, but also any accumulations of income thereon in the hands of the trustees, is at Mrs Gregson's death to be divided among her surviving children, whom failing, the destinees-over. Seeking, as we must, Mr Brown's intention, and considering the alteration which his codicil made, the question arises, Did he intend the destination-over on forfeiture of the settlement to step in and carry such accumulations to the destinees-over named in the settlement to the disappointment of his evident purpose that Mrs Gregson's children, and failing them the destinees-over of the codicil, should enjoy not merely the capital dealt with by the codicil, but

any accumulated fruits of that capital. It appears to me that the intention is clear, and that the clause in question as aptly covers income which Mrs Gregson cannot claim as it does income which the trustees may withhold from her.

I should myself, therefore, have been disposed to come to the conclusion that the application of the destination-over or forfeiture of the settlement would be repugnant to the intention of the codicil, and that the codicil being the testator's last word and complete in itself, must rule. But as I understand your Lordships are agreed, I do not carry my doubt the length of dissent.

I desire in conclusion to say that if I understand the circumstances aright, I think that the parties, including the trustees, have assumed against the children of Mrs Gregson a matter which is by no means clear. They seem to have thought that because the Argentine heritage was by Argentine law outside Mr Brown's settlement, therefore Mrs Gregson's children had no right to have the shares in that heritage or its proceeds of their uncles and aunts, who held by the settlement, brought into the fund for division as residue among all who took under the settlement. I think that it is a question which in the interest of the children of Mrs Gregson requires the attention of the trustees and of their guardian whether the principle of election has been properly applied. I refer to the Roxburgh case, *Kers* v. *Wauchope*, 1815, Hume 25, and 1819, 1 Bligh's App. 1. I give no opinion on the subject. I only wish to make it clear that in giving judgment on the case as presented, so far as I am concerned, we are not foreclosing the question to which I have adverted.

LORD MACKENZIE—The first question put to us is, "Did the election by Mrs Gregson to claim her legal rights involve forfeiture by her children of the provisions in their favour contained in the codicil of date 20th November 1901?" In my opinion the answer to that question should be in the negative. I do not consider it necessary to refer to any authorities in order to reach that result, because I think the plain language of the fourth purpose of the settlement and of the codicil of 1901 are sufficient by themselves. It is of course necessary in order to arrive at what the intention of the testator was to read these two together. If the question had been put to the testator, What is your daughter Mrs Gregson's share? that question, in my humble judgment, could have received only one answer—Mrs Gregson's share is limited to a liferent. The right of the children, on the other hand, is a separate and independent interest in the fee of the estate.

Mrs Gregson repudiated the settlement, and therefore, under the express language of the fourth purpose, forfeited her share—the right of liferent. All that was forfeited by the election to take her legal rights was her right to income. That cannot affect the right of the children, because I have been unable to see throughout the course of the argument how the forfeiture of a share given to A can operate the forfeiture of a share given to B. Therefore on that question I agree with the conclusion reached by your Lordship.

Then the question arises, what becomes of the income? The fact that Mrs Gregson's right to receive the income is gone in consequence of her repudiation seems to me to put an end to the direction to accumulate, because the direction to accumulate is directly dependent upon the direction to pay income to the daughter, and therefore the only destination of the income under the settlement is that it should go as directed under the concluding words of the fourth purpose. There being forfeiture it was admitted that there was no room for the principle of equitable compensation. Mrs Gregson's share in the event which has happened vests in and belongs equally to the other children. That results in branch (*a*) of the third question being answered in the affirmative.

Those are the only points that were argued, and as the other questions put in the case are dependent upon our taking the view that this is a case for the application of the doctrine of equitable compensation they do not arise.

LORD SKERRINGTON—The testator died on 12th March 1910 leaving a trust-disposition and settlement or will dated 5th March 1901 and a number of codicils, only one of which, that of 20th November 1901, is material to the present case. He was survived by seven children, one of whom was a daughter, Mrs Gregson, who claimed her legitim. She had two children, who with their father and guardian are the second parties to the case.

The third parties, who are the other six children of the testator, maintain that on a sound construction of the residue clause of the will Mrs Gregson's election to claim her legal rights involved the forfeiture by her children of the provision in their favour contained in the codicil of 20th November 1901. The clause of forfeiture in the residue clause of the will applies in terms to the children of the testator and to no one else, and there are no express words in the codicil extending the forfeiture to grandchildren. In the absence of clear and necessary implication to that effect, of which I can find no trace either in the will or in the codicil, I cannot come to the conclusion that the testator intended that a forfeiture incurred by one benficiary should prejudice another beneficiary.

Perhaps the most forcible way of stating the contention of the third parties is to say that every line of the codicil assumes that Mrs Gregson will both survive the testator and also elect to give up her legitim, and then to argue that such survivance and election are implied conditions which must be purified before the codicil with its bequest in favour of Mrs Gregson's children can come into operation. Mrs Gregson's survivance of the testator was assumed by the codicil, because the contingency of her predeceasing him leaving issue had already been provided for by the will. Equally her

willingness to give up her legitim was assumed in the codicil, because the trustees were there directed to hold and invest her share "for her behoof instead of paying" it to her, which latter they were not authorised by the will to do unless she elected to give up her legitim. Moreover, the direction to pay the income to Mrs Gregson during her life is consistent with the same assumptions on the part of the testator. It is, however, a *non sequitur* to argue that the operative bequest in favour of Mrs Gregson's children was impliedly subject to the condition that these assumptions should be proved by subsequent events to have been well founded.

I have come to the conclusion that in whatever form the argument may be stated for the third parties they have failed to demonstrate that the bequest of the fee to Mrs Gregson's children contained in the codicil was conditional on the bequest in favour of their mother taking effect. In short, the bequest to the children created a separate and independent interest within the meaning of the rule of *Fisher* v. *Dixon*, (1831) 10 S. 55, *aff.* 6 W. & S. 431, as followed and explained by the Lord President (Inglis) in *Jack's Trustees* v. *Marshall*, (1879) 6 R. 543, 16 S.L.R. 326, and *Snody's Trustees* v. *Gibson's Trustees*, (1883) 10 R. 599, 20 S.L.R. 392. Two cases were cited (*Campbell's Trustees* v. *Campbell*, (1889) 16 R. 1006, 26 S.L.R. 699, and *M'Caull's Trustees* v. *M'Caull*, (1900) 3 F. 222, 38 S.L.R. 107) in which an opposite conclusion was reached, and the bequest of the fee was held to be forfeited in consequence of the liferenter having claimed legitim. In both these cases the Court held that a clause directing the disposal of a child's "share" in the event of forfeiture had reference to the liferented fund and not merely to the interest of the liferenter. The language of the will in *Campbell's* case was very different from that which we have to construe in the present case, but it is less easy to distinguish the present case from that of *M'Caull's Trustees*. I respectfully agree, however, with Lord M'Laren in thinking that the judgment in which he reluctantly concurred in *M'Caull's* case cannot be regarded as a precedent in the construction of the wills of other testators.

For the reasons stated I am of opinion that the bequest in favour of the second parties was not forfeited, and that the first query must be answered in the negative. As regards the income of the second parties' share accruing during Mrs Gregson's lifetime, I see no difficulty in holding that by the terms of the residue clause of the will it was forfeited owing to Mrs Gregson's election to claim legitim, and was carried by the gift-over in favour of the other children of the testator. Accordingly query 3 (*a*) must be answered in the affirmative. It was suggested in argument that the income in question should be regarded as accumulations of income within the meaning of the codicil, and must be paid over to the fiars along with the capital on the death of Mrs Gregson. I negative this view upon the ground that the discretionary power conferred by the codicil on the trustees to withhold and accumulate a part of the income never came into effect in view of the forfeiture by Mrs Gregson of her life interest.

The remaining questions are superseded. None of them raises in proper shape any question in regard to the Argentine property, and no such question was argued before us. Accordingly our decision will not foreclose any separate question, if there be a question, with reference to that property.

The Court pronounced this interlocutor—

"Answer the first question of law therein in the negative: Find it unnecessary to answer the second question: Answer branch (*a*) of the third question in the affirmative: Find it unnecessary to answer any of the subsequent questions, and decern: Find all the parties to the case entitled to their expenses out of the general trust estate, and remit," &c.

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Counsel for the Second Parties—Wilson, K.C.—Paton. Agents—Alex. Morison & Company, W.S.

Counsel for the Third Parties—Constable, K.C.—Dykes. Agents—Macpherson & Mackay, S.S.C.

Wednesday, November 17.

COURT OF SEVEN JUDGES.

[Lord Hunter, Ordinary.

BUCHANAN *v.* TAYLOR.

Lease—Outgoing—Compensation for Improvements—Agreement that Compensation be Subject to Deduction of Value of Unexhausted Improvements Received by Tenant at Entry—Validity of Agreement—Agricultural Holdings (Scotland) Act 1908 (*8 Edw. VII, cap.* 64), *sec.* 5.

The Agricultural Holdings (Scotland) Act 1908, sec. 5, enacts—"*Avoidance of Contract inconsistent with Act.*—Subject to the foregoing provisions of this Act, any contract or agreement made by a tenant of a holding, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement comprised in the First Schedule hereto, shall be void so far as it deprives him of that right."

A lease between a landlord and the tenant of a farm provided that the value of certain unexhausted improvements which the tenant at his entry to the farm had received without payment, should form a deduction from any sum that might be found due to him as compensation on his waygoing. *Held* (*diss.* Lords Dundas and Skerrington) that the stipulation did not contravene the terms of the Agricultural Holdings (Scotland) Act 1908, section 5.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), enacts—Section 1