not appear to me to indicate an intention to sever the interest. It does no more than indicate what the law itself would dictate. In other words it is exactly the same as the expression found in the old case of *Barber* v. *Findlater*, 1835, 13 Shaw, 422, where, as Lord Glenlee observed, it would necessarily follow that when the bequest was joint each during their joint lifetime would take one-half. But if any doubt remained on the subject that doubt is solved by the direction to the trustees to pay over what he calls the "residuary sum" on the death of the last survivor of his two cousins. I cannot conceive any reason why the trustees should be directed to hold until the death of the survivor of the two cousins except for the purpose of providing for the life interest while either of them remained in life.

Accordingly it appears to me that we have here as clear a case as one could well imagine of a joint, and not of a separate, bequest. If we are to be guided by authorities, I imagine that the cases which come nearest to the present are the two old cases cited to us to-day—*Tulloch* v. *Welsh*, 1838, 1 D. 91, and *Barber* v. *Findlater*. I am unable to distinguish them, but on the words of the codicil taken by themselves I have no doubt that we ought to answer the first question put to us in the affirmative, and if we so do it will be unnecessary to answer the other questions.

LORD MACKENZIE—I concur, and upon the same grounds.

LORD SKERRINGTON—I also concur.

LORD JOHNSTON was not present.

The Court answered the first question of law in the affirmative, and found it unnecessary to answer the remaining questions.

Counsel for the First Parties—Ingram. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Second Party—Wilson, K.C.—Jas. Macdonald. Agents—Cornillon, Craig, & Thomas, W.S.

Counsel for the Third Party—Cooper, K.C.—Paton. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for the Fourth Parties—Hepburn Millar. Agents—W. & J. Cook, W.S.

Saturday, February 20.

SECOND DIVISION.

NIXON'S TRUSTEES *v.* KANE.

Succession—Election—Approbate or Reprobate—Forfeiture or Equitable Compensation—Res aliena.

A testatrix provided by her will that a provision to her daughters should be in full of all claims competent to them against her as executrix of their late father, or against his estate, or under his settlement. The daughters having claimed the amount due to them by their mother under their father's will, as well as their legal rights in their mother's estate, *held* that they had not forfeited their testamentary provisions absolutely, but only so far as necessary to make equitable compensation to the other beneficiaries under the will.

Christopher Johnston Bisset and others, the testamentary trustees of the deceased Mrs Hannah Smith or Kane or Nixon, who resided at Newport, Fife, *first parties*, and Miss Catherine Maria Kane, Mrs Paulina Kane or Burns, Mrs Adriana Kane or Henderson, and Mrs Esther Kane or Berman, four daughters of the testatrix, with the consent and concurrence of their respective husbands as their curators and administrators-in-law, *second parties*, presented a Special Case for the opinion and judgment of the Court as to whether the second parties having claimed their legal rights were entitled after equitable compensation had been made to participate as beneficiaries under the deceased's will.

By her *trust-disposition and settlement* the testatrix, who died on 4th April 1896, directed her trustees, thirdly, to apply the free annual proceeds and income of her means and estate or the residue thereof towards the education and maintenance of the second parties, and the survivors or survivor of them. The proceeds and income so provided were declared to be strictly alimentary and not assignable, and she provided further—"Which provision shall be accepted by my said daughters in full of all claim they can have against me as executrix of their father the late Paul Kane, or against his estate or under his settlement." She further provided that on the death of the survivor the trustees should divide the capital of her estate or the residue thereof among the children of the second parties, the division being *per stirpes* and the issue of those predeceasing taking their parent's share, and failing issue she directed that it should belong to the heirs and assignees of the last survivor.

The Case stated, *inter alia*—"5. . . . Each of the four daughters named in the third purpose of the said trust-disposition and settlement above referred to, shortly after they attained majority on or about 8th January 1897, 24th May 1900, 24th April 1902, and 23rd June 1903 respectively, and having been independently advised, elected to claim and receive their legal rights, and accepted payment thereof, amounting to the sum of £51, 16s. 8d. each. Each of said four daughters after said advice also elected to claim and received payment from the trustees of a sum of £200 which was due to them by the truster as executrix of the will of her first husband the said Paul Kane, he having left a legacy of that amount to each of said daughters by his will, and appointed the truster as executrix of his will. The said Paul Kane died on 24th May 1889, and the truster, as his executrix appointed by his will, took and retained possession of his whole estates, and immixed them with her own. The discharges granted by said four daughters for legitim narrate that the

daughters 'resolve and elect not to accept the provisions of the said trust-disposition and settlement' by Mrs Nixon, and refer to their granting of even date a discharge of the legacy of £200.

"6. The election of the said four daughters, who were the liferent beneficiaries under the said trust-disposition and settlement of the said deceased Mrs Hannah Nixon, to take their legal rights and payment of the sums due to them by the truster as executrix foresaid, resulted in the withdrawal from the trust estate of a total sum of £1007, 6s. 8d. The youngest daughter of the truster, being the said Esther Kane, granted discharges of her legitim and of said legacy of £200 on 12th September 1903. Since that date the whole income of the trust funds has been accumulated, and the accumulations have now reached the above sum of £1007, 6s. 8d.

"7. In the foregoing circumstances the question has arisen whether the second parties by claiming and accepting payment of legitim from the truster's estate, and of the said sums due to them by the truster as executrix of their deceased father, have forfeited all interest as beneficiaries under the said trust-disposition and settlement; or whether the trust estate having been compensated for the said sums withdrawn therefrom by the second parties, the first parties are now bound to resume payment to the second parties of the income of the trust estate."

The *questions of law* were—"1. Are the second parties now entitled to payment of the income of the trust estate, the sums paid to them having been made good to the trust estate? Or 2. Have the second parties by claiming and receiving payment of said sums forfeited all interest under the said trust-disposition and settlement?"

Argued for the first parties—By taking rights, legally competent to them, but involving repudiation of the terms of the will, the second parties had forfeited all right to benefit under the will—*Bonhotes* v. *Mitchell's Trustees*, May 27, 1885, 12 R. 984, 22 S.L.R. 648. Where beneficiaries repudiated a will in part they could not claim under it—*Douglas-Menzies* v. *Umphelby*, [1908] A.C. 224. The testatrix was entitled to put the daughters to their election of their father's legacy even though it did not belong to her—*Crum-Ewing's Trustees* v. *Bayly's Trustees*, 1911 S.C. (H.L.) 18, [1911] A.C. 217, 48 S.L.R. 401. An express forfeiture clause was not necessary to bring about this result. The case of *Gray's Trustees* v. *Gray*, 1907 S.C. 54, 44 S.L.R. 39, might be against this contention, but *Jacks' Trustees* v. *Jacks*, 1913 S.C. 815, 50 S.L.R. 536, which was later in date, was in its favour.

Argued for the second parties—The second parties were entitled to succeed, because where a will was upset by a beneficiary under it claiming his legal rights, then, notwithstanding a clause providing that the testamentary provision should be in full of legal rights, the person so claiming would be entitled to a beneficial interest under the will as soon as the disturbance caused by his election had been made good—*Gray's Trustees* v. *Gray*, *cit. sup.* The case of *Jacks' Trustees* v. *Jacks*, *cit. sup.*, founded on by the first parties, was not in point except as to a doubt expressed by Lord Johnston, which was not concurred in by Lord Kinnear. In any event, in the present case the second parties' election could not produce forfeiture, because the option put to them was not between their legal and testamentary rights but between their testamentary rights and a debt due to them by their mother. Such a condition would not be recognised—*Moon* v. *Moon's Trustees*, 1909 S.C. 185, 46 S.L.R. 165.

At advising—

LORD GUTHRIE—[*After stating the facts of the case*]—On the deceased's death it is clear that the second parties were put to their election. They were entitled to take their liferent provisions under the settlement, but in that case they would manifestly have no right either to the legacies left to them under their father's will or to their legal rights. Or they could enforce payment of those legacies, in which case they would lose their liferent provisions under their mother's will, but would be entitled to claim their legal rights. They elected, under independent advice, to demand from the first parties (contrary to the express terms of their mother's will) the sums due to them under their father's settlement; and they also claimed their legal rights in their mother's estate, which claim was inconsistent by implication with the generality of their mother's will, and was inconsistent in addition with the express provisions to them therein of the liferent of the whole residue of her estate. The necessity in these circumstances for election follows necessarily from the application of the ordinary principles of the law of approbate and reprobate, and so do the results of election. So far as the legacies were concerned, the second parties had, in their own right and independently of their mother's settlement, a *jus crediti* against the testator's estate for payment of the legacies which she was due to them as executrix of their father's will. The testatrix's attempt to prevent enforcement of that *jus crediti* was truly disposing of a *res aliena*, and the principle of election applied—*Bonhotes*, 12 R. 984; *Douglas-Menzies*, [1908] A.C. 224; *Crum-Ewing's Trustees* v. *Bayly's Trustees*, 1911 S.C. (H.L.) 18, [1911] A.C. 233.

But the question remains whether the case is not one to which the doctrine of equitable compensation is applicable. I am of opinion that it is. While in law the consequence of the second parties' election would have been that the bequests, which they had elected not to take, would have fallen into residue or intestacy, the consequence in equity was merely that compensation fell to be made out of the conditional bequest to those who suffered, and to the extent to which they suffered, by the second parties' non-compliance with the condition, which was express, as to the legacies under

Paul Kane's settlement, and with the condition, which was implied, as to the second parties' right to claim their legal rights.

So far as the second parties claimed their legal rights, contrary to the exclusion implied by the generality of the settlement, and contrary to the provision to them of a liferent of the whole residue, the case seems to me indistinguishable from *Macfarlane's Trustees*, 9 R. 1138, 19 S.L.R. 850. And so far as the second parties claimed the legacies due to them under their father's will, contrary to the express provision of their mother's settlement, the case seems to be ruled by *Gray's Trustees*, 1907 S.C. 54. It is true that the question of equitable compensation has ordinarily arisen in the cases of widow or children, when the choice has been between conventional provisions and legal rights. But I see no sufficient reason why the doctrine should not apply in the absence of relationship between the testator and the beneficiary, and in the case where the exclusion applies to estate of the beneficiary, which it is not in the power of the truster directly to affect. The doctrine is stated quite generally in the series of cases beginning with the case of *Kers* v. *Wauchope*, 1 Bligh 1, the first Scotch case in which the doctrine of equitable compensation seems to have been mooted. In that case Lord Eldon said—"In our Courts we have engrafted upon this primary doctrine of election the equity, as it may be termed, of compensation. Suppose a testator gives his estate to A, and directs that the estate of A, or any part of it, should be given to B. If the devisee will not comply with the provisions of the will the Courts of equity hold that another condition is to be implied as arising out of the will and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A, in consideration of his giving his estate to B; if A refuses to comply with the will, B shall be compensated by taking the property, or the value of the property, which the testator meant for him out of the estate devised, though he cannot have it out of the estate intended for him."

It was argued for the second parties that the case of *Gray's Trustees* was wrongly decided, and reliance was placed on certain *obiter dicta* in the subsequent case of *Jacks' Trustees*, 1913 S.C. 815, in which it was suggested that such words as those in Mrs Nixon's settlement, by which the second parties are put expressly to their election (which are substantially identical with those in *Gray's Trustees*), ought to be held equivalent to a clause of forfeiture, with the result that the conventional provisions became finally and to all effects a lapsed interest. But, without indicating any doubts as to the soundness of the judgment in *Gray's Trustees*, it is enough to say that until that case is disapproved by a full bench or by the House of Lords it is binding on this Court.

I am therefore of opinion that the first question should be answered in the affirmative, and the second question in the negative.

LORD DEWAR—I am of the same opinion. I think this is a case in which the doctrine of equitable compensation ought to be applied. In *Naismith* v. *Boyes*, 1 F. (H.L.) 79, 36 S.L.R. 973, it was held that a declaration by a testator that certain provisions which he had made to his wife and children were to be "in full of all claims for terce, *jus relictæ*, legitim, and otherwise," was to be construed as excluding only such claims as might conflict with the testament. Lord Watson said that in inserting the clause the testator "had no object in view except to protect the settlement by preventing the enforcement of these claims to the disturbance of the will and to the detriment of the beneficiaries whom he had selected." If the words used at the end of clause 3 in this case are construed in a similar sense, they only mean that the second parties were barred from making such claims against Paul Kane's estate as would prevent the true intention of the testatrix being carried out. I do not think that the claims which were made had that effect. The will is very simple and clear. Mrs Nixon's obvious intention was to benefit her daughters. Her scheme was to provide a fund—consisting of all her own estate and the estate of her first husband Paul Kane, which was in her hands—for the alimentary liferent use of her daughters, and to their issue and failing issue to the heirs or assignees of the last surviving daughter in fee. That is practically the whole will, and the main purpose and intention was to preserve the fund for the maintenance and comfort of her daughters during their lives. Nothing has been done which prevents this purpose or any other purpose receiving effect. The claims made temporarily diminish the fund, but the amounts withdrawn have now been replaced. No one has suffered or will suffer in respect of these claims. The fund is intact and the will can now operate on all that it was intended to operate upon. If in these circumstances it were held that the second parties had forfeited their rights under the will, the main purpose—one might almost say the only purpose—which the testatrix had in view would be defeated. I am accordingly of opinion that the second parties are entitled to payment of the interest of the trust estate.

LORD JUSTICE-CLERK—I am of the same opinion as your Lordships. I cannot doubt that this is a case to which the doctrine of equitable compensation applies. The fact that the daughters took their legal rights no doubt had the effect in the meantime of affecting the fund adversely to the purposes. But the fact to-day is that the fund is as full as it was before the legal rights claims were satisfied. I cannot therefore doubt that the position from that time forward is the same as it would have been had the daughters not taken their legal rights. And that being so I can see no ground on which it could be held that the doctrine of equitable compensation in favour of the daughters should not apply. I concur in full in what has been expressed by your Lordships in your opinions.

LORDS DUNDAS and SALVESEN were sitting in the First Division.

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

Counsel for the First Parties—Sandeman, K.C.—Garson. Agents—Alexander Morison & Company, W.S.

Counsel for the Second Parties—Anderson, K.C. — W. T. Watson. Agents — Macpherson & Mackay, S.S.C.

Wednesday, February 24.

FIRST DIVISION.

[Bill Chamber.

GLASGOW INSURANCE COMMITTEE *v.* SCOTTISH INSURANCE COMMISSIONERS.

Statute — Construction — Jurisdiction — National Insurance Act 1911 (1 *and* 2 *Geo. V, cap.* 55), *secs.* 59 (5), 65—*Regulations "for Carrying this Part of this Act into Effect" — Power of Court of Session to Review such Regulations.*

The National Insurance Act 1911, sec. 65, enacts—"The Insurance Commissioners may make regulations for any of the purposes for which regulations may be made under this part of this Act or the schedules therein referred to, and for prescribing anything which under this part of this Act or any such schedules is to be prescribed, and generally for carrying this Part of this Act into effect, and any regulations so made shall be laid before both Houses of Parliament as soon as may be after they are made, and shall have effect as if enacted in this Act: Provided that if an address is presented to his Majesty by either House of Parliament within twenty-one days on which that House has sat next after any such regulation is laid before it, praying that the regulation may be annulled, His Majesty in Council may annul the regulation, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder."

Held (*diss.* Lord Johnston) that the Court of Session had no jurisdiction to review any regulations made under the provisions of the above section, and that such regulations could only be reviewed by the procedure provided in the section.

Institute of Patent Agents v. *Lockwood*, June 11, 1894, 21 R. (H.L.) 61, 31 S.L.R. 942, *followed.*

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), enacts—Section 59 (5)—"Any Insurance Committee may, and shall if so required by the Insurance Commissioners, combine with any one or more other Insurance Committees for all or any of the purposes of this Part of this Act, and where they so combine the provisions of this Part of this Act shall apply with such necessary adaptations as may be prescribed."

Section 65 is quoted (*supra*) in the rubric.

The Insurance Committee for the Burgh of Glasgow, constituted under the National Insurance Act 1911 and the National Insurance Act 1913 (3 and 4 Geo. V, cap. 37), *complainers*, brought a note of suspension and interdict against the Scottish Insurance Commissioners, constituted under the foresaid Acts, *respondents*, "to interdict, prohibit, and discharge the respondents and all others acting by their authority or for their behoof from following forth or acting upon or taking any steps to carry into effect the National Health Insurance (Drug Accounts Committee) Regulations (Scotland) 1914, professing to be made by the Scottish Insurance Commissioners under section 59 (5) and section 80 of the National Insurance Act 1911, and dated 19th December 1914, and from laying or authorising or instructing the laying of the said regulations before both Houses of Parliament or either House of Parliament, and to ordain the respondents to recall, cancel, and countermand any instructions or directions or requests already given by them either directly or indirectly for carrying or taking any steps to carry into effect the said regulations, or for laying or authorising or instructing the laying of the said regulations before both Houses of Parliament or either House of Parliament."

The complainers pleaded—"(1) The said regulations being *ultra vires* of the respondents, the complainers are entitled to interdict as craved. (2) The said regulations being an invasion of the statutory jurisdiction and the rights of the complainers, they are entitled to interdict as craved."

The *Regulations* in question, dated 19th December 1914, were for the alleged purpose of giving effect to a resolution of the National Insurance Commissioners for Scotland to require the Insurance Committees in Scotland to combine as from 1st January 1915 for the purpose of establishing a central organisation to be known as the Drug Accounts Committee.

On 2nd February 1915 the Lord Ordinary on the Bills (ANDERSON) pronounced this interlocutor—"Allows the note to be amended as proposed, and this having been done, ordains the respondents, pending the hearing of the case on answers, to recall, cancel, and countermand any instructions or directions or requests already given by them, either directly or indirectly, for laying or authorising or instructing the laying of the regulations referred to before both Houses of Parliament or either House of Parliament."

Opinion.—"I think it is only right to stop the further procedure of these regulations through the House of Commons, because if they go through the House it is quite clear, on the case of *Lockwood*, that the complainers will be debarred from having the legal question which they have raised tried. The opinion of certain Judges of the House of Lords in the case of *Lockwood*, which was a case very similar to this,