der could have been called upon to pay for what has been done here under the authority of the Sheriff, which exceeds largely anything that could properly be called repair or upkeep.

LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court recalled the interlocutor of the Sheriff-Substitute of 21st September 1898, and all subsequent interlocutors, sustained the defences, and assoilzied the defender from the conclusions of the action, and decerned.

Counsel for the Pursuer—Jameson, Q.C. —Cullen. Agent—F. J. Martin, W.S.

Counsel for the Defender—Dundas, Q.C. — Cook. Agents — Simpson & Marwick, W.S.

Saturday, March 3.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GUNN'S TRUSTEES *v.* MACFARLANE.

Succession — Bequest of "Free Residue" — Reduction of Amount of Bequest by Legitim Claims — Equitable Compensation.

A testatrix left the free residue of her estate to be divided into three shares, and held for her three sons, A, B, and C in liferent, and their children in fee, one share to each son and his children, these provisions being declared to be in full of all their claims against her estate. She was survived by A, B, and C, and by three daughters. The three daughters claimed legitim. A repudiated the settlement, and also claimed legitim. B and C accepted the provisions in their favour. Before any division of the estate had been made, A and B died without issue, and the shares provided for them and their children fell into intestacy. In a multiplepoinding raised to ascertain the rights of the parties, C contended that he and his children were entitled to the share of the residue bequeathed to them without any deduction being made to meet the claims for legitim, or alternatively, that they were entitled to receive as equitable compensation, out of the sum set free by the death of his brothers without issue, such a sum as would make his and his children's share equal to what it would have been before the residue was reduced by payments of legitim.

Held that the free residue of the testator's estate consisted of what remained after the claims for legitim had been satisfied, and that if C and his children got their share of the free residue so ascertained, they got all that the will gave them, and thus no room was left for the application of the principle of equitable compensation.

Mrs Agnes Jane Goodsir or Macfarlane or Gunn died on 17th May 1895, leaving a trust-disposition and settlement dated 11th August 1893. By the third, fourth, and fifth purposes of the deed she left the free residue of her means and estate to her three sons in liferent and their children in fee, in the following proportions:—four-tenths for Malcolm David Macfarlane and his children, three-tenths for Alexander Goodsir Macfarlane and his children, and three-tenths for William Macfarlane and his children. The foregoing provisions in favour of the three sons were declared to be in full of their whole claims against the truster's estate, and any son repudiating the settlement was to forfeit for himself and his issue all claims to a share of the truster's estate, and have right only to his legal provisions.

Mrs Gunn was survived by six children, viz., the three sons named in the deed, and three daughters, Mrs Agnes Goodsir Macfarlane, Mrs Helen Macfarlane or Horne, and Miss Eliza Macfarlane.

Before the residue of the trust-estate had been ascertained Malcolm David Macfarlane died without issue on 25th September 1895 leaving a trust-disposition conveying his whole estate to trustees. His trustees repudiated the settlement, and claimed his legal rights, The three daughters of the truster also claimed legitim. Alexander Goodsir Macfarlane and William Macfarlane accepted the provisions in their favour in the truster's settlement as in full of their claims against her trust-estate.

Questions as to the division of the trust-estate having thus arisen, Mrs Gunn's trustees on 19th August 1896 raised an action of multiplepoinding for their determination.

During the dependence of the action Alexander Goodsir Macfarlane died on 6th March 1898 without leaving issue, and an executor-dative was appointed to administer his estate. By the death of Malcolm David Macfarlane and Alexander Goodsir Macfarlane, both without leaving issue, seven-tenths of the capital of the truster's estate became undisposed of by her settlement. William Macfarlane, the remaining son of the testator, was a widower, and had two sons both in pupillarity.

Claims in the multiplepoinding were lodged by Mrs Gunn's trustees, the marriage-contract trustees of Mrs Agnes Goodsir Macfarlane on her behalf, the marriage contract trustees of Mrs Helen Macfarlane or Horne on her behalf, Miss Eliza Macfarlane, the trustees of Malcolm David Macfarlane, the executor-dative of Alexander Goodsir Macfarlane, and William Macfarlane.

By a series of interlocutors, the last of which was dated 2nd December 1899, the Lord Ordinary (KINCAIRNEY) ranked the claimants in the trust-estate by findings which by implication showed the following results:—The three daughters of the testator and the trustees of Malcolm David

Macfarlane were found entitled to legitim out of the whole estate: Three-tenths of the residue of the estate, after payment of the above legitim, was to be held by Mrs Gunn's trustees for behoof of William Macfarlane in liferent and his children in fee, William Macfarlane and Alexander Goodsir Macfarlane's executor-dative were found entitled to legitim out of the estate subject to fulfilment of the trust purposes so far as still subsisting, and seven-tenths of the residue of the estate after payment of the above legitim, which had fallen into intestacy by reason of the deaths of Malcolm David Macfarlane and Alexander Goodsir Macfarlane without issue, was divided equally among the six children of the truster or their representatives as intestate succession.

Mrs Gunn's trustees reclaimed, and argued—The Lord Ordinary had found that the three-tenths of the residue which they were to hold for William Macfarlane and his children was subject to deduction of the legitim claimed by the three daughters and the trustees of Malcolm David Macfarlane. They maintained that the three-tenths was not subject to this deduction. Mrs Gunn had by her will disposed of her whole estate including the legitim fund, and William Macfarlane and his children were entitled to three-tenths of the estate under deductions of debts as distinct from legitim, if the amount of the estate rendered it possible for them to get such proportion and also for the trustees to pay the legitim. By the death of Malcolm David Macfarlane and Alexander Goodsir Macfarlane without children the trustees had now ample funds, out of which they could pay the legitim demanded without encroaching on the three-tenths. Claims for legitim could be paid out of intestate succession—*Hamilton's Trustees* v. *Boyes*, May 27, 1898, 25 R. 899, *aff.* July 28, 1899, 36 S.L.R. 973. The situation was now the same as if Malcolm and Alexander had predeceased the testator and partial intestacy had resulted at the time of her death. In any event the principle of equitable compensation required that, if the three-tenths were reduced by reason of claims for legitim, it should be increased to the same extent from any estate of the testator's which had not been disposed of.

Argued for the claimants the three daughters and their representatives and the trustees of Malcolm David Macfarlane—The reclaimers' present argument had not been stated before the Lord Ordinary and was unsound. The truster had given William Macfarlane and his children three-tenths of the free residue of her estate, *i.e.*, after debts had been deducted. Claims for legitim were debts—*Tait's Trustees* v. *Lees*, July 8, 1886, 13 R. 1104. So that William Macfarlane and his children were only entitled to three-tenths of the value of the estate after legitim had been deducted. The estate out of which the trustees now proposed to pay the legitim had fallen into intestacy after the date of the truster's death, and it was impossible to maintain that legitim which was due at the date of death could be taken from such a source. The principle of equitable compensation did not apply. It only applied where the doctrine of forfeiture also applied. They did not forfeit by claiming legitim any part of the testator's estate which by reason of events subsequent to her death fell into intestacy.

At advising—

LORD TRAYNER—The question which we are asked to decide under this reclaiming-note does not appear to have been argued before the Lord Ordinary, and I think it was stated at the bar that it had not. At all events, the counsel for the reclaimers did not point out to us any specific finding by the Lord Ordinary which he asked us to recal. The question is, no doubt, decided by implication by the Lord Ordinary in the ranking upon the fund *in medio*, which he has given to certain of the claimants, but not, as I have said, specifically. The question I understand arises thus—Under the will of the late Mrs Gunn, her son William Macfarlane is entitled to a liferent and his children to a fee of three-tenths of the free residue of her estate. Some of her children not provided for under Mrs Gunn's will at all, have claimed their legal rights, and the representatives of at least one of her children, in whose favour certain provisions were made in the will, have renounced these provisions and claimed their legal rights instead. The result of this has been to reduce the residue, and William (I treat him as the claimant for the sake of brevity) has claimed (1) that he shall be ranked on the fund *in medio* for the amount of three-tenths of the residue before it was reduced in the manner I have described, or otherwise (2) that he should be ranked on the fund for such sum, by way of equitable compensation, as will make three-tenths of the reduced residue equal to three-tenths of the unreduced residue. He says—and I take it to be the fact—that the trustees of Mrs Gunn have funds in their hands which will enable them to pay this compensation. In my opinion William Macfarlane is not entitled to what he claims under either of these heads.

William's right under his mother's will is to three-tenths of her "free residue." But free residue is the residue after all legal claims upon the estate have been satisfied, and therefore after all claims of legitim have been satisfied which are due by the estate to the testator's children. The deduction of claims for legitim does not therefore reduce the "free residue," for the free residue can only be ascertained after such deduction has been made. William, however, contends that in leaving him three-tenths of the free residue, Mrs Gunn anticipated that no such claim as legitim would be made on the estate, and that she intended him to have three-tenths of the estate as she bequeathed it. This assumed intention, however, cannot be regarded, for Mrs Gunn had no right to test upon the legitim fund. Of that estate which she could test upon, but only of that estate, she left William three-tenths of the free residue, whatever that might be, and he is

receiving that provision in full. Under the provisions of the will he can get no more. And that disposes of the second head of his claim. For if he has got all that the will gave him there is no room for any compensation. Getting all that the will gave him, and therefore suffering no loss by the other children's claim, there is nothing to compensate. I therefore think the reclaiming-note should be refused.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD MONCREIFF was absent.

The Court adhered

Counsel for the Pursuers, Mrs Gunn's Trustees, and for the Claimants William Macfarlane and Alexander Goodsir Macfarlane's Executor-Dative—Chree. Agents —Scott Moncrieff & Trail, W.S.

Counsel for the Claimants, the Marriage-Contract Trustees of Mrs Helen Macfarlane or Horne—Blackburn. Agents—Gillespie & Paterson, W.S.

Counsel for the Claimants, the Trustees of Malcolm David Macfarlane—Watt. Agents —Morton, Smart, & Macdonald, W.S.

Counsel for the Claimants, the Marriage-Contract Trustees of Mrs Agnes Goodsir Macfarlane and Miss Eliza Macfarlane—Kincaid Mackenzie — Balfour. Agents—Blair & Cadell, W.S.

Saturday, March 3.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

HURST *v.* BEVERIDGE.

Bankruptcy — Sequestration — Discharge — Assignation of Pension for Debt—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 146 *and* 149.

A bankrupt's estates were sequestrated in 1896. His chief asset was a life pension of £266 from the Board of Customs, and of this £120 a-year was, with the consent of the Commissioners, assigned to the trustee on the bankrupt's estate for payment of the latter's debts. In 1899, 10s. in the £ having been paid to his creditors, the bankrupt petitioned for his discharge, with a view to having the assignation of his pension recalled under sec. 149 of the Bankruptcy (Scotland) Act 1856. The petition was opposed by certain of his creditors.

The Court *refused* the petition *in hoc statu.*

In October 1899 John Hurst, an undischarged bankrupt, presented a petition to the Sheriff of the Lothians praying the Court to pronounce a deliverance finding the petitioner entitled to his discharge, and on again considering this petition, with the declaration or oath made by the petitioner, in terms of the 146th section of the said Bankruptcy (Scotland) Act 1856, and on being satisfied with said oath or declaration, to pronounce a deliverance discharging the petitioner of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration, and thereafter to recal the deliverance, dated 19th August 1896, under which the Commissioners of Her Majesty's Customs, London, consented to payment being made to the trustee on the petitioner's estate of a sum of £120 per annum out of the pension payable to petitioner.

The facts of the case were set forth as follows in the report of James Craig, C.A., Edinburgh, trustee on the sequestrated estate of the bankrupt, which was produced and referred to in the petition: —"The estates were sequestrated in the Sheriff Court of the Sheriffdom of the Lothians and Peebles at Edinburgh on the bankrupt's own petition on 27th May 1896. The estates disclosed consisted of a small quantity of furniture which had previously been removed from bankrupt's house to an auction sale-room for disposal by public roup. This furniture was subject to a claim at the instance of the landlord for rent, and the expenses of a sequestration for rent. The bankrupt disclosed an income of £266 per year of pension from Her Majesty's Board of Customs, and liabilities were stated at £543, 7s. 1d. The liabilities consisted of claims for money lent and household accounts, and the trustee feels that as the bankrupt had for a considerable time prior to his sequestration been earning a good income, his financial embarrassments were caused by extravagance. By agreement with the trustee the bankrupt assigned £120 per annum out of his stipend or salary, and the trustee, with the concurrence of the bankrupt, presented a petition in the Sheriff Court at Edinburgh, in terms of section 149 of the Bankruptcy (Scotland) Act 1856, that part of the said pension be paid to the trustee for behoof of the creditors, and a deliverance was pronounced appointing the petition and interlocutor to be laid before the Commissioners of Her Majesty's Customs in order that they might give their consent in writing to the sum of £120, or such other sum as the said Commissioners might consider reasonable, to be paid to the trustee, in order that the same might be applied in payment of the debts of the bankrupt. After consideration the Commissioners of Customs consented to the same being paid to the trustee, and the trustee has regularly each month received £10 from the Commissioners. The trustee has already divided in all amongst the creditors dividends equal to 7s. 4d. per £ on the claims as lodged, and has declared a further dividend of 2s. 6d. per £ payable on 27th September current."

In terms of section 146 of the Bankruptcy (Scotland) Act 1856, the trustee reported "that the aforesaid John Hurst has complied with all the provisions of the statute; that he has made a fair discovery and surrender of his estate; that he has attended the diet for his examination; and that his bankruptcy has arisen