to appear and defend himself, but all that the petitioners say is that his mode of winding-up this business is not a good one, and is prejudicial to their interests. That, it appears to me, is a question of accounting, and in cases where the Court consider a remit to an accountant to be necessary, it is not to be assumed that the consent of parties is required in order to make the report binding upon them. The object of the report is merely to bring the matters of fact in the case before the Court in a convenient form.

We have in the Messrs Scott's report quite sufficient to show us how matters here really stand. The Lord Ordinary has given effect to this report by appointing a judicial factor upon this estate, and I am of opinion that we ought to adhere to that interlocutor.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Petitioners—C. S. Dickson—Sym. Agents—Torry & Sym, W.S.

Counsel for the Respondents—W. C. Smith. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, March 20.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

DUNCAN AND OTHERS (HEWIT'S TRUSTEES) *v.* LAWSON.

Succession—Bequest to Charity—Mortmain Act (9 Geo. II. cap. 36)—Heir-at-Law—Election.

A truster whose estate included freehold and leasehold property in England, empowered his trustees to sell his whole estate, and directed them to dispose of the residue thereof by paying legacies, including certain to his heir-at-law, and to divide the balance among various charitable institutions. The heir-at-law accepted payment of some of the legacies bequeathed to him.

It was established by an opinion of the Court in England that in virtue of the Mortmain Act the bequests to charitable institutions, in so far as they were payable out of the English freehold and leasehold estates, were null and void; that in the event of the trustees exercising the powers of sale of these estates conferred upon them by the truster, the bequests would still be null and void in so far as payable out of the proceeds; that the Court would hold these bequests to be void whether the heir-at-law made claim to the freehold estate or not; and that even in the event of his waiving his right, the estates would not fall to be distributed in terms of the settlement, but would be treated as undisposed of.

The trustees sought declarator that the heir-at-law having accepted the bequests in his favour, was under implied obligation to renounce all claims against the estate.

Held that as the heir could not surrender the English real estate to the uses of the will, he was not bound to elect between his rights as heir and his rights under the will.

David Gavin Hewit, leather dresser, Edinburgh and London, died on 1st August 1887, survived by his wife, and by one child, who died on 23rd August of the same year, aged a few weeks, before the period of vesting named in the after-mentioned deed. Mr Hewit and his child were survived by Mrs Lawson, the only sister of Mr Hewit. Mrs Lawson died intestate on 19th November 1887, survived by William Lawson, her eldest son and heir-at-law. Mr Hewit left (besides other testamentary writings which need not be more particularly referred to) a trust-disposition and settlement dated 21st May 1887.

At the date of his death the truster was resident in England, but it was admitted that he died a domiciled Scotsman. In his trust-deed he desired that his affairs should be "administered and wound up as far as practicable in accordance with the law and practice of Scotland."

The trust-estate consisted of moveable and heritable property. The heritable estate was situated partly in Scotland and partly in England. The heritable estate situated in England consisted of freehold and of leasehold property. To his trustees, of whom William Lawson was one, the testator disponed his whole means and estate, heritable and moveable, real and personal, of what kind or nature soever or wheresoever situated, and to enable his trustees to carry out the purposes of his settlement he conferred on them "all requisite powers, and particularly (but without prejudice to said generality, and without prejudice to the powers hereinbefore contained with reference to my businesses in Edinburgh and London) I empower them to retain the property and securities in which my means and estate may be invested at the time of my death, and also whenever they think fit, to sell, realise, and convert into money the whole estate or any part thereof (whether as left at my death or at any time invested), and that either by public roup or private bargain, and to execute and deliver all deeds and writings necessary for divesting themselves of the premises, binding the trust-estate in absolute warrandice."

Mr Hewit directed his trustees to pay several legacies, and, *inter alia*, one to Mrs Lawson of £3000, one of £3000 to William Lawson, and one to each of his trustees, who should accept, of £105. Mrs Lawson, prior to her death received payment of the legacy of £3000 bequeathed to her. William Lawson received payment of both of said legacies of £3000 and £105 bequeathed to him on 11th November 1887.

The deed further provided—"In the event of my having no child or children, or in the event of the failure of such child or children and their issue before the period of vesting, then I direct my trustees to dispose of the free residue as follows:—To pay to my said wife a legacy of Five thousand pounds sterling, and to each of my said three nephews, William Lawson, Robert Lawson, and George Lawson, an additional legacy of Three thousand pounds; . . . and whatever balance may then remain, I authorise my trustees to divide and apportion, in such shares as they may consider best, among the following charitable institutions, viz., The Corporation of the Scottish Hospital, London; the Caledonian Asylum, London; the Royal Infirmary of Edinburgh; the Longmore Hospital for Incurables, Edinburgh; the Royal Blind Asylum, Edinburgh; the Leather Trades' Benevolent Institution, London; and the Leather Trades' Benevolent Institution, Glasgow, declaring that my trustees shall be the sole judges as to the time or times when any sum or sums shall be so divided and apportioned, and they shall not be liable to be called in question by the said institutions, or any of them, or those acting for any of them; and also declaring that if there be any dubiety as to any of the institutions in respect the precise name thereof may not have been given, my trustees shall be entitled themselves to decide conclusively and finally as to the institution entitled to the benefit."

Questions having arisen between William Lawson and the other trustees as to whether the bequests to charitable institutions, so far as payable out of the proceeds of the English freehold and leasehold property, were valid and effectual, the said trustees brought this action against Lawson for declarator (1) that they were entitled to administer the estate in terms of the deed, and that the balance of residue to be divided among the institutions was not liable to any abatement in respect of part of the estate consisting of real estate situated in England; that the defender's claim was limited to his three legacies and did not include the real estate in England; (2) that the defender could not claim both the legacies and the said real estate; that he was bound to renounce and discharge all claims competent to him against the estate or against the trustees; (3) that if found entitled to claim the real estate he was bound as a condition "(1st) to repay to the said trustees the said sums of £3000 and £105, already paid to him, with interest; . . . and to renounce and discharge all right competent to him to claim the said second legacy of £3000; and (2nd) to bear a rateable proportion of the whole debts, legacies, and bequests payable from the trust-estate corresponding to the value of the said real estate, together with all expenses incurred or to be incurred by the pursuers, and all duties payable to Government effeiring to the said real estate."

The defender averred that "according to the law of England, by virtue of the Mortmain Act (9 Geo. II. cap. 36), no land or other heritable estate in England can be effectually conveyed or charged in any way, for the benefit of any charitable uses whatsoever, unless the gift be made by deed indented, sealed, and delivered in presence of two witnesses twelve months at least before the death of the granter; and all gifts of land or other heritable estate in England, or any estate or interest therein, or any charge or incumbrance thereon, made to or in trust for any charitable uses in any other manner, are absolutely and to all intents and purposes null and void. Freehold and leasehold estate in England, and money to arise from the sale of such estates, are embraced in the said prohibition; and legacies and bequests of residue, consisting in whole or in part of English freehold and leasehold estates, are null and void under the said statute, so far as such legacies or bequests consist of such estate, or the proceeds to arise on the sale or disposal thereof. Further explained and averred that by the law of England so far as the testator's settlements import bequests to charitable institutions or uses of or out of English freehold or leasehold estate, he died intestate; and the freehold and leasehold estates passed on his death to his child, and on his child's death to the defender's mother; and on her death intestate the said English estate, so far as heritable, passed to the defender, her eldest son and heir-at-law, for whom the pursuers now hold." He also averred that he had received payment of the legacies of £3000 and £105 before any reference to the Mortmain Act, which was first brought to his knowledge in 1888.

The pursuers pleaded—"(1) The defender not being entitled to claim the freehold estate in England, decree ought to pass in terms of the first conclusion of the summons. (2) *Separatim*—in respect that the defender has accepted payment of the legacies of £3000 and £105, he is barred *personali exceptione* from claiming the freehold estate, and decree ought to pass in terms of the second conclusion of the summons. (4) If it shall be found that the defender can claim the said freehold estate, and upon his so claiming it, he is bound (1st) to renounce all claim to the legacy of £3000, and to repay the legacies of £3000 and £105 already paid to him; and (2nd) to bear a rateable proportion of the whole debts, legacies, and bequests payable by the trust, and of the expenses of the administration, proportionally to the value of the freehold estate so claimed. (5) In any view, the defender is bound on taking said freehold estate to bear a rateable proportion of the said legacies, debts, and expenses as aforesaid."

The defender pleaded, *inter alia*—"(3) By the operation of the Mortmain Act (9 Geo. II. cap. 36) the bequest of the residue of the testator's estate to the charitable institutions mentioned is null and void so far as such residue consists of the testator's freehold and leasehold estate in England or the proceeds thereof, and to that extent the testator died intestate. (5) The defen-

der is not put to his election between the legacies bequeathed to him under the testator's settlement and his right to the said heritage in respect (1st) he does not take the said heritage as heir of the testator, and (2d) the said heritage is withdrawn from the settlement not by any act of the defender, but by the statutory law of mortmain. (6) The testator having left sufficient personal estate, and the debts, legacies, annuities, and other provisions left by the deceased, together with the expenses of administration, being primarily chargeable thereon, the pursuers are not entitled to apply any part of the English heritage in payment of the said debts, legacies, annuities, and provisions and expenses. (7) *Separatim*— the liability of the English freehold estate to bear any part of said debts, legacies, annuities, provisions, and expenses, must be determined according to the law of England, and the freehold estate is not liable for any part thereof, in respect they are all primarily chargeable by the law of England against the personal estate and English leasehold estate."

On 24th January 1889 the Lord Ordinary (KINNEAR) remitted to counsel to prepare a case for the opinion of the Chancery Division of the High Court of Justice upon the points of English law raised on record.

The case, after stating the facts above narrated, submitted for the determination of the Court the following questions—"(1) Are the bequests to charitable institutions set forth in the ninth purpose of the trust-deed, so far as they are payable out of the proceeds of the English freehold and leasehold estate, valid and effectual, according to English law; Or are they, in respect of the provisions of the Mortmain Act (9 Geo. II. c. 36), null and void? (2) Are the bequests of shares of the residue of the trust-estate, bequeathed to charitable institutions under purpose 14 of the trust-deed, so far as they are payable out of the English freehold and leasehold estate, valid and effectual according to English law; Or are they null and void under the provisions of the said Mortmain Act? (3) In the event of the trustees exercising the powers of sale of the freehold and leasehold estate conferred on them by the truster, would the bequests mentioned in question 2, so far as payable out of the proceeds of the sale of the English freehold and leasehold property, be valid and effectual; Or would they be null and void under the provisions of the said Mortmain Act? (4) Assuming that the bequests mentioned in questions 1 and 2, so far as payable out of the English freehold and leasehold property, or out of the proceeds of the sale thereof, are null and void, who will be entitled to take the sums which would have gone to satisfy those bequests? (5) On the same assumption as in question 4, and in the event of the said William Lawson being the person to whom the English freehold and leasehold estate or either passed, would he take the same as heir-at-law of his mother, or as heir-at-law of the child Thomas David Hewit, or as heir-at-law of the testator; or in what capacity would he take? (6) Upon the same assumption, has anyone a title to plead that the bequests above specified are void except the person or persons designated by the answer to the 4th question? and in the event of the said person consenting to waive his right, would the said freehold and leasehold estate, according to the law of England, fall to be distributed in terms of the settlement?"

On 6th April 1889 the Chancery Division issued an order containing the opinion of the Court on the case submitted to them.

The opinion, after enumerating the parties to the action, proceeded as follows:—"This Court is of opinion that the bequests to charitable institutions set forth in the 9th purpose of the trust-disposition dated the 21st May 1887, so far as they are payable out of the proceeds of the English freehold and leasehold estates, are not valid or effectual according to English law, but are null and void by virtue of the provisions of the 9th George II., chapter 36, re-enacted by the 51 and 52 Victoria, chapter 42; and is of opinion that the bequests of shares of the residue of the trust-estate bequeathed to charitable institutions in the 14th purpose of the said trust-disposition, so far as they are payable out of the English freehold and leasehold estates, are also invalid and ineffectual according to English law, and are null and void by virtue of the provisions of the said Acts; and is of opinion that in the event of the trustees of the said trust-disposition exercising the powers of sale of the freehold and leasehold estates conferred on them by the truster David Gavin Hewit, the bequests of shares of the residue of the trust-estate bequeathed to charitable institutions so far as payable out of the proceeds of the English freehold and leasehold estates, would still be invalid and ineffectual, and would be null and void by virtue of the said Acts: And is further of opinion that the bequests aforesaid in so far as payable out of the English freehold and leasehold estates or out of the proceeds of the sale thereof, being null and void as aforesaid, the persons entitled to take the sums which would have gone to satisfy the said bequests are, as to the English freehold estate or the proceeds thereof, the heir-at-law of the testator, or of the last purchaser within the meaning of the 3rd and 4th William IV. chapter 106; and as to the English leasehold estate or the proceeds of sale thereof, the persons entitled at the testator's death to take his personal estate according to the English Statute of Distributions; and is of opinion that if and so far as the testator was the last purchaser within the meaning of the 3rd and 4th William IV. chapter 106, the said William Lawson will take the English freehold estate or the proceeds of sale thereof as heir-at-law of the testator, and not as heir-at-law of his mother, or of the (testator's) child Thomas David Hewit; and is of opinion that, according to English law, the Court would, on the facts being brought before it, hold the said bequests to be void whether the heir-at-law of the testator, or of the last purchaser as to the freehold estate, or the persons entitled to the testator's personal estate, according to the

English Statutes of Distributions, made claim thereto or not: And even in the event of the said heir-at-law, or the persons entitled as aforesaid to the testator's personal estate, consenting to waive his or their right thereto, the said freehold and leasehold estates would not, according to the law of England, fall to be distributed in the terms of the settlement, but would be treated as undisposed of; and that the heir-at-law or the next-of-kin, as the case may be, may dispose of such estates by a proper deed or deeds, but if in favour of a charity such deed or deeds should be enrolled in accordance with the provisions of the 51 and 52 Victoria, cap. 42."

On 12th July 1889 the Lord Ordinary (KINNEAR) assoilzied the defender from the conclusions of the summons with the exception of the second branch of the third conclusion.

"*Opinion.*—It is established by the opinion of the Court in England that the bequests to charitable institutions, in so far as they are payable out of the English freehold and leasehold estates, are null and void; that in the event of the trustees exercising the powers of sale of these estates conferred upon them by the truster, the bequests would still be null and void in so far as payable out of the proceeds; that the Court would hold these bequests to be void whether the heir-at-law made claim to the freehold estate or not; and that, even in the event of his waiving his right, the estates would not fall to be distributed in terms of the settlement but would be treated as undisposed of.

"It would seem to me to follow that the defender cannot be required to renounce his claim to the English freehold estates as a condition of his taking the legacies which the testator has bequeathed to him, or to repay the legacies he has already received in the event of his taking up the English estates. It is said that by claiming these estates as undisposed of he will reprobate the settlement by which he has already taken benefit. But the bequests to charities, in so far as they might have affected the estates to which he is entitled as heir-at-law, are not merely ineffectual but null and void. It is obvious and elementary that a nullity can neither be reprobated nor homologated. The plea of approbate and reprobate assumes, as the Lord President explains in *Douglas* v. *Douglas*, 24 D. 1207, 'the power of making an election, and a consequent obligation to make an election,' and his Lordship adds, that 'To make a proper case of election the facts of the case must be such as to satisfy three conditions. In the first place, the person making the election must have a free choice . . . In the second place, the necessity of making the election must arise from the will, express or implied, of some one who has power to bind the person put to his election; and in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied.' Neither of the two last-mentioned conditions are satisfied by the facts of the present case. The testator must be held to have expressed no intention to give his English freehold estates to charities, because, according to the opinion of the English Court, the bequests which might otherwise have had that effect are null and void. This does not mean that they are inoperative by reason of any technical rule of law, which the heir may enforce or may waive as he thinks fit, but that they are not to be read as expressing the testator's intention. They are struck out of the will as effectually as if they had been cancelled or revoked by the testator himself. But even if they could be read as part of the will, the defender has no power to give legal effect and operation to the testator's intention. If he were to accept his legacies as in full of all claims arising to him through the testator's death, and were to waive his right to the English freehold estates, the will would still be inoperative as regards these estates. The bequests are null and void in so far as payable out of these estates or their proceeds, whether the defender makes claim to them or not.

"It is true that if the defender takes the estates in question as heir-at-law, they will become his absolute property. He may dispose of them as he pleases, and he may give them to a charity if he thinks fit, provided he complies with the conditions of the Statute 51 and 52 Vict. c. 42. It is said that he is thus in the same position as a legatee whose private property a testator has assumed to dispose of by the will under which he takes benefit. But the two cases are essentially different. When a testator disposes of property which he knows to belong to another, the proprietor can take no benefit under the will if he refuses to give effect to the clear intention of the testator. But it is indispensable, in order to bring this rule into operation, that the testator should know that the property is not his own, or at least that he has no direct power to dispose of it; and if that condition is satisfied it is also necessary that the legatee should be in a position, by reason of his right of property, to approbate the will with effect. But it cannot be assumed that the testator in the present case was aware that the Mortmain Acts would prevent his will from being carried into effect. On the contrary, it is manifest from the frame of his settlement, that he had no doubt of his power to dispose of his whole estate as he desires it to be disposed of. There is no reason to suppose that if he had known his bequests to charities to be inoperative, so far as they bear to affect his estates in England, he would have imposed an obligation upon his heir-at-law to make a gift in favour of these charities in accordance with the provisions of the statute. I assume that would have been a legal condition. But it certainly is not expressed, and it does not appear to me to be necessarily implied in anything that the testator has done. But if it were implied it cannot be certain, when the legacies become payable to the heir, that he will be able to comply with it, for he cannot dispose of the estates in favour of a charity

except in accordance with certain statutory provisions, and one of these is that he shall live for twelve months after the gift is made. Assuming, therefore, contrary to the opinion I have expressed, that the will can be read as importing such an intention as the pursuers suppose, it is still uncertain whether the defender will be in a position to approbate with effect. But there is no authority for holding that a legatee can be put to an election, whereby he shall be required, in order to obtain a legacy which has been bequeathed to him, to dispose of his own property in favour of others without its being certain that he will after all be able to secure to those others the benefit which the testator is presumed to have intended.

"The decision which appears to be most favourable to the pursuers is that of the House of Lords in *Dundas* v. *Dundas*, 4 W. & S. 460, because in that case the point taken in the House of Lords, in contradistinction to the case of *Ker* v. *Wauchope*, was that the deed disposing of real estate in England was not merely challengeable but null, and therefore that it could not be read in so far as it bore to affect English land. But I cannot read that decision as fixing a principle which will govern the present case. The distinction on which it proceeded was regarded by Lord Eldon in *Ker's* case and by Lord Brougham in that of *Dundas* as 'thin and unsubstantial' in itself, although it had been established by a series of decisions following upon that of *Cuningham* v. *Gainer*, in which it was first promulgated by Lord Hardwick. This might be a reason for hesitating to adopt it in a case not directly ruled by the same precedents. But there appears to me to be no room for the distinction in question in the circumstances of the present case. It was held that although a will was not duly executed according to the statutes to affect land, yet if in the same will personalty is given upon condition that the legatee shall convey land, the words which cannot be read as affecting the land may be read for the purpose of putting the heir to an election, because the gift to him and the condition on which it is made are inseparable, and therefore the bequest of personalty cannot be read without reading at the same time the condition on which it is given. The present case appears to me to be distinguishable on the two grounds already indicated—*first*, because it is not an inseparable condition of the bequests to the defender that he shall make a gift in favour of charities; and *secondly*, because the invalidity of the bequests to charities is owing to the nullity of the bequests themselves and not to any mere defect in the particular form by which they are made. In the case of *Dundas* the bequest of land was invalid because the will was not duly executed. But the intention to bequeath land was perfectly legal, and words expressing that intention, although they could not affect the land directly, might therefore be read as importing a condition attached to a bequest of personalty. But a bequest of lands in England to charity is null and void in whatever form it be expressed, and words expressing an intention so to bequeath must therefore go for nothing."

The pursuers reclaimed, and argued—That granted that the bequest of English heritage to charities was bad, yet the difficulty arising therefrom might be got over by the sale of the English heritage and its conversion into personalty in the hands of the trustees, and subject only to the jurisdiction of the Scottish Courts—*Macdonald* v. *Macdonald*, L.R., 14 Eq. 60. There was an implied direction to convert, because what was to be divided was a sum of money, and as the heir was not entitled to oppose the sale of the English heritage the Mortmain Act could thus be got over, and the charities receive their bequests—*California Redwood Company* v. *Walker*, March 19, 1886, 13 R. 810; *Pacific Coast Mining Company* v. *Walker*, March 19, 1886, 13 R. 816. The bequests to charities were not subject to abatement but if it should be held that they were, then the defender was bound to elect between his legacies and his right to the real estate. Though some of the questions between the parties fell to be dealt with by English law, yet the Scottish Courts must in the first place deal with the question of election—Jarman on Wills (4th ed.), vol. i., pp. 447-8; *Dewar* v. *Maitland*, L.R., 2 Eq. 834; Statute of Frauds (29 Charles II. cap. 3); and cases cited by the Lord Ordinary.

Argued for the respondent—As heir of the testator he was entitled to the real estate in so far as the same or the proceeds thereof if duly administered under the settlement fell to the charitable institutions. The question between the parties fell to be decided by the law of the *situs*—M'Laren on Wills, vol. i., p. 26; Story on Wills, sec. 474; *Douglas* v. *Douglas' Trustees*, June 27, 1862, 24 D. 1191; *Thomas* v. *Tennant's Trustees*, November 17, 1868, 7 Macph. 114; *Tennant* v. *Tennant's Executors*, June 28, 1889, 16 R. 876; Bell's Comm. (7th ed.) vol. i. p. 143; *Harrison*, L.R., 8 Ch. App. 342. It was a question of English law whether the legacies fell on the English heritage, or whether the assets could be so marshalled that the legacies fell on the heritable estate leaving the personalty free for the charities. This was not a case in which the heir was put to his election.

At advising—

LORD M'LAREN—The questions which we have to determine in this case arise under an action of declarator instituted by the testamentary trustees of Mr David Hewit against his heir for the purpose of determining the relative rights of the heir and the testamentary disponees to the testator's real estate in England, which is admittedly affected by the English law of mortmain.

The testator was survived by his widow and one child. By his will Mr Hewit directed his trustees to pay certain legacies including a legacy of £3000 to the defender personally, and a legacy of 100 guineas given to him as a trustee; and in the event, which

has happened, of his child dying without issue, the trustees were directed to pay certain other legacies, including an additional legacy to the defender of £3000, and to divide the balance of the residue amongst charitable institutions named by him, in proportions to be determined by the trustees.

It is objected by the heir, that according to the provision of the statutory law of mortmain, real estate cannot be bequeathed by will to charitable uses, and it is now admitted that the testator's intentions in favour of the charities cannot be carried into effect in the manner directed by him. But this action contains alternative conclusions to the effect that the heir by acceptance of the legacies bequeathed to him has come under an obligation "to renounce and discharge all claims competent to him against the estate and effects of David Hewit or against his trustees," or otherwise "to bear a rateable proportion of the whole debts, legacies, and bequests payable from the trust-estate corresponding to the value of the real estate." These are the material conclusions. Lord Kinnear sitting as Lord Ordinary has decided the case adversely to the trustees on the first of the two conclusions which I have quoted, and has reserved the question argued under the second conclusion, and his Lordship's judgment has been brought under review by the reclaiming-note which we are now to dispose of.

The hypothesis of the first of these conclusions (the second conclusion of summons) is that the heir is put to his election between the benefits which he may claim in the characters of heir and legatee, and the question whether the heir is put to his election falls to be determined by the law of the testator's domicile—in this case the law of Scotland. It is true that under a testamentary disposition of mixed estate the validity of a disposition or bequest of immoveable property must be determined by the law of the *situs*, and accordingly in the present case a judicial opinion has been obtained from the High Court of Justice in England, which as we know was adverse to the validity of the charitable bequests, so far as consisting of or payable from the real estate in England. But the question whether the heir is put to his election is a question involving the construction and effect of the will as an expression of the mind of the testator, and is therefore a question for the Court of construction—the Court which has jurisdiction over the will in its entirety. This is a point which has perhaps only a theoretical interest, because undoubtedly the Courts of England and Scotland have preferred to treat such questions on common principles, and in the Court of last resort the decision of the English and Scottish Courts on questions of election have been cited indifferently in illustration of the principles which regulate this chapter of the law.

It is not necessary for the purposes of the case to define strictly the conditions of a case of election under a will, but I may say that a case of election will generally arise when a testator is professing to dispose of property over which he has only an imperfect power of disposition, which can be made perfect by the assent of the legatee to the testamentary instrument.

The case of a father disposing of the *legitim* fund, and the case of a proprietor disposing of his heritable estate on deathbed, are illustrations. The assent of the child having a right to *legitim* in the first case, and of the heir in the second case, suffices to perfect the title of the disponee. In such cases the child or the heir if he claims a legacy must in the language of our old decisions surrender his legal claims to the uses of the will.

In the cases raising an election it is in general not necessary that the heir or person having the adverse interest should take any active step to set up the will; it is enough that he makes no adverse claim, in which case the trustees or executors may proceed to administer the estate on the assumption that the testator's power of disposal is unchallenged. This much at least seems to be reasonably clear. In order to put a legatee to his election, it must be in his power by waiving his objection to the will or adverse claim, to perfect the right of the testamentary disponees. There is certainly no case in which a legatee who had not the power of perfecting the right of the disponees has been called on to give an equivalent benefit, nor has any opinion to this effect been cited. Such an obligation could only arise under a provision of the will itself, as in the case of *res aliena scienter legata*, when the testator is held to have impliedly directed the purchase of the thing by his heir for the benefit of the special legatee.

Applying these principles to the present case, we find, in the opinion of the High Court of Justice returned by Mr Justice Kay, that not only are the bequests to charities null and void so far as they are payable out of English freehold and leasehold estates, but in the words of the opinion of the learned Judge, "Even in the event of the heir-at-law, or the persons entitled to the testator's personal estate, consenting to waive his or their right thereto, the said freehold and leasehold estates would not, according to the law of England, fall to be distributed in the terms of the settlement, but would be treated as undisposed of." It is pointed out in his Lordship's opinion that the heir may dispose of the estate in question by a proper deed, but that if in favour of a charity, such deed or deeds should be framed in accordance with the provisions of the Statute 51 and 52 Vict. cap. 42. It therefore appears that the defender cannot by any waiver of his claim or assent to the will bring the will into operation as an appropriation of the English estates to charitable uses.

He may give an equivalent sum out of his own means, or he may in his own right dispose of the estates to charitable uses, but in the latter case the validity of the new conveyance would depend on the conditions of the statute, and would be con-

tingent on the heir's survivance for the period prescribed by the statute.

It is not within the defender's power to surrender the real estate in England to the uses of the will, and it follows, in my opinion, that the defender's right to the legacies bequeathed to him is not conditional on his making such surrender. In other words, he is not bound to elect between his right as heir and his right under the will.

I do not add more on this point, because I agree with all that is said by the Lord Ordinary regarding it, and adopt entirely his Lordship's interpretation of the decisions in which this subject is discussed.

The Lord Ordinary has left open the liability of the real estate to contribute to the payment of debts and legacies. If the claim of the trustees under this head was confined to the subject of the right to charge a proportion of the debts and personal legacies on the real estate, we should be in a position to dispose of the question at present. But the trustees claim the right to charge a proportional part of the charitable bequests on the English estate, and it is evidently impossible to separate the two questions so as to give an effectual decision applicable to the one class of testamentary charges while the other point is left open.

Since this case came into the Inner House a suit has been instituted in the Chancery Division of the Supreme Court in England, for the purpose of ascertaining the rights of the heir-at-law and the trustees in relation to the English estate.

If the administrative title of the trustees is sustained as relative to the real estate, it will then be for the Court to determine to what extent the English estate can be affected with payment of debts and legacies, consistently with our recognition of the invalidity of the disposition of that estate in part to charitable uses.

If the trustees do not succeed in establishing their administrative title a different question will arise, viz., the question whether the claim of the trustees to burden the English estate with debts and personal legacies can be made good by withholding payment of the pecuniary legacy payable to the defender.

Nothing that we decide this day is intended to prejudge their claims. In the meantime I agree with Lord Kinnear that the case is not in shape for the decision of any question except the question of election, which we are now considering, and I suggest that your Lordships should affirm the Lord Ordinary's interlocutor and sist proceedings in the meantime, leaving it to the parties to move, when by the decision of the English suit or from other causes the difficulty I have referred to may be removed.

LORD ADAM and LORD KINNEAR concurred.

LORD ADAM intimated that the LORD PRESIDENT, who was absent, concurred in the opinion of Lord M'Laren.

The Court adhered.

Counsel for the Pursuers — Graham Murray—C. S. Dickson—J. Brodie Innes. Agents—Davidson & Syme, W.S.

Counsel for the Defender—Asher, Q.C. —Lorimer. Agents — Morton, Smart, & Macdonald, W.S.

Friday, March 20.

FIRST DIVISION

THE NIDDRIE & BENHAR COAL COMPANY, LIMITED, AND ANOTHER *v.* HURLL.

Public Company—Memorandum of Association—Preference Share—Division of Profits.

The memorandum of association of an incorporated company declared the capital to be divided into A or preference, and B or ordinary shares, and provided that the A shares should rank prior to the B shares on the profits of each year for a 10 per cent. dividend; that the "B" shares should rank on the balance of the profits of each year after the preferential dividend was paid; and that no deficiency in dividend in any year should be made good out of the profits of future years.

For several years a loss on the ordinary revenue account of the company resulted in a debit balance on that account. The debit balance was subsequently reduced, and in the year ending 30th April 1890 profits were earned which were not applied as dividend, but applied in further reducing the debit balance. During the following year profits were earned sufficient to wipe out the debit balance, to pay 10 per cent. of preference dividend to the A shareholders, and to leave a surplus available for division.

Held that the A shareholders were not entitled to have this surplus applied in payment of a preference dividend on the A shares as for the year ending 30th April 1890, and that the surplus fell to be applied in payment of a dividend to the B shareholders for the current year.

The Niddrie and Benhar Coal Company, Limited, were incorporated under the Companies Acts 1862 to 1880 on the 16th day of August 1882, with a memorandum and articles of association. By the memorandum of association the capital of the company was declared to be £152,500, divided into 15,000 shares, therein termed A or preference shares of £5 each, and 62,000 shares, therein termed B or ordinary shares of £1, 5s. each, having the following rights and privileges, as set out in the memorandum of association, namely:—"The A shares shall rank prior to the B shares on the profits of each year, ending on the 31st day