Monday, March 20.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw, and Lord Robson.)

CRUM EWING'S TRUSTEES *v.* BAYLY'S TRUSTEES AND OTHERS.

(*Ante* January 28, 1910, 47 S.L.R. 423, and 1910 S.C. 484; and July 20, 1910, 47 S.L.R. 876, and 1910 S.C. 994.)

Succession—Election—Approbate and Reprobate—Invalid Appointment in Settlement Containing Provisions to Objects of Power—Challenge of Exercise of Power.

"The doctrine of approbate and reprobate in Scotland and the doctrine of election in England are the very same thing under different names. They depend upon a principle which in its comprehensiveness and simplicity was put by Lord Eldon in the House of Lords in the Scotch case of *Ker* v. *Wauchope* thus—'It is equally settled in the law of Scotland and of England that no person can accept and reject the same instrument.'"

A testatrix conveyed to trustees "all and sundry the whole estate and effects . . . which shall belong to me at the time of my decease or over which I may have power of disposal by will or otherwise," and declared that she was acting "in exercise of all powers of disposal, apportionment, or otherwise competent" under the trust-disposition and settlement of her father. She destined the trust estate in certain shares to her children in liferent and their children in fee. The funds coming from her father's estate belonged in fee under his settlement to her children, although subject to her liferent and her power of appointment, and her exercise of the power of appointment by giving the children merely a liferent and their children the fee was held to be a bad exercise.

Held (*rev.* judgment of the First Division) that although the funds coming from her father's estate were separable from the testatrix' own funds, yet her children could not claim the right conferred upon them in the former under his settlement and at the same time take a benefit in the latter under her settlement, but were put to their election; and this obligation to elect was not affected by the interest given in the testatrix' estate being declared alimentary, Scots law differing herein from English law, nor by there being no declaration that such interest was in lieu of any claim on the fund coming from the father's estate, while there was such a declaration as to legitim and the marriage-contract funds.

This case is reported *ante ut supra*.

James Campbell Pitman, advocate, curator *ad litem* to Mildred Jean Douglas and others, grandchildren of Mrs Jane Coventry Crum Ewing or Bayly, appealed to the House of Lords

At delivering judgment—

LORD ATKINSON—The main question for decision in this case, as developed in the very able and helpful arguments addressed to your Lordships by the counsel appearing for the respective parties concerned is, as I understand it this—whether the doctrine styled in English Courts of law the doctrine of election, is identical with the doctrine styled in the Scotch courts of law the doctrine of "approbate and reprobate," or whether the latter differs from the former in this essential, that a beneficiary under a deed or will is, under the Scotch law, never to be put to his election unless there can be found in the particular instrument in express words, or by necessary implication, a declaration of the benefactor's intention that he shall be put to his election. And, further, that this declaration or expression of intention cannot be implied unless it be shown that the benefactor knew, or must be taken to have known, that he was disposing, by the particular instrument, of property not his own but belonging, in whole or in part, to the beneficiary on whom he confers a benefit, or to whom he makes a gift by that same instrument. One may put aside the case of an express condition or direction. In such a case the beneficiary must comply with the express requirements of the deed or will.

It must, I should think, be assumed that every donor who executes a deed, and every testator who makes a will, intends the gifts he purports to make, and the benefits he purports to confer, should be taken and enjoyed by those for whom he designs them and none others, so that a beneficiary who asserts a claim to something given to another by their common benefactor necessarily defeats *pro tanto* the intention of that benefactor. This, it is urged, is not enough in Scotland.

In the case of *Noys* v. *Mordaunt*, 2 Ver. 581, the English doctrine is based upon an implied condition. In that case, decided in the year 1707, a testator, having two daughters, his co-heiresses, devised his fee-simple lands to one of them, and lands settled upon him entail to the other. The first devisee claimed a moiety of the entailed lands. The Lord Keeper in delivering judgment said—"In all cases of this kind where a man is disposing of his estate amongst his children, and gives to one fee-simple lands and to another lands entailed or under settlement, it is upon the implied condition that each shall release the other." Nothing whatever is said as to whether the testator knew, or should be taken to have known, that he could not devise the entailed estate to one of his daughters to the exclusion of the other. No point of this kind was made. If he is to be assumed to have known the law, and therefore to have known that he was devising to one daughter not only her own share of the entailed estate but also her

sister's share, and that the necessary expression of intention is to be implied from this fact, one would suppose that it might with equal plausibility be assumed in the present case that the testatrix knew, or must be taken to have known, that she could not appoint to her grandchildren the corpus of a fund she was only empowered to appoint to her children. If so, the requirement of the Scotch law was satisfied.

The same remark applies to the case of *Whistler* v. *Webster* (1794), 2 Ves. Jr. 366, and to every other English authority down to the present time. According to them, apparently, the donor's knowledge, actual or imputed, that he is bestowing on another property not his, the donor's, own, is a matter of indifference, whereas according to the argument of Mr Blackburn it is the crucial, the determining consideration under the Scotch law upon which depends the expression, by implication, of the intention that the beneficiary must elect. This difference between the two systems, if it exist, is fundamental. And what puzzles one is how it has come about that great Judges like Lord Eldon, even when deciding a Scotch case, and Lord Cairns, and in recent times Lord Robertson, never alluded to this differentia of the Scotch doctrine in the judgments they have each respectively delivered dealing with that doctrine, or seem to be aware of its existence.

I refer to Lord Eldon's judgment in *Ker* v. *Wauchope* delivered on the appeal to this House reported in 1 Bligh 1. That was a case of which the subject-matter was the estate of the Duke of Roxburgh, held to be a domiciled Scotchman. The appellants, the Ladies Ker, were the co-heiresses at law, and next-of-kin of this nobleman. In the month of March 1904 he fell sick of the complaint of which he died, and on the 14th of that month executed a deed by which he directed the respondents, John Wauchope and James Dundas, trustees named in a settlement of the previous year, to sell and dispose of all his unentailed real estate, and to invest the proceeds thereof and of his personal estate, after payment of his funeral expenses, debts and the legacies left by his will, in the public funds, or upon real security in Scotland, and to pay the interest and dividends thereof equally between the appellants with certain ultimate trusts not necessary to mention. The Duke was the owner of these lands. He had full disposing power over them. He died the day the deed bears date, the 14th of March 1804, without issue. The appellants as his heiresses at law immediately instituted an action to have this deed set aside so far as purported to convey land, on the ground that it had been executed on the Duke's death-bed. They succeeded, and their right to the land as heiresses at law was established on appeal by a judgment of your Lordships' House.

The surviving trustee then instituted an action to have the rights of the several parties in the trust funds remaining in his hands ascertained and declared. In that proceeding the Ladies Ker claimed under the terms of this deed of the 14th of March 1804, which they had caused to be set aside as invalid to dispose of the realty, a life interest in the residuary personal estate, and the main question for decision was whether they, having reprobated the deed in so far as it purported to dispose of the realty, could approbate it so far as it purported to dispose of personalty. It was decided that they could not do so; that they could not claim the life interest given them either as beneficiaries under the deed or as next of kin. Having read the arguments most carefully, I cannot find that it was even suggested that the Duke must be assumed to have known the law, and therefore to have known he was attempting to dispose of his estate in a manner which, in the event of his immediate demise, was by law prohibited, or that for that or any other reason the deed was to be construed as containing by implication an expression of his intention that these ladies should be put to their election. Nothing of the kind. The decision is rested upon the broad equitable grounds on which the English doctrine of election is based, and no reference whatever is made to the distinctions relied upon by the respondents in the present case.

Lord Eldon in giving judgment, at page 21 of the report, says—"I do not undertake a minute discussion of the arguments urged in this case; it will be sufficient to state the fundamental principle which ought to guide our decision. The deed in question upon this appeal is in the nature of a testament. It is equally settled in the law of Scotland and of England that no person can accept and reject the same instrument. If a testator gives his estate to A, and gives A's estate to B, courts of equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to effectuate the implied condition contained in the will of the testator. The court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given or intended to be given to another person." Again in *Codrington* v. *Codrington*, L.R., 7 H.L. 854, Lord Cairns thus expresses himself at page 861—"By the well-settled doctrine which is termed in the Scotch law the doctrine of 'approbate and reprobate,' and in our courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them. The authorities on this branch of the law are very fully referred to in the judgment given in this case by my noble and learned friend, who was then Lord Chancellor, and they were considered not long since in this house in the case of *Cooper* v. *Cooper*."

In the case of *Douglas Menzies* v. *Umphelby*, A.C. 1908, 224, a testator domiciled in Scotland, having an estate in Great Britain and another in Australia, executed two testamentary instruments, one disposing of his British estate, and the other of his Australian estate. In his so-called British will he directed that his British estate should be administered according to the law of Scotland, and in his Australian will that his Australian estate should be administered according to the law of New South Wales. The widow, by proceedings in Scotland, established, in the events which happened, her legal right in the name of *jus relictae* and *terce* as against the British estate. She then, in the Australian courts, claimed the benefit of the dispositions in her favour contained in the Australian will. It was held that the two instruments formed only one will containing a coherent scheme of intention, and that the widow, having elected to defeat the will in part could not claim under it, and accordingly took no interests under the Australian will.

Lord Robertson, in giving judgment, at page 232 of the report, says—"In considering the merits of the decision appealed against, it is well to remember what is the doctrine of approbate and reprobate invoked by the appellant. Although the name is different, the principle—as was laid down by Lord Eldon in *Ker* v. *Wauchope* — is the same as that of the English law of election. It is against equity that anyone should take against a man's will and also under it. This rests on no artificial rule but on plain fair dealing. If anyone has the right by law to take a share of a testator's estate which the testator has not given, but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits."

I am quite unable to reconcile these pronouncements with the rule contended for by Mr Blackburn. I think they establish that the English and Scotch doctrines though differing in name are identical in principle, and therefore that in this case (subject to the second point which has been raised) the children of the testatrix claiming in default of appointment, and also claiming their legitim in their mother's separate estate, should be put to their election between those rights and the benefits conferred upon them by her will.

The second point is this. It is urged that as the liferents given by Mrs Bayly's will are only alimentary the English case of *in re Wheatly*, 27 Ch.D. 606, applies; that her daughters are in the same position as the married ladies who in that case were entitled to life interests settled to their separate use without power of anticipation, and since in that case these interests could not, by reason of this restraint, be appropriate to compensate the beneficiaries who would be disappointed by election to take against their benefactor's will, the ladies were held not to be bound to elect, so in this case neither were the testatrix's daughters bound to elect. The answer to that contention is that liferents, though given solely for alimony, are not in the same position under the Scotch law in relation to this doctrine of "approbate and reprobate" as are life interests such as those dealt with *in re Wheatly* under the English law. The gift in the former case does not prevent election, and the life interest given to the daughters may be seized upon and applied to compensate the disappointed beneficiaries. *Macfarlane's Trustees* v. *Oliver*, 9 R. 1138, 19 S.L.R. 850, a case of high authority, establishes this, and indeed as I understood it was admitted by counsel at the Bar that this was so. This in the result would mean in the present case that the interest of the sum of £5000, half Mrs Bayly's separate estate, could be accumulated to compensate her grandchildren for the loss of the benefits she designed for them.

I therefore think that the judgment appealed from was wrong, and should be reversed and this appeal allowed.

EARL OF HALSBURY—Considering the two very learned and most satisfactory judgments, which I have had an opportunity of reading in print, by my noble and learned friend who has just pronounced judgment and my noble and learned friend Lord Shaw, I do not think it necessary to add anything to what they have said.

LORD MACNAGHTEN—I also have had the opportunity of reading in print the judgments of my noble and learned friends, and I entirely agree with them.

LORD SHAW—In the special case presented for the opinion and judgment of the Court various questions of law were put. Some of these have been settled and others are superseded, and I venture to state the narrative in its briefest form so as to bring out the only point which was submitted to your Lordships and which remains between the parties for settlement.

The late Mr Humphrey Ewing Crum Ewing by his trust-disposition and settlement conveyed a certain share of the residue of his estate for the behoof of his daughter Mrs Bayly and her children, the income to go to Mrs Bayly during her life as an alimentary provision, and the capital to be divided among her children in such proportions and "subject to such restrictions, provisions, and limitations" as she might direct, and failing appointment the children were to share the capital equally. Mr Crum Ewing died in 1887. Mrs Bayly died in 1908. The net value of the third share falling to her in liferent and her children in fee was about £17,000. Under Mrs Bayly's marriage-contract she had a power of appointment among her children of a sum of £2000 which her father had conveyed to the marriage-contract trustee. Her own separate estate amounted to about £10,000.

By Mrs Bayly's trust-disposition and settlement she purported to affect and dispose of not only the two last-mentioned funds but also the first fund of £17,000, of which, as has been shown, she had only an alimentary liferent, and the fee of which

was in her children subject to her apportionment. That she clearly meant, however, to embrace that fund along with the other two within the scope of her testamentary dispositions is, I think, proved by the language of her settlement. The estate is in general terms conveyed to trustees as "all and sundry the whole estate and effects, heritable and moveable, real and personal, of whatever kind and denomination and wheresoever situate, which shall belong to me at the time of my decease, or over which I may have power of disposal by will or otherwise"; and she declares towards the close of the deed that "these presents are granted in exercise of all powers of disposal, apportionment, or otherwise competent to me under the said antenuptial contract and the said trust-disposition and settlement by my said deceased father." On this head the deed need not be further referred to. I agree with the opinion expressed in the Court below to the effect that it is quite manifest that Mrs Bayly meant by her will to deal with the funds flowing from her father's estate, with the marriage-contract funds, and with her own funds, as one massed estate.

This estate thus massed was destined by Mrs Bayly's settlement in certain shares to her children in liferent and their respective children in fee. So far as this destination affected the share of the estate proceeding from her father, in which Mrs Bayly herself had only a liferent and in which her children had a fee, it was a bad exercise of the power of apportioning the fee among her children to attempt to convert her children's rights into a liferent and propone the fee to their children. The judgment of the Court of Session holding that this was a bad exercise of the power is not challenged.

The question disputed at your Lordships' Bar is whether Mrs Bayly's children are entitled to have payment made to them of the capital of the fund flowing from their grandfather's estate, thus defeating the intention of their mother that their right therein should be confined to a liferent, and at the same time are entitled to participate in the benefits conferred on them by Mrs Bayly with regard to the other portions of the estate dealt with by her will. These children are, on the one hand, maintaining the invalidity of Mrs Bayly's trust deed as an exercise of the power of appointment among her children conferred by her father, while, on the other hand, they are maintaining the validity of the deed in so far as it conferred upon them benefits out of her own estate. The strongest presentment of the case for their doing so is to say that in so far as these children were concerned their mother was dealing with capital and property which were not her own but theirs, and that they have a right to confine her testamentary settlements to her own estate. Accordingly it is contended that the children are not put to their election because their rights under the settlement, in so far as it could be effected, namely, in so far as it conveyed Mrs Bayly's estate, are separable from their independent rights. These three facts accordingly remain—(1) that Mrs Bayly's settlement purports to deal with a massed estate, (2) that this massed estate consists partly of property really already belonging in capital to her children and not to her, and (3) that the estates, her own and that other, are separable. In these circumstances the majority of the First Division has held that the children are not put to election.

I have considered with the greatest respect and care the judgments of the Court below, elucidated and criticised as these were by powerful arguments at your Lordships' Bar. I am of opinion that the conclusions reached by Lord Johnston are sound conclusions. Having investigated to the best of my ability the case law on the subject, Lord Johnston's conclusion appears to me to be in accord with the principles both of the law of England and of the law of Scotland.

As to the law of England I really do not think that there can be any manner of doubt; and one of the most remarkable facts (in view of the argument addressed to your Lordships to the effect that there was a difference between the laws of the two countries on the subject) is that the most authoritative pronouncements in both countries do not give any countenance to the idea that such difference exists. The doctrine of approbate and reprobate in Scotland and the doctrine of election in England are the very same thing under different names. They depend upon a principle, which in its comprehensiveness and simplicity was put by Lord Eldon in the House of Lords in the Scotch case of *Ker* v. *Wauchope* thus—"It is equally settled in the law of Scotland and of England that no person can accept and reject the same instrument." In as comprehensive, although ampler language, Lord Cairns put again the law of both countries on the same footing of general principle in *Codrington* v. *Codrington* (L.R., 7 H.L. 854)—"By the well-settled doctrine, which is termed in the Scotch law the doctrine of approbate and reprobate and in our Courts more commonly the doctrine of election, where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent therewith."

It is perfectly true that owing to the peculiarity of the English law of succession there does not arise the application of the doctrine of election except with regard to provisions *in gremio* of the deeds. In the law of Scottish succession, however, and in the law of all countries where the rights of children are of such a nature that it is in the general case beyond the legal power of a parent totally to disinherit them, there come frequent occasions when the legal rights of the children have to be balanced against the conventional provisions of a settlement under which they

also have benefits. If, however, they choose their legal rights, it is familiar and elementary that they cannot at the same time choose their conventional benefits. Their *legitima portio* falls to them as a debt due from the estate, and they cannot on the one hand *pro tanto* deplete the estate and on the other claim conventional provisions made out of it by the parent's settlement. That is only an illustration of a difference in the law of succession, and therefore of extending and applying the principle of approbate and reprobate to that particular; but nothing of this imports any change in the principle to be applied. Although illustrations occurred in argument founded upon the ancient and highly valued Scottish system of the children's indefeasible claim to legitim as against, or in preference to, a testamentary provision, the principle of this case is not touched by the illustration. As has been said, so far as the authorities go, Judges of the highest eminence treat the laws of the two countries as the same.

It remains to consider whether a difference—apparently unknown to these Judges—has grown up in Scotland under the authority of the Scotch decisions after referred to. Lest injustice be done to the argument, I cite it as it appears in the respondent's case. "In arriving at the testator's intention in such cases as this, where he has attempted to do what it was not in his power to do, a leading consideration in Scots law has always been, 'Did the testator know that he was exercising power which he did not possess?' The respondents are aware that in this respect the law of Scotland differs from the law of England, and this is clearly reflected in the statements of the leading text writers, but the difference is directly traceable to the Roman law, on which the Scots law is founded. By the Roman law, where one bequeathed a subject which he knew did not belong to him, the heir had to purchase it for the legatee or to pay its value to him. Where the testator *rei alienæ* believed the subject to be his own, which *in dubio* was to be presumed from the act of bequeathing, the legacy was void. This is still the law of Scotland." I shall refer in a moment to the doctrine of the civil law, but the case proceeds—"This is still the law of Scotland and explains why the maxim that *res aliena scienter legata* raises the presumption that the owner of the *res*, if a beneficiary under the deed, is to be put to his election, and the maxim that *res aliena inscienter legata* raises no such presumption have always been recognised in Scotland as leading rules in cases of approbate and reprobate." Of this passage I will only say I find no justification for the supposition that such a notable *non sequitur* is part of the law of Scotland.

With regard to the law of Rome, a doctrine or principle of the civil law adopted into the practice of Scottish jurisprudence is an authority to which all would bow. But the observation must be at once made that the passage from the Institutes of Justinian (2, 20, 4) does not appear to have any real bearing on the doctrine of election at all. It is not treated by Erskine (iii, 9, 10), who echoes and expounds the passage, as having any such bearing. The Roman law was simple enough. If a person bequeathed what he knew did not belong to him, it was assumed that that was equivalent to an instruction to his heir to buy the thing bequeathed for the legatee or to pay to the legatee its equivalent. The doctrine could not apply to things which it was beyond the power of the legatee to secure on account of their not being *in commercio*,—as, for instance, the illustrations are given of a testator bequeathing a temple or even the *Campus Martius*. In such a case the whole legacy fell. The legacy, of course, also fell in the cases where the subject of it did not belong to the testator, but as to which it was not known what the views of the testator on the subject of ownership were. The reason given in the Institutes is significant. It is as follows:—'*Forsitun enim, si scisset alienum, non legasset,*' and a rescript of Antoninus Pius is cited in support of this reason.

In short, the endeavour was simply to get at the real mind of the testator with regard to whether or not it was meant that the specific thing or its equivalent was to go in all the circumstances to the legatee. The only underlying principle in the whole of that section of the Institutes has reference to the specific legacy bequeathed or purported to be bequeathed. There is no reference whatever to the embarrassment produced by the legatee having to choose between testamentary provisions on the one hand and independent rights or property which he has in the thing on the other. Nor, I may be permitted to add, could this embarrassment or this election possibly arise in regard to the *res aliena* dealt with in that title of the Institutes. For that *res aliena* was neither the property of the testator nor of the heir. The note of Cujacius is unanswerable, '*Res heredis non habetur pro aliena.*' As shown by a succeeding section, *res aliena* is treated as quite a different thing from *res legatarii*. For my own part, I do not think that the reference to this institutional passage in the Roman law has produced, in the authorities, any illumination on the subject. If authority or the views of Roman jurists on the point of approbate and reprobate be sought, it will be found in a different quarter, viz., from the 30th and 31st books of the Digest. A dictum, for instance, of Pomponius is as apt and as succinct as that of Lord Eldon—'*Legatarius pro parte adquirere, pro parte repudiare, legatum non potest.*'

Passing now from the alleged authority of the civil law to the proposition that "the law of Scotland differs from the law of England" upon this subject, I am of opinion that this proposition is not well founded. I think it right to deal with the state of the Scotch authorities upon this particular point. Weight in argument was attached to two opinions of learned Judges in Scotland. In *Nisbet's Trustees* v.

Nisbet (1851, 14 D. 145) Lord Cunningham, at p. 149, begs "distinctly to disclaim every notion that the law of Scotland in questions analogous with the present has been derived from English precedence or practice. Far from it." He refers to the Roman law as being "the chief fountain of our jurisprudence," and, after certain allusions to England, which need not be further referred to, he concludes by the observation that "in the present state of the law it is satisfactory to find that the decisions in both countries in cases of election have been to the same import when analogous questions have occurred in either." I do not find in that authority much support for the proposition of the difference contended for.

The other authority is the late Lord Curriehill, whose observations in *M'Donald* v. *M'Donald* (4 R. 45, 14 S.L.R. 26) have been much relied upon. That learned Judge, referring to a decision of Lord Romilly in *Churchill* v. *Churchill* (1867, L.R., 5 Eq. p. 44) says this—"The rule of law which underlies that judgment, and, indeed, all the decisions as to election or approbate and reprobate, is that, although *res aliena scienter legata* in a testament bequeathing a legacy to the owner of the *res aliena*"—if this be a reference to the civil law, I have already commented on the misconception—"may put him to his election between claiming the legacy and taking his own property, yet if the testator made his bequest erroneously, believing that he had the power while he had it not, the legatee will not be put to his election. The rule is illustrated in the case of *Douglas' Trustees* v. *Douglas* (1862, 24 D. 1191)."

The alleged "rule of law" is treated as applicable both in England and in Scotland. I understand your Lordships all to be of opinion that such a rule forms no part of the law of England.

Further, the judgment of Lord Romilly in the case of *Churchill* v. *Churchill*, does not, it appears to me, give countenance to it. The case of *Churchill* was one of a kind of which there have been various examples in Scotland, to which I shall afterwards refer. The testator had a power of appointment to his children. He did exercise such a power in his will, but in a subsequent portion thereof he created a distribution inconsistent with the exercise of the power, and involving restrictions of the rights of the appointees. It was held that the restrictions in his will must fly off, and that the appointment under that deed must be considered as absolute. The appointees, taking accordingly under an absolute appointment and under the will, were not precluded from taking other benefits conferred by the same document. They were not, in short, electing between taking rights under the will and rights inconsistent with the will. All the rights which they claimed were rights under the will, if properly construed. If one examines the judgment of Lord Romilly one will find but little support for the alleged "rule of law." He makes observations, repeated in the course of his opinion, that it would be highly undesirable to determine the rights of appointees or legatees according to the state of mind or opinion of the testator—that is to say, to import into the construction of his settlement a certain state of his knowledge so as to qualify rights which, apart from that state of knowledge, this very same deed on its proper construction would have given.

Finally, it only remains to add, with regard to this opinion of Lord Curriehill, that the point relied upon as above cited was not a decision, and indeed did not enter into the merits of the question determined in the case of *M'Donald*. It may be as well to state what that question really was.

Sir John and Lady M'Donald had power under an antenuptial contract of marriage to make an appointment of the marriage trust funds among the children of the marriage. The spouses made an apportionment of the sum of £25,000 to the eldest son. In the language of Lord Neaves (there having been litigation as to the shape and condition of the apportionment), "it was a positive and valid deed of appointment, by which there was given to the defender, the eldest son of the parents, a sum of £25,000, which the parents allotted and apportioned as his share." In this House this was held an absolute appointment, and "what was said as to applying the £25,000 to the extinction of debt . . . was not a condition of the appointment, so as either to make it null or to make the desire so expressed obligatory on the defender." It was, however, maintained that a deed of entail executed by the father imposed upon the son an obligation to disencumber the estates of the £25,000, and alternatively a declarator was asked that the son "had elected to take the £25,000, and was bound to denude of these estates." It was held "that the eldest son was not put to his election, but that, although he had taken the money absolutely and kept it up as a debt against the entailed lands, he was also entitled to remain in possession of those lands." Standing the judgment of this House, the Second Division of the Court of Session had no difficulty in holding that once the condition supposed to be attached to the allotment of £25,000 flew off, the case made by the pursuer that there could be an application of the doctrine of election, or approbate and reprobate, could not prevail.

The only other case of importance which was founded on at the Bar was the case of *Douglas* v. *Douglas* (24 Dunlop. p. 1191). I have referred to Lord Curriehill's judgment in that case already, but I think it right to point out that the true reason why the doctrine of approbate and reprobate could not be applied in such a case had nothing to do with the point put in argument here, or with a question as to the state of mind or knowledge of the testator. The true reason of the case was that the doctrine of approbate and reprobate cannot be introduced where it is impossible for the person against whom

it is pleaded effectively to exercise the election demanded. Archibald Monteith appointed his property to be entailed in his own name, and next on his brother James and his issue. James was Archibald's trustee. He massed his own estate with Archibald's and placed the combined estates under another and different entail. General Monteith Douglas, Archibald's heir of entail, had, of course, no difficulty in establishing that James had acted *ultra vires* in putting Archibald's estate under a fresh entail, and in holding that James' direction could only apply to his own estate. In that estate General Monteith Douglas had also certain rights. It was urged that General Monteith Douglas was bound to elect between taking his rights as heir of entail under Archibald's deeds and taking the benefits conferred on him in regard to James' estate. It will be seen, however, that General Monteith Douglas could not possibly elect in such a situation, for Archibald's estate was settled not upon him alone, but was settled upon him and a series of heirs of entail, and accordingly any so-called election by him would have been to the prejudice of a separate line of heirs, and such a transaction would not be permitted by law. In the language of Lord Justice-Clerk Inglis (afterwards Lord President)—"I think the party who is put to his election must have a free choice, and that whichever alternative he chooses he shall have a right absolutely to that which he has chosen without the possibility of his right being interfered with or frustrated by the intervention of any third party." That General Monteith Douglas had no such right was clear, because if he had attempted to exercise it he would have forfeited the entail. As Lord Benholme puts it, in a word—"He had it not in his power to permit or to consent to the arrangements of James in regard to Archibald's estate being carried into effect. He was bound to do what he did in keeping the estates and entails distinct, and he had no alternative." This is the case of *Douglas*. I am bound to say that I view with some surprise the comments which have followed it. One of these, proceeding from a very high authority, namely, the late Lord M'Laren, I will cite. In his Wills and Succession (i, 252) he states—"If a testator, erroneously supposing himself to have a power of appointment over the property of another, disposes of it by will, his legatees, who repudiate the appointment, are not thereby put to their election with respect to the testamentary provisions in their favour." The only authority given for that proposition is the case of *Douglas*, and in my opinion the case of *Douglas* was decided upon another ground which I have stated, and the proposition otherwise appears to me quite without support in the law of Scotland.

I think some confusion has entered into this case by endeavouring to give a much wider application than is legitimate to dicta laid down and clearly applicable only to the particular type of case in which they were used. I have already illustrated this, and I will conclude by citing a recent and strong instance of what I mean. The case of *Matthews Duncan's Trustees* (3 Fr. 533, 38 S.L.R. 401), has been cited as negativing the proposition of election put forward in this case, and in support of the view that where an appointment in a settlement had the effect of reducing the appointee's right to a liferent and otherwise restricting it these appointees could claim their rights independent of the will, and also certain other rights given to them by the will of the testator. What was held, however, in *Duncan's* case was, not that there was no appointment, but that there was—not that the will had made a bad appointment, but that, if properly construed, it had made a good appointment. After citing Sugden on Powers (p. 526)—"Where conditions are annexed to the gift not authorised by the power, the gift is good and the condition only is void, so that the appointee takes the fund absolutely"—Lord Adam, applying the principle to *Matthews Duncan's* case, adds—"If the settlement is to be read as if it contained none of the conditions attempted to be imposed on the children's shares of their provisions, then they are only claiming what the settlement gives them." They were, in short, not claiming against the settlement or electing as between benefits under it and independent of it, and the case accordingly was not one for applying the doctrine of approbate and reprobate.

That class of case is differentiated, I think, completely from cases like the present. For in the present case it is agreed, and the judgment of the Court of Session stands to the effect, that the testator has made no exercise of a power of appointment. What the testator has done is deliberately to mass together along with his own his children's property. I do not think it is on the whole doubtful that his intention was that, if these children converted in favour of their children their rights of fee into a right of liferent, then the testator would endow them with a liferent of what she herself was leaving. There is no impediment to the children doing this. Their rights are independent, and they are unfettered, for instance, by entail; but they do not choose to do so. In these circumstances who can determine what the testator would have done if the scheme of the settlement, its essential being the massing of the estates, had been contemplated as being disturbed entirely by the children's declining to acquiesce in the testator's intentions?—who can tell whether the testator would in such circumstances have given them the liferent in her own estate which they now claim? Such conjectures are unavailing; but what does remain is that the liferent to the children of the testator's own estate was a liferent given on the supposition and the footing that a liferent and no more was to be taken of the estates which were massed along with it. This appears to me to raise, conformably on the one hand to the intentions of the testator in this deed, and on the other to the general principles of the

doctrine of approbate and reprobate, a case for its application. I understand your Lordships to be clear that that application is in accordance with the law of England, and I am humbly of opinion that it is also in accordance with the law of Scotland.

There is a case of *Wedderburn Dundas* v. *Dundas* (1830), 4 W. & S. 460, on which we had not the advantage of having the views of the parties and which is not referred to the judgments of the Court below, but the opinions in that case appear to me to have a direct and helpful bearing on the present case. General Dundas, a domiciled Scotsman, by his settlement conveyed his whole property to trustees. Part of the estate was English, and the deed was defective in the form of conveyance of the English estate. It was found by the Court of Session and this House that the "heir to the English estate could not take it and at the same time claim a provision made to him by the trust deed." In that case the testator meant to convey property over which he had full power; in the present case the testator meant to convey property over which she had only a limited power. That is the difference, but the analogies are that (1) just as in the present case the deed was bad in so far as purporting to convey certain property; (2) the deed massed that property, not effectively conveyed, with the testator's other estate effectively disposed of; while (3) the claimant of benefits under the settlement was taking, in his own separate right and free from its provisions, a part of the property which the will purported to deal with—all just as here.

The Lord Ordinary (Cringletie) alluded to a case of *Trotter* which had been cited, and then he proceeded thus—"In that case it was admitted on all hands, both by English and Scotch lawyers, that the law of approbate and reprobate in Scotland and the law of election in England are to the same effect, and that they both apply wherever it is clear that the testator intended to bequeath or convey a subject but has failed to do so in a legal technical manner. If in such case the person to whom that subject belongs or falls through the failure of the proper technical conveyance, and which he would not have got had the deed been technically formal, has also a separate interest in the deed; and while he claims that separate interest claims also the subject conveyed away from him informally, he will not be permitted to take both. In Scotland the law of approbate and reprobate applies; in England that of election. Both go to this, that the person may make his election, viz., either take the share arising out of the deed, if the testator's whole intentions have effect, or the subject not technically conveyed; but not both." And the Lord Ordinary sums up—"There being no doubt that his father did not intend that he should have that subject and a share of all the others the law of approbate and reprobate applies."

This judgment was affirmed in the Second Division, the Lord Justice-Clerk Boyle noting that "it is clear that the intention of General Dundas was to mass all his estates." On appeal the decision was confirmed by this House. I am of opinion that the points of principle which I have ventured to cite from these judgments are not merely applicable to the case of a settlement which deals ineffectively, owing to defect of form, with a certain portion of the general mass of estate purported to be conveyed, but also to the case of a settlement which deals ineffectively therewith owing to defect of power.

With regard to the case of *Whistler*—although that case followed *Noys* v. *Mordaunt*, and may not be considered (in the mass of decisions) of the pre-eminence attached to it, I cannot but agree with Lord Johnston in his view that it has a special application to the argument presented by the respondents in this case. When, for instance, Sir Richard Arden put the question thus—"That no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect to everything contained in it whereby any disposition is made showing an intention that such a thing shall take place without reference to the circumstance whether the testator had any knowledge of the extent of his power or not," the language appears to me to cover the argument presented. And the answer is quite as satisfactory—"Nothing can be more dangerous than to speculate upon what he would have done if he had known one thing or another. It is enough for me to say he had such intention, and I will not speculate upon what he would have intended in different cases put."

As I have already indicated, I think that this testator did intend that her testamentary disposition should affect the entire massed estates. In my view it is not sufficient to say, as the learned Judges of the majority in the Court below have said, that these massed estates are separable, and that the will can be applied to the one portion which remains after the children's capital is detached from the mass. It is just in such cases that the principle of approbate and reprobate is equitably and appropriately applied. It does not appear to me to be legitimate that the estates should be separated simply because they are separable, if the testator intended on the contrary that they should be treated in the mass, and disposed of her own property upon that footing. For these reasons I am of opinion that the judgment of the majority of the Court below falls to be reversed, and an answer in a contrary sense given to the question dealt with in the judgment.

There was taken a separate point of the testator having prescribed against her children taking legitim or the marriage contract provisions as well as those under the will, whereas she did not make such a prescription against them claiming their independent rights. As to that, my view is that this is not sufficient to entitle a Court to conclude that a claim of separate rights, independent of the will and destroy-

ing its general scheme, together with a claim of benefits under the will, was any part of the contemplation or intention of the testator. On that subject, also, I think Lord Johnston has come to a correct conclusion.

LORD ROBSON—I concur, and I have nothing to add to the reasons which have been stated with such fulness.

LORD CHANCELLOR—I also agree.

Their Lordships reversed the order appealed from, with expenses out of the general estate, and not out of any particular portion.

Counsel for the Appellant—Macmillan. Agents—Webster, Will, & Company, W.S., Edinburgh—Grahames, Curry, & Spens, Westminster.

Counsel for Respondents—Blackburn, K.C.—Leadbetter. Agents—W. & J. Cook, W.S., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Friday, December 9.

SECOND DIVISION.

[Sheriff Court at Cupar.

GRAY *v.* ST ANDREWS DISTRICT COMMITTEE OF FIFE COUNTY COUNCIL AND OTHERS.

Statute—Construction—Imperative or Permissive Words—Highways (Scotland) Act 1771 (11 *Geo. III, cap.* 53), *sec.* 1.

Road—Statute Labour Road—Width—Highways (Scotland) Act 1771 (11 *Geo. III, cap.* 53), *sec.* 1.

The Highways (Scotland) Act 1771, sec. 1, proceeds on the following preamble—"Whereas by an Act of the Parliament of Scotland, passed in the year 1669, and entituled 'Act for repairing Highways and Bridges,' it is enacted that the said highways shall be twenty feet of measure broad at least, or broader if the same have been so before"—and enacts—"That the justices of the peace and commissioners of supply for the respective shires and stewartries, and the commissioners and trustees of turnpike roads established by special Acts of Parliament within that part of Great Britain called Scotland, shall have power, and they are hereby authorised and empowered, to make, repair, clear, widen, and extend, and to keep in good repair after being so cleared, widened, and extended, the several highways and roads under their management and direction respectively, so as the same shall be in all places full twenty feet width of clear passable road, exclusive of the bank and ditch on each side of such highway or road respectively."

A statute labour road in Fife had been made of the width of 25 feet, but at a certain place it had been narrowed to a width of 11 feet 6 inches by means of obstructions placed thereon by the road authorities. A man who had been injured in a driving accident at this place brought an action of damages against the road authorities. He proved that the accident was due to the narrowness of the road.

Held (1) that the enactment in the Highways (Scotland) Act 1771, sec. 1, as to the width of the road was imperative, not empowering only; and (2) that accordingly the defenders were bound to maintain the road in question so as to afford to the public a clear passable width of twenty feet, and having failed to do so were in fault.

Road—Reparation—Statute Labour Road—Delegation of Duty as to Half of Road to Another Authority—Accident to Member of Public through Failure to Maintain Road of Statutory Width—Liability to Make Reparation—Joint and Several Liability where Encroachment on both Halves of Road.

The *medium filum* of a certain statute labour road was for 1000 yards the boundary between the jurisdictions of the A and C District Committees. By an arrangement between the two Committees which had subsisted for many years, 500 yards of the said road had been wholly maintained by the A Committee, and 500 by the C Committee. A person who had been injured in a driving accident, which occurred on the part of the road maintained by the A Committee, brought an action of damages against both Committees, in which he proved that the accident had been caused by the road having been narrowed, by heaps placed on both sides thereof, to less than the statutory minimum width of twenty feet. The C Committee maintained that in virtue of the said arrangement sole responsibility for the road rested with the A Committee, and that they were not liable for the said accident. The A Committee maintained that the liability was joint and several.

Held (1) that the arrangement founded on did not relieve the C Committee from statutory liability as in a question with the public for the proper construction and maintenance of the half of the road lying within its own jurisdiction, and (2) that as the accident had been caused by the road having been illegally narrowed by obstructions placed upon both sides thereof, both Committees were jointly and severally liable to the pursuer for the damage he had suffered.

The Highways (Scotland) Act 1771 (11 Geo. III, cap. 53), sec. 1, is quoted *supra in rubric.*

David Gray, 270 Great Western Road, Aberdeen, brought an action in the Sheriff Court at Cupar against the St Andrews