REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS OR WRITS OF ERROR,

And decided during the Session, 1819.

59 GEO. III.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION (FIRST DIVISION).

Lady ESSEX KER, and Lady MARY KER . . . . . } *Appellants.*

JOHN WAUCHOPE, Esq. Writer to the Signet; the Rev. CHARLES BAILLIE; Sir WILLIAM SCOTT, of Ancrunr, Baronet; and Sir HENRY HAY M'DOUGALL, Baronet . . . . . } *Respondents.*

A. by a testament made on death-bed, bequeaths all his real and personal estates in trust to be sold. The interest of the residue he directed to be paid to B. and C. his heirs-at-law and next of kin, during their lives, &c. The principal of the residue he gave to D. &c. B. and C. reduce the death-bed disposition. The Court held that they could not claim the life-interest given to them, either under the testamentary instrument or as next of kin, for default of disposition. But that the deed not being ab-

Feb. 17, May 3, 1819.

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solutely void, according to the law of Scotland, was properly admitted in evidence against them to shew the testator's intention, and that D. &c. the residuary legatees, must be compensated out of the life-interest, given to B. and C. for the disappointment occasioned by their act.

JOHN, the late Duke of Roxburgh, by a testamentary disposition, dated the 4th of October, 1790, conveyed his whole unentailed real estate, and his personal estate, to himself, and his heirs whomsoever of his body, whom failing, to the Appellants equally between them and the heirs of their bodies; and failing either of them, to the survivor and the heirs of her body; whom failing, to his heirs of tailzie succeeding to the Earldom and estate of Roxburgh, under burthen of the payment of his debts and funeral expenses, and of all legacies which he might bequeath. On the 5th of November, 1803, the Duke executed another deed, whereby, without revoking the former for the better settlement of his affairs, in the event of his death, agreeably to the instructions given, or to be given by him, in relation thereto, he granted and disponed to the Respondent, John Wauchope, and to James Dundas, Clerks to the Signet, his whole unentailed real estate, (describing particularly all the lands and heritages he held in fee simple,) together with his personal estate, in trust, for the uses, ends, and purposes specified in the following words:—"To the end "that my lands, houses, and other heritages, "before conveyed, now belonging, or which "shall belong to me at my death, may be sold, "either in whole or in part, at the discretion of

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" my trustees; and that the produce and prices
" thereof may be applied to the purposes after-
" mentioned:—In the first place, for the pay-
" ment of my death-bed and funeral expenses,
" and of the expenses of management and exe-
" cuting this trust: Secondly, for and in pay-
" ment of all the just and lawful debts, which
" shall be owing by me at my death: Thirdly,
" for payment and satisfaction of all obligations,
" legacies, annuities, donations, or other be-
" quests granted, or to be granted, by me to
" any person or persons whatsoever, by any bond
" deed, missive, memorandum, codicil, or other
" writing whatsoever, expressive of my will and
" intention, executed at any time of my life,
" and even upon death-bed: And lastly, the
" whole residue, remainder, and surplus, of my
" said estate and effects, shall be conveyed
" and made over or applied and employed
" by my said trustees or trustee acting for
" the time, to and in favour of such person
" or persons, or for such uses and purposes, as I
" have directed, or shall direct, by any deed,
" missive, memorandum, or other writing, exe-
" cuted, or to be executed, by me to that effect."
The trust disposition also, in the events of the trustees not accepting or declining to execute the trust, makes the following provision:—" Then,
" and in either of these cases, the lands and
" other heritages and debts, and sums of money,
" and other *subjects* and effects, hereby dis-
" poned, shall fall and belong to such person or
" persons, and be applied to such uses and pur-
" poses as I have directed, or shall by any deed,

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" missive, memorandum, codicil, or other writ-
" ing of the date hereof, or of any other date
" or dates, direct and appoint; and failing such
" appointment, then to the person or persons
" whom I shall appoint to be my residuary lega-
" tee or legatees." By a subsequent clause, the trust-deed nominates the trustees, and failing them, the residuary legatees, to be the Duke's executors and administrators of his estate and effects, excluding all others his nearest of kin and executors from these offices. By a writing executed at the same time with the last-mentioned trust-deed, the Duke declared, " That
" in the event of his sudden death, or in the
" event that he should be prevented from exe-
" cuting a deed of instructions, it was his will,
" that the deed which he formerly made in favour
" of the Appellants, should be carried into effect
" so far as regarded them."

In the beginning of March, 1804, the Duke fell sick with the complaint of which he died. On the 19th of the same month, he executed an instrument, by which he directed the Respondent, John Wauchope, and James Dundas, as trustees named in the settlement of the 5th of November, 1803, to sell and dispose of his whole (unentailed) real estate in Scotland, and his house in St. James's-square, London, and from the produce thereof, and of his personal estate, after payment of certain annuities and legacies in the deed specified, and of his debts, funeral charges, and expenses of management, he authorized them to invest the whole residue and remainder of the property thereby bequeathed,

in the public funds, or upon real security, in Scotland, and he thereby "directed his trustees "to pay annually the dividends and interest, "equally between the Appellants; and failing "either of them, to the survivor, during their "lives, or that of the survivor; and upon the "death of the survivor, to pay over the residue to "Sir John Scott, (father of the Respondent, Sir William Scott,) and the Respondents Charles Baillie "Hamilton, and Sir Henry Hay M'Dougall, and "their executors and assignees, in the proportions "therein specified." The Duke died without issue upon the day on which this last mentioned instrument was executed, leaving the Appellants his heirs-at-law and sole next of kin. Immediately after his death, the Appellants brought an action in the Court of Session, to reduce this deed; and obtained a judgment, by which it was found, that being executed on death-bed, it was inept, so far as it conveyed lands; in consequence of which, the deed was set aside, and the Appellants' right to the lands, as heirs-at-law, established upon appeal to the House of Lords.

After a lapse of some years, the Respondent Wauchope, who alone had accepted and acted in the trust, brought an action of multiple-poinding, for the purpose of ascertaining, judicially, the respective rights of the parties claiming adverse interests in the trust-fund remaining in his hands. When the cause was brought before the Lord Ordinary, he ordered the parties to state their respective claims in writing. The Appellants claimed a life-interest in the residuary personal estate in the precise terms of the trust-deed; or

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if the Court should be of opinion, that, having rejected and annulled that deed in one respect, they could not avail themselves of any of its provisions, then, in the character of the Duke's *next of kin*, they claimed the profits of the residue of his property during their lives, and the life of the survivor, as a subject not disposed of by his will. On the other hand, the Respondents, Hamilton and M'Dougall and Sir J. Scott, insisted, that they were not only entitled to the capital of the funds after the death of the Appellants, and the survivor of them, but that they were entitled to the profits during the lives of the Appellants; upon the ground that the Appellants having reprobated the deed so far as it contemplated the disposal of land in Scotland, could take no benefit under that deed.

Upon these respective statements of claims, the Lord Ordinary, having heard Counsel, pronounced an interlocutor, by which, after reciting, to the effect before stated, the substance of the deeds dated the 14th of October, 1790, the 5th of November, 1803, with the writing or signed declaration of the same date, and the principal deed in question of the 19th of March, 1804; and after finding as facts the signature and execution of these several instruments, the action brought by the Appellants, and the consequent reduction of the deed made on death-bed, in so far as it related to the whole of the heritable subjects, expressed to be conveyed by it, which were descendible to the Appellants as heirs *alioqui successuræ*, under the titles thereof, which stood in the person of John, Duke of Roxburgh; the in-

terlocutor proceeds to find, " that the Appellants " having thus challenged and reduced the death-" bed deed, in so far as it affected the heritage, " cannot avail themselves of that deed, by claim-" ing the life-rent of the moveables under it:" and finally, it is found and declared, "That al-" though by the terms of the settlement, the re-" siduary legatees are entitled to claim the resi-" due of the effects vested in the trustees, after " the death of Ladies Essex and Mary Ker, (the " Appellants,) and the survivor of them; yet, that " the life-rent of these subjects *does not belong* to " the Ladies Ker *as the Duke's executors*, he " having appointed the trustees his executors, " and having appointed the whole residue of his " fortune to be paid at a certain period to the " residuary legatees, and therefore, the Ladies " Ker can have no legal claim to the life-rent of " these effects, except by this settlement, (the " trust-deed of the 19th of March, 1804,) which " they cannot approbate and reprobate; there-" fore, repels the claim of Ladies Essex and Mary " Ker, to the life-rent of the subjects in *medio*, " and *decerns*; but before further answer as to " the claim of the residuary legatees, appoints " them to be heard on the question, Whether by " the terms of the Duke's settlement, as the resi-" due is declared not to be payable until after " the death of his sisters, they are entitled to de-" mand payment thereof immediately?"

Against this interlocutor the Appellants gave in a representation, by which, in addition to their former arguments, they contended, that John, Duke of Roxburgh, was domiciled in England; and that

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his moveable succession must, therefore, be regulated by the law of England; which, as they represented, acknowledged no such principle as that applied to the case by the Lord Ordinary. Upon considering this representation, with answers, his Lordship pronounced the following interlocutor.

" The Lord Ordinary having considered the re-
" presentation, and the answers thereto, together
" with the whole process, in respect that the plea
" now maintained, as drawn from the English law,
" which it is said does not admit of the doctrine
" of approbate and reprobate, does not apply to
" this case, supposing the fact as to the law of
" England to be as there stated; seeing that John,
" Duke of Roxburgh, being a Scottish noble-
" man, and his whole landed property being in
" Scotland, and that being the place of his resi-
" dence for the greater part of the year, his domi-
" cile must be held to have been in Scotland,
" notwithstanding his having, during the sitting
" of Parliament, an occasional residence in Lon-
" don, where he died; and in respect the pur-
" suers *only claim* the life-rent in question of the
" residue of the Duke's fortune, *by virtue of the*
" *deed* of 1804, which they have actually chal-
" lenged, and set aside in part, refuses the repre-
" sentation, and adheres to the interlocutor com-
" plained of."

The Appellants submitted these interlocutors to the review of the first division of the Court. But the Court adhered to the interlocutor of the

Nov. 23, 1815. Lord Ordinary. By another petition to the same

Dec. 14, 1815. division, the Appellants reclaimed against the in-

terlocutor of the Court; but the prayer was refused, and the Court adhered to their former interlocutor. Against these several interlocutors, the present appeal was presented.

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For the Appellants—*Mr. Wetherell* and *Mr. Abercrombie.* The doctrine of *approbate and reprobate* is not clear in application or principle. It has been treated as a result of *homologation*; as where a party has adopted an instrument and taken some benefit under it, he cannot afterwards question its validity; he must co-operate, if necessary, to effectuate all the provisions of that instrument. In *Gainer v. Cunningham* the decision turned upon very special circumstances. The case in question is different. According to the doctrine as it appears in the text writers on the law of Scotland—a party, an heir-at-law, as in this case, may avail himself of a deed in his favour, and at the same time challenge another deed of the same grantor, which, if duly executed, would deprive him of some legal right. The objection is admitted to be legal, when the instruments are on separate papers. If they happen to be united, then it is said, the party cannot *approbate* and *reprobate.* Such distinctions in a system of law are singular. A case of this nature occurred in the year 1784. One Gordon made a will of his personal estate in favour of his heir-at-law: a few days after, he made an entail of his landed property in favour of the same person, but laying him under restrictions. The will and the entail referred to each other; and were indisputably meant as one settlement of the whole property of the testator

Arguments.

Fac. Die Jan. 17, 1758.

Not reported.

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and entailer. The heir-at-law took the personal estate under the will, and having afterwards challenged the deed of entail as executed on death-bed, it was contended, that he could not approbate and reprobate the same instrument, and that the two being executed *unico contextu*, were to be considered in that light. The judgment of the court was, that the heir, notwithstanding his having taken the personal estate under the will, might set aside the separate deed of entail. It was accordingly set aside, and he enjoyed both real and personal estate; the one as heir-at-law, without restriction, the other according to the terms of the will. This decision, if it proceeded upon a rational principle, would not have been different, although the deed of entail had been attached or annexed to the will, or formed part of it. The propensity of the courts below to extend this doctrine of *approbate* and *reprobate*, has been checked by this House, in the

Mar. 29, 1802. decisions upon *Wilson v. Henderson*, and *Craw-*

Mar. 14, 1806. *ford v. Coutts*. A deed made upon death-bed is not absolutely void, because the heir may waive his right, or his right may not be affected, in which case he is barred. But this deed, so far as it conveyed the inheritance, was challenged and reduced before the question of election was raised. Is the right of heirs at law to give way to presumed intention? if so, where is the ground of presumption? The testator, when he framed or approved of the instrument, was capable of understanding the effect of his own acts; and if he intended to make his bequest conditional, he would have inserted an express condition. Suppose the deed to have

been so reprobated by the Appellants, that they can take nothing under it, then the life interest in the residue is not disposed of. It cannot fall into the residue for the benefit of the Respondents. They are not residuary legatees, but legatees in remainder of a residue. The executors cannot take it, they are mere trustees. To whom then can it go, but to the Appellants as next of kin? The deed is reduced, and cannot be read against them. *Hearle v. Greenbank*, *Sheddon v. Goodrich*.

3 Atk. 714. 8 Ves. 497.

For the Respondents—the *Solicitor-General Sir R. Gifford*, and *Mr. C. Warren*. The principle of law which forbids a person to take a benefit from one part while he denies effect to another part of the same deed, is founded in natural equity, and confirmed by authority and practice. Every provision of a testamentary settlement operates as a condition. To defeat the provision, or to refuse the performance of the condition, excludes the recusant from the benefit of the will. The law will not admit of opposite and incompatible pretensions. The courts both of England and Scotland have adopted the maxim of the Roman law: "*Absurdum videtur licere eidem partim comprobare "judicium defuncti, partim evertere.*" Decisions grounded upon this principle have frequently occurred in the tribunals of Scotland: *Anderson v. Bruce*, Morr. Dict. p. 607. 21 Dec. 1680—*Paterson v. Spreuil*, Kame's Remarkable Decisions, vol. ii. p. 114—*Cunningham v. Gainer*, Jan. 15, 1758. Morr. Dict. p. 617—*Gibson v. M'Bean*, Id. 620—*Martin v. Martin*. The case of *Loudon*

Ersk. Inst. b. 3. t. 9. s. 10.

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lately decided in the Court of Session, illustrates and enforces the doctrine. The decision took place * under the following circumstances:—

" *George Loudon*, who had been for some time re-
" sident, and died in Jamaica, had sent home
" 2,000*l.* sterling, of which 1,000*l.* was lent out
" upon heritable security. He executed a will
" in the English form, by which, *inter alia*, he
" directed his executors, so soon as Robert Lou-
" don, his nephew, should attain the age of 21, to
" invest the sum of 5,000*l.* sterling in security upon
" property in Great Britain, for his use during the
" term of his natural life; and after his death, to the
" use of the heirs of his body; and he directed that
" the sum of 2,000*l.* which he had remitted to
" Great Britain, as above mentioned, might be
" applied in part payment of the said sum of 5,000*l.*
" sterling. He further directed his executors to
" invest the sum of 1,500*l.* sterling in good secu-
" rity, the interest or profits of which were to be
" paid to his brother William Loudon, during his
" life-time, and after his death, the principal was
" given to his children. The testator also appoint-
" ed his nephew Robert Loudon his residuary lega-
" tee. William Loudon was the testator's heir-at-
" law. For several years he continued to draw
" the interest of the 1,500*l.* given to him in life-
" rent, but having obtained information of the
" heritable bond for 1,000*l.* he contended that it
" was not carried by his brother's testament, but

* 1811, Jan. 29, May 23, Dec. 10.—The case not reported.

" fell to him as his heir-at-law. This claim was
" met on the part of Robert Loudon the nephew,
" by the doctrine of approbate and reprobate;
" and he further maintained, that William Lou-
" don had homologated the settlement by taking
" benefit under it, having drawn for several years
" the interest of the 1,500*l.*—Lord Newton, Ordi-
" nary, found that the heir-at-law had not done any
" thing sufficient to infer homologation, unless
" it could have been established that he had
" full knowledge of the contents of the settle-
" ment at the time when the alledged acts of ho-
" mologation were done. He sustained, however,
" the plea of approbate and reprobate to its full
" extent: For he found in the same interlocutor,
" ' that he (William Loudon), is not entitled both
" ' to approbate the will by accepting the bequest
" ' of the interest of 1,500*l.* and to reprobate it by
" ' challenging the conveyance of the above 1,000*l.*
" ' according to the purpose of the will; therefore
" ' ordains him to declare his option within ten
" ' days, whether he will take the interest of the
" ' 1,500*l.* provided to him and his family by the
" ' will, or claim the 1,000*l.* lent out on heritable
" ' security, but destined by the testator for an-
" ' swering the purposes of his will.' This judg-
ment was confirmed by two successive interlo-
cutors of the court. The Appellants having
challenged and reduced the death-bed disposition,
so far as the heritage is bequeathed by it, those
acts amount to an abandonment of the life-inte-
rest in the personalty created in their favour by
the deed. That interest consequently, and of ne-

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cessity, falls to the enjoyment of the Respondents. If it can be supposed that these acts do not amount to an election, then it remains to be determined by the Appellants, whether they will take the life-interest in the mixed fund given by the testamentary instrument, and give up the unentailed real estate, or insist upon their legal right to the inheritance, and abandon the life-interest in the personalty. The Appellants must elect: They cannot *approbate* and *reprobate*. This is not a case like those cited for the Respondents. The bequests are contained in one, not in two instruments. The law is different where the instruments are distinct; and this is a question of positive law, not of expedience or morality. It is argued, upon the authority of *Hearle v. Greenbank*,

3 Atk. 714.

8 Ves. 497.

and *Sheddon v. Goodrich*, that the testamentary instrument as to land not having been legally executed, cannot be read to shew any intention upon the subject. Those cases may be distinguished from

2 Ves. Sen. p. 12.

the present. In *Boughton v. Boughton*, it was decided by Lord Hardwicke, that a will not executed according to the *statute*,

29 Car. 2.

though void as to real estate, might be read to raise a case of election against the heir; because the condition was annexed to the gift of the personalty. In the case of copyhold, where no surrender has been made, although it cannot pass by a will, and no condition is expressed, yet, where the testator has given a legacy to the heir, and the copyhold to a stranger, the Court compels an election: *Pettiward v. Prescott*.

7 Ves. 541.

The distinctions made in these conflicting cases are not satisfactory, and do not seem

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to rest upon intelligible principles. The question was much discussed in the case of *Thelluson v. Woodford*, where the doctrine of election prevailed.

The law of England may be doubtful on the point, but the law of Scotland, is clear and decisive. The case of *Cunningham v. Gainer* is an express decision upon the subject. In that case the testament was executed upon death-bed; yet the Court suffered it to be read, and in their judgment proceeded upon the principle of approbate and reprobate. There was no appeal against that judgment. It has established the law upon the question. It has guided the courts ever since.

In the case of *Brodie v. Barry*, Sir William Grant, the late Master of the Rolls, expressing his doubts of the soundness of the distinction between express and implied conditions, decided that a will duly executed in the English form, by which estates in Scotland were devised to trustees, together with estates in England and personal property, might be read to raise a case of election against the heir, to whom a legacy was given by the will. In *Crawford v. Coutts*, there were two instruments, the latter executed on death-bed, containing a revocation of the former. No benefit was given to the heir by the invalid instrument, and he stood upon his independent right. The doctrine of *approbate* and *reprobate* did not come in question, and the case

2 V. and B. 127. There was no condition expressed.

* 13 Ves. 211. where most of the cases *pro* and *con*, to be found in the Books of Report, are cited.

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is altogether inapplicable. In *Wilson v. Henderson*, the will contained no provision as to lands, and the death-bed disposition was a separate instrument.

The other cases, cited for the Appellants in the court below, contain no principle which can bear upon the present question. In some of those cases, such as *Weir v. the Laird of Leé*, and *Sir P. Home v. E. of Home*, it was decided that a party might produce in evidence an admission or statement of fact made in one part of a deed, without being bound to admit the truth of every other part of the same deed. In other cases adduced, of a different class, as those of *Gray and Somerville v. Abernethy*, and *Fee v. Traill*, where reservations had been unwarrantably made in conveyances by persons bound to execute them simply, it was found that parties intitled might avail themselves of the full benefit of the conveyances, refusing to acknowledge or effectuate the reservations. How do these decisions affect the doctrine of election?

Morr. Dict. p. 605, 612.

Morr. Dict. p. 609, 616.

But the Appellants if they cannot avoid election, resort to a new device; they would take the real estate as heirs, and the life interest in the residue of the personalty as next of kin. They argue that if they cannot have that interest under the will, there is no disposition of the life interest. They cannot claim it as next of kin. In fact, there is no intestacy. By a clause in the trust disposition of 1803, all *the subjects* thereby disponed are given, in default of appointment, to the person or persons whom the disponer should appoint to be

his *residuary legatee or legatees.* If he has not disposed of the life-interest in the personalty, it falls, by virtue of that clause, into the residue, upon the refusal of the Appellants to perform the implied condition of the will; as it would in case of their death, and the Respondents take it under appointment. Lastly, if the life-interest does not fall into the residue, it is a fund out of which the Respondents must be compensated for the disappointment occasioned by the acts of the Appellants. *Welby v. Welby.**

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2 Ves. & Bea. p. 90.

Mr. Wetherell in reply. In this case the question of election is not raised against the heirs; because the death-bed disposition being an invalid instrument cannot be read to shew any intention

* The report of the judgment pronounced in that case, by Sir W. Grant, contains the following passage:—"That an "heir, to whom an estate is devised in fee, may be put to an "election, although, by the rule of law, a devise in fee to an "heir is inoperative, I should have thought perfectly clear, "independently of Lord Cowper's decision in the case in "Gilbert;† for, if the will is in other respects so framed as to "raise a case of election, then, not only is the estate given to "the heir under an implied condition, that he shall confirm "the whole of the will, but in contemplation of equity the "testator means, in case the condition shall not be complied "with, to give the disappointed devisees out of the estate, over "which he had a power, a benefit correspondent to that of "which they are deprived by such non-compliance. So, that the "devise is read, as if it were to the heir absolutely, if he con-"firm the will; if not, then in trust for the disappointed devi-"sees as to so much of the estate given to him, as shall be equal "in value to the estates intended for them."

† Anon. Gilb. Eq. Rep. 15.

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as to the land. The principle of the decisions in *Hearle v. Greenbank*, and *Sheddon v. Goodrich*, is founded in universal law,—it must extend to cases in Scotland.

The Judgment of the Court below is at all events defective in one respect. There has been no decision upon the question reserved, as to the life-interest in the personalty. The Judges of the Court of Session have pronounced that the Appellants are not to have it. But they have not said who is to have that interest which yet remains to be disposed of. The consideration of that difficulty might have altered or affected their judgment.

The Lord Chancellor,—after stating the principal facts of the case as the foundation of the Judgment, which he recommended for the adoption of the House, proceeded to this effect:

In this Case, according to the pleadings in the Court below, the Respondents, Hamilton, Scott, and M'Dougall, claim an immediate interest in the proceeds of the residuary fund of the personal estate. The Appellants make an adverse claim to the same subject, either under the deed of trust, or as next of kin, for default of disposition. From the language of the interlocutor, "*that the* "*life rents do not belong to the Appellants, as the* "*Duke had made the trustees his executors, and* "*had appointed the whole residue of his fortune* "*to be paid to the residuary legatees*," it does not clearly appear, whether the Lord Ordinary meant to negative the claim of the Appellants as

next of kin. It is very true, that the Duke had appointed the trustees his executors, and had appointed the residue of his fortune to be paid to the residuary legatees; but that was not to take place until the death of the survivor of the Appellants. The conclusion, "*that, therefore, the "Ladies Ker can have no legal claim to the life-"rent of these effects, except by this settlement "which they cannot approbate and reprobate, "therefore repels this claim of Ladies Essex and "Mary Ker to the life-rent of the subjects in "medio,*" does not seem to be a complete judicial decision, nor a necessary conclusion from the premises.* Having repelled their claims, and having stated that the trustees were executors, the Lord Ordinary goes on to make a reservation upon certain questions which have not yet received the decision of the Court below. The question was, Whether the residuary legatees were, or were not, to have immediate payment of the residue? If the Appellants could not claim the life interest

* The passage of the interlocutor to which these observations apply runs thus:—"Finds, &c. that the life-rent of the subjects "does not belong to the Ladies Ker as the Duke's *executors*, "he having appointed, &c. Therefore, &c." These words, if considered without reference to the words of the subsequent interlocutor, might be considered as a finding that the Appellants were not entitled as *next of kin*. For "the appellation of execu-"tors is sometimes applied *designativè* to those who are barely en-"titled to the moveable succession of the deceased *ab intestato*, "and have a right to claim the office of executors if they think "fit." Erskine's Inst. B. 3. Tit. 9. § 1. So in the same author, B. 2. Tit. 2. § 3.—"*Next of kin*, or *executors*," are coupled as synonymous denominations. In like manner the subject of moveable succession is called *executry*. Id. B. 3. Tit. 9. § 1.

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under the settlement, it must follow of course either that they had a right to claim it as next of kin, or if they were not at liberty to bring forward that claim, the profits of the residue must either belong to the trustees and executors, during the lives of the Appellants and the survivor, or it must accumulate during that period, and be paid over to the parties who, at the death of the survivor, were appointed to take the capital. If we are to understand the decision of the Court below according to the last of these suppositions, as the interest, and all accumulation of interest, must go to the Respondents, or their representatives, there would be no reason why they should not take the interest immediately, as well as the capital, at the death of the survivor of the Appellants. There is, however, no express declaration to this effect in this Judgment of the Lord Ordinary; unless, (as it is probable) he meant to decide, that there being a testamentary disposition under which the Appellants could not claim as legatees, they could not claim in any other right; and then reserving the question how this interest was to be disposed of, and when it was to be paid. In the second interlocutor of the Lord Ordinary, it is said, "The pursuers only claim the life-rent in "question of the residue of the Duke's fortune, "by virtue of the deed of 1804;" whereas, the claim made in the pleadings is not only by virtue of the deed of 1804, but also as the next of kin of the Duke. The interlocutor in this respect, therefore, is not quite correct, unless it can be said, that as the life-interest in the residue was given

to them by the Deed of 1804, and all other persons were excluded by the effect of the provisions of that deed, the result of that exclusion, and the intestacy which ensued upon their incapacity to take as legatees, devolved the life-interest upon them, as a consequence of the bequest in the deed, and the circumstances attending it. In such a sense only can the claim of the Appellants be said to be made by virtue of the deed of 1804 only. In the petition to the first division of the Court of Session, reclaiming against these interlocutors of the Lord Ordinary, the claim as next of kin is distinctly brought forward again. The result of the discussions before the Lord Ordinary, and before the Court of Session, seems to me upon the whole to be a decision, that the Appellants had no title to the life-interest in the residue, either under the deed of 1804, or in the character of next of kin to the testator; but I do not perceive, that the Court of Session has disposed of the reservation which is contained in the interlocutor of the 17th of January, 1815, which appoints the question to be heard, whether the residuary legatees could take any thing till after the death of the survivor of Ladies Essex and Mary Ker, upon the general question raised in the pleadings.

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, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A., and gives A.'s

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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. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift. I have not overlooked the distinction which has been pressed on the consideration of the House. It is said, if a will be made which is attested by three witnesses, and which, therefore, according to the statute, is a good will, to pass land; and, in the same will, a case of election is proposed, there the will being duly executed according to the statute, if the devisee will take the land of the devisor, according to the disposition, he shall not refuse to comply with the implied condition of making good the will in certain respects, where it cannot have effect under the will, without his assent and co-operation: that is the simplest case of election. But in a case like the present, where the will has made the land personal estate; and, in one part of that will, the land, is disposed of, and in another part, the personal estate: if the will is not executed according to the statute, it is no will of land: but, as a bequest of personalty does not require attestation, the will is good to that extent. What then is to be done as to the case of election? It is said, that because, as a will of land, it is abso-

lutely void, it is exactly the same as if it contained nothing as to land; that it cannot be read to shew an intention; and, therefore, cannot be viewed as an instrument proposing election. The distinctions upon this head of law appear to be rather unsubstantial. It has been held, that although a will containing dispositions of land be not duly executed according to the statute; yet, if in the same will, personalty is given upon condition that the legatee convey the land; in such case, in as much as the disposition of the personalty cannot be read, without reading at the same time the condition upon which it is given, the gift and the condition are inseparable; and the case of election is raised, because the testator in the disposition, not of land, but of personalty, expresses and directs what is to be done. These are undoubtedly thin distinctions; and a judge having to deal with them finds a difficulty in stating to his own mind, satisfactory principles on which they may be grounded. This was the opinion of a Judge* who has lately, to the regret of the profession and the public, retired from his judicial labours. I doubt whether the Court in which he so long administered justice will ever see a judge of greater ability and integrity. The opinion to which I allude is expressed in a recent case, where the Judge, having disburthened his mind of his sentiments as an individual, observes in conclusion, that whatever might have been the foundation of the distinction, he found it established, and therefore, in his judicial character, he could not, with propriety, travel

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beyond this question—Is the distinction applicable to the decision of the case before the Court? In such a conclusion, and upon similar grounds, I acquiesce: for long professional experience has convinced me that it is more beneficial to the community to adhere to imperfect or ineligible rules of law, which have been long established, than that each succeeding Judge should be at liberty, upon his own notions of expedience, to improve and unsettle the law. The distinction which I am now considering was promulgated by Lord Hardwicke, a Judge profound in legal knowledge. Since his time, men have enjoyed their property upon that established doctrine, and the traditional experience of the Courts does not furnish a wiser maxim than that which is contained in the short precept, *stare decisis*. I therefore shall only consider the question whether the doctrine of election is applicable to the case before the House. In *Brodie v. Barry*, the late Master of the Rolls applied the doctrine to the case of property in Scotland, as Lord Hardwicke had before done in the case of *Gainer v. Cunyngham*.* I have looked at the decree and the proofs as recorded in that case, and it appears to me from the result, that Lord Hardwicke was of opinion, that a Scotch instrument, though not good to make an effectual title to Scotch land, might be read to raise a question of election. There is a ground which may be represented as a solid ground to take a Scotch case out of the

* This case is not to be found in any of the books of English Reports. A note of it, extracted from the Register's Book, will be found at the end of this case.

distinction, which I have admitted to exist in English cases. A deed made upon death-bed is not absolutely void by the law of Scotland. In many cases it will regulate the title, notwithstanding the objection which the heir may raise against it. Until reduced to a nullity, it is only voidable, and may be read for the purpose of ascertaining the intention of the testator. I do not think it necessary to examine and discuss all the cases upon this subject. It may be sufficient to state my opinion that, according to the law of Scotland (perhaps more directly than in our law), the doctrine of election was properly applied to this case. According to this decision, if the Appellants set up their title as next of kin, an election would be made, but it would be made in a manner perfectly nugatory, if they are left at liberty to disappoint the intentions of the testator, as to the real estate; to abandon their rights under the deed, and to claim, in the character of next of kin, the life-interest in the personal estate which is not disposed of by the deed. But as the Appellants have in fact, to a certain extent, annulled the deed by judicial process, their election is thereby made to take nothing under that repudiated instrument. A question then arises, what is to become of the life-interest, which the Appellants cannot take, either as legatees, or as next of kin? In our courts we have engrafted upon this primary doctrine of election, the equity as it may be termed of *compensation*. Suppose a testator gives his estate to A. and directs that the estate of A., or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts

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of Equity hold that another condition is to be implied, as arising out of the will, and the conduct of the devisee; that inasmuch as the testator meant that his heir-at-law should not take his estate which he gives A., in consideration of his giving his estate to B.; if A. refuses to comply with the will, B. shall be compensated by taking the property, or the value of the property, which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him. Under these circumstances it does not appear to me that there is any ground for advising your Lordships, either to affect this interlocutor, as far as regards the question of approbation and reprobation of the deed, or as far as in construction it negatives the title of the Appellants as next of kin. It may be necessary to correct the language contained in this interlocutor, so as to show unequivocally what points are determined. The latter point the Court has not yet determined, namely, whether the Respondents, are, or are not, entitled to take their compensation, until the death of the survivor of the Appellants; the Court below having given no opinion, it is impossible that we should give any opinion upon that point. It is for their determination in the first instance.

See the minutes of the judgment at the end of the note subjoined to the case.

The cause must, in point of form, be remitted, with a view to have that question decided. It appears to me very easy of solution. There are certain persons who, according to the expression and principles of our law, have a vested remainder in the capital. They have also, by way of compensation, a title to the life-interest, preceding that remainder in the fund. Having, therefore, the

whole interest, I do not understand upon what ground it can be argued, that there ought to be an accumulation of the profits, until the decease of the survivor of the Appellants. If the Appellants have no right, and the Respondents have all the right, in the subject of litigation, why is it not to be applied immediately by way of compensation, upon the ground, that, the condition of the gift being rejected, the life estate did not form a part of the disposition?

The Case cited in the foregoing arguments and judgment under the name of GAINER *v.* CUNYNGHAM, appears in the Register's Book, under the following date and title.

See Dict. p. 617.

Tuesday, the 31st day of July, 1750, between Mary Cunyngham, widow of Robert Cunyngham, Esq. deceased, and Susannah Cunyngham, an infant by the said Mary, her mother and next friend—Plaintiffs. Daniel Cunyngham, Esq., William Coleman the elder, Esq., William M'Dowall, and Drewry Ottley the elder, Esqrs., and Elizabeth Cunyngham—Defendants.

The Cause was originally heard on the 13th of April, 1749. The pleadings are shortly abridged from the abstract in the Register's Book. The bill states: That Robert Cunyngham, the Plaintiff Mary's late husband, being resident at Edinburgh, in Scotland, did, by a deed of disposition or gift of his own hand writing, dated the 17th day of July, 1741, in consideration of the friendship he had for the Plaintiff Mary, assign and make over unto her, by the name of Mary Gainer, all his lands of Craig, in Scotland, and his whole moveable estate therein particularly described, upon condition that the said Mary should be a tender nurse to him during his life, and take care of his family affairs; and also that she should not

at any time then after cohabit with Captain James Dalrymple, or be in his company, unless by accident; with a power for the said testator to revoke the said deed: and under these provisions the said Mary was to enjoy the said premises after the said testator's death, for her own life, and afterwards he gave the said premises unto the Plaintiff Susannah, by the name of Susannah Cunyngham, his goddaughter, an infant, under the care of the Plaintiff Mary, and the heirs of her body for ever; remainder to his sons Daniel and Charles Cunyngham, Esqrs. and their heirs for ever, and in the disposition and assignment, he obliges himself, his heirs, and successors, who should inherit his estate at Cayon, in the island of Saint Christopher's, to clear the lands above mentioned of all debts, and to warrant and defend his said assignation, to be good, valid, and sufficient to the Plaintiff Mary, during her natural life, and after her decease to the Plaintiff Susannah, and the heirs of her body for ever, and thereby directed the said deed to be registered in the Books of Session, and appointed a proctor for that purpose. That the said deed was in every particular duly executed and completed according to the law of Scotland, and the said Robert Cunyngham did on the 27th day of October, 1748, duly make and publish his last will and testament, written in his own hand; and thereby directed, that his lands and houses in Basseterre Town should be affixed to his plantation at Cayon, in the said island, and never to be separated therefrom, and he gave his said plantation and lands in Basseterre Town, and all the stock thereon, let to his son Daniel Cunyngham, the Defendant, at 2500*l.* a year, unto William M'Dowall, of Castle Semple, in the Shire of Renfrew, Esq., Drewry Ottley, of Saint Christopher's, Esq., and the Defendant Coleman, and their heirs, upon trust for the payment of his funeral expenses, *debts, and legacies*, therein particularly mentioned. And upon further trust for the said Defendant, Daniel Cunyngham, for life, with power for him to charge by his will the said premises with the double of such sums as he had or should receive as his wife's fortune, remainder after his said son Daniel's death

to his heirs male or female of his body, with divers limitations over upon conditions therein specified. And then amongst many legacies particularly set forth in the will, given to his children, grandchildren, and relations, the said testator gave to the Plaintiff Mary, by the description of his dear wife, Mary Gainer, which he had theretofore concealed, *all his lands, plate, household furniture, linen, and whatsoever he then had, or should have in Scotland*, at his death, for her life, for her maintenance; and for the maintenance and education of his daughter Susannah Cunyngham, and the heirs of her body; remainder to his said son Daniel Cunyngham, and his heirs for ever: and further bequeathed to his said wife 200*l.* a year for her life, to be paid quarterly, and all such money as Major James Dalrymple owed the said Testator, and thereby declared that the said provision was to be in full of her dower. And further directed, that all the produce of his plantation at Cayon, the necessary charges excepted, should be from time to time shipped on such ships as the Defendant William Coleman, his heirs and assigns, should direct; and consigned unto him and them, until the said Testator's funeral charges, *debts, and legacies* should be paid; and gave him and them power out of the said produce, as the same should be remitted to him and them, *to pay the said debts and legacies in Great Britain*, with interest, agreeable to his said will, without any order from his said executor, or any other person or persons who should then after come to inherit the said plantation; and the better to secure such consignments to the said Coleman, his heirs and assigns, until such debts and legacies were paid, the said Testator directed, that his said son, Daniel Cunyngham, and all others who should inherit the said plantation, should every year send an account to the said Testator's trustees, of the whole produce thereof, and how applied, and if his son, or others, should misapply the same, and not consign it to the said Coleman, his heirs and assigns, then it should be in their or one of their power, with the consent of one or more of the said Testator's Trustees, to put an overseer upon the said plantation, to manage the same, and

to send the produce thereof to the said Coleman, his heirs and assigns, and declared his said son, Daniél, executor of his said will. That the said Testator in his life-time owed several sums of money to divers persons, particularly to Elizabeth Kennedy, 1400*l.* carrying interest at five pounds per cent., which was secured as a mortgage upon his said lands at Craig, in Scotland, and to the said trustee, William M'Dowall, *l.* and to the said trustee, William Coleman, *l.* And the Plaintiff hoped she should have had quiet possession of the said lands and effects in Scotland conveyed to her by the said disposition, and that the said trustees would have cleared the same of all debts affecting the same out of the said Testator's estate at Saint Christopher's, and would have paid the annuity of 200*l.* during the Plaintiff's life, according to the directions in the said will. But Elizabeth Cunyngham, at the instigation of the Defendants, or some of them, immediately upon the death of the said Testator, entered into, and seized upon all the said lands and personal estate in Scotland, and put the Plaintiff to great expense in commencing and prosecuting several suits in that kingdom, which were determined in the Plaintiff's favour, and her right to the possession of the said lands and personal estate established; from which determination of the Lords of Council and Session, in order further to distress the Plaintiff, the said Elizabeth Cunyngham appealed to the Lords Spiritual and Temporal in Parliament. But the said Elizabeth Cunyngham, the day before the said appeal was to have come on, withdrew her petition of appeal, by which means the Plaintiff was put to a very great expense in preparing for her defence. That the said Daniel Cunyngham, as executor to the said will, had been cited into the Prerogative Court of Canterbury, to accept or refuse the probate of the said will; but in order to give the Plaintiffs all the vexation, and put them to all the expense he was able, had not to that time declared whether he would accept or renounce the same. And the Plaintiff Mary had frequently applied to the said trustees and executors, to pay to her the annuity of 200*l.*, as the same became due,

according to the direction of the said will, from the rents and profits of the said estates in Saint Christopher's, remitted to them; and from that fund to pay off and discharge the funeral expenses and incumbrances on the said Scotch estate; which they refused to do: and did spirit up and procure the said Kennedy, and several other creditors of the said Testator, to commence suits in Scotland against the Plaintiff, on purpose to load the said Scotch estate. And the said trustees M'Dowall and Coleman, had commenced suits in Scotland for very large debts, which they pretended to be due to them from the said Testator, in order to load the said Scotch estate, so given to the Plaintiffs; notwithstanding the whole plantation estate, amounting to 2500*l.* a year sterling, is paid into their hands; and although they were directed by the said will to disencumber the said Scotch estate,* by the produce of the Saint Christopher's estate. That the said trustees and executors had procured and spirited up one John Gibbs, who performed the Testator's funeral, to bring actions in Scotland, for the expenses of such funeral; and by keeping her from the possession of the Scotch estate and moveables; and by procuring and stirring up suits against that estate and moveables; and by neglecting to pay her any part of the said annuities, had brought her and her infant daughter, the Plaintiff Susannah, into the utmost distress; and when the Plaintiff was by the means aforesaid, destitute of all money and assistance, the said Daniel Cunyngham, had the conscience to apply to the Plaintiff, by his agent, and proposed that if she would quit all her right and title for herself and child to the said lands and moveables in Scotland, which the Plaintiff charged were well worth 10,000*l.*, and to the annuity of 200*l.* he would in lieu thereof secure to her for her life 100*l.* a year, and 600*l.* in money; otherwise he would take care (be the expense ever so great to him) that Plaintiff should never

* This does not appear as a specific direction in the will. The words are general "to pay debts in Great Britain." See page 29.

receive the least benefit from the said deed of gift and will. The Bill then prayed, that the Defendants might be compelled to accept or refuse the said trust; and to set forth an account of the trust estate, and the produce thereof which had come to their or either of their hands, and how they had applied the same: and that they might be compelled by the rents and produce, or if necessary, by mortgage or sale of the said plantation estate, to disencumber and clear the Scotch lands and moveables, and pay the Plaintiff Mary all the arrears of her 200*l.* a year, and the growing payments thereof, as they should become due; and that in the mean time, if necessary, an overseer, or receiver, might be appointed on the said plantation estate; and that the said disposition, conveyance, and deed of gift, made in favour of the Plaintiffs, might be confirmed; and the said Testator's will established against the said Daniel Cunyngham, the heir-at-law, or that the Plaintiff Mary might have her dower.

The Defendants not having appeared at the hearing, a decree *nisi* was pronounced, and afterwards made absolute.

But upon the petition of the Defendants Cunyngham, Ottley, and Coleman, the cause was re-heard.

The Defendant Cunyngham, by his answer, set forth that Robert Cunyngham, his father, signed the deed, dated the 17th day of July, 1741; but he insisted that the same was not only void and insufficient in point of form, by reason of several defects in the execution thereof, but was also not completed in point of substance, so as to render the same binding and effectual, according to the laws of Scotland; and the said Robert Cunyngham continued, as the Defendant believed, seized of the premises till his death. And insisted, that Plaintiffs ought not to avail themselves of the said deed, as an effectual conveyance of the said lands and premises to them, in the manner therein expressed, either against the Defendant or against the creditors of the said Robert Cunyngham, who have notwithstanding the same, a good right to resort to the said lands for the satisfaction of their demands. And in regard the said deed purported

to affect the said lands lying wholly in Scotland, and no part thereof in this kingdom, hoped the Court would leave the validity or insufficiency thereof, to be determined by the laws of Scotland, where the same was made, and where the said Robert Cunynghani, and the Plaintiffs, both resided at the time when the same was made. That the Plaintiff Mary, about the time when the said Deed of gift bears date, and for some time before, was by the Testator considered as the lawful wife of Captain Dalrymple, and was never acknowledged by the Testator in his life-time as his wife, save by the said pretended will; but that he always called her by the name of Dalrymple, by which name, both the children and all the servants in the family always called her. That Robert Cunyngham, the Testator, was long before the marriage pretended between him and the Plaintiff, married to another woman (as the Defendant believed) who was still living. That the Plaintiff Mary, on being summoned before the clergy and ministers of the Church of Scotland, declared that the Plaintiff Susannah was the child of, and begot by, the said Captain James Dalrymple, her husband. That the Testator, notwithstanding his marriage, some time before his death, lived and conversed with the Plaintiff Mary in a criminal way; but was looked upon and esteemed not to have been married to her. That his father, the Testator, was about the 7th day of January, 1742, being about nine months before his death, seized with a lethargick disorder, which totally deprived him of his senses for several days; and though he afterwards grew better, and was able to get about again, yet he never recovered the perfect use of his understanding, but continued from that time in a state of dotage and unsound mind to his death, and was not capable of making a will. That from his first seizure to his death, he was not of sound mind or understanding, so as to be capable of making a will; and that he was so totally under the power of the Plaintiff, that she could prevail on him to do any thing. That it appeared by the said will, that the legacies thereby left, amounted to the sum of 8950*l.*, and the annuities thereby bequeathed, computing the same at

ten years' purchase, amount to the sum of 3000*l.* And the said Testator being indebted at his death in arrear, the sum of 10,000*l.*, legacies, annuities, and debts, amounting together to near the sum of 20,000*l.* will, if the said pretended will be established, more than exhaust all the funds and estates, real or personal, which he left at his decease; so that the Defendant, the executor therein named, and the only surviving son of his said father, and who never disobliged him, and had then a wife and three children, to all of whom his said father in his life-time expressed the greatest affection, and who (on the face of the said will was intended to take a very beneficial interest under the same) would be entirely deprived of any provision from his said father, though the greatest part of the said estate in the West Indies came to him in right of his wife, the Defendant's late mother. And the said Defendant insisted, that, by the laws of Scotland, no lands or real estate whatsoever, are deviseable by will, but must be conveyed in the life-time of the party conveying by deed of gift. And therefore, in case the said pretended will had been duly executed by his said father, and he had the full enjoyment of his senses at the time of the execution thereof, yet the bequest therein to the Plaintiff, of all his lands and other things he had in Scotland at his decease, was a void devise; and he submitted that the Court should leave the Plaintiff to resort to such remedy in relation to the said estate in Scotland, as well under the said Deed of gift, as under the said will to which they should be entitled by the laws of Scotland, and which they should be able to obtain in that kingdom, without the interruption of this Court. That the Plaintiffs brought two several actions in the Courts of Scotland, one for the recovery of the goods, and the other for the recovery of the possession of the house and premises in Scotland. That the Lords of Session in the first of the said actions refused the Plaintiff access to the said moveable estate, till such time as the Defendant should return to Great Britain; and in the mean time ordered the same to be sold, and the money arising thereby, to be paid into the hands of the

Sheriff for such person as should appear to have the best right thereto; but in the other of the said actions pronounced sentence in favour of the Plaintiffs, from which last-mentioned sentence, the Defendant, Elizabeth Cunyngham, in his absence, appealed to the Lords Spiritual and Temporal in Parliament. And the said Defendant saith, he having arrived in this kingdom from the West Indies before the said appeal came on, the said Defendant Elizabeth Cunyngham had no further concern therein; and the Defendant having discovered that his father was greatly indebted at his death, and that several of his creditors had brought actions in Scotland, for the recovery of their demands out of the said estate; and that such demands would exhaust his estate and effects, the Defendant suffered the said appeal to drop. He admitted that he had been cited into the Prerogative Court, to accept or refuse the probate of the will; but being advised the same was not valid, on account of the incapacity of his father at the time when he made his will, he had declined to prove the same. That the Plaintiff Mary had applied to the Defendants M'Dowall and Coleman, to pay her said Annuity of 200*l.*, given to her by the said will, from the produce of the said estate in Saint Christopher's, and from that fund to pay off and discharge the funeral expenses and incumbrances on the Scotch estate, which they had refused to do on account of the invalidity of the said will. But he denied that he had spirited up or procured the said Elizabeth Kennedy to commence any suit against the Plaintiff, on purpose to load the said Scotch estate. He further answered, that he had ever since his father's death in his own right, and not as executor under the said will, been in possession of all his said father's plantation and effects in the West Indies; and that the consignments of the produce thereof, had since his death, from time to time been made to the Defendant Coleman, and that he had usually employed him as his factor, to dispose of such consignments for his use. And he insisted, that for the reasons in his answer assigned, the Plaintiffs were not entitled to have any account from him, or any other of the Defendants, of the Plantations of his said father: but in case

the Court should be of opinion that the Plaintiffs were entitled to such account, he submitted to be examined upon interrogatories touching the same. The said Defendant William Coleman the elder, by his answer stated, that the produce of the said estates in the West Indies, described in the will as let to the Defendant Daniel Cunyngham for the sum of 2500*l.*, was for several years before the Testator's death, consigned to the Defendant, to be disposed of here according to the general usage between planter and merchant. That for many years before, and to the time of the said Testator's death, there was a great intercourse of dealing between him and the Defendant on the account of the produce of his estate in the West Indies; and during that time, the Defendant disbursed several considerable sums of money for the said Testator. That by an account stated between the said Robert Cunyngham and the Defendant, on the 18th of August, 1731, and signed by them, there was owing from the said Robert Cunyngham to the Defendant, the sum of 4050*l.*; for securing which, together with such further sum as the Defendant should advance to or for the said Testator, a mortgage in fee of the plantation at Cayon was executed to the Defendant, and also a bond to the same effect. That the debt so due to the Defendant was increased by subsequent advances, and being very large, he had given directions to have the proper action brought in Scotland for the recovery of the same out of the said estate there: and he believed that such action had been accordingly brought, not to load the said Scotch estate, which he denied, but that all proper measures for securing so very large a debt might not be neglected; and the rather for that, by reason of the open and declared war with France and Spain, the Defendant's security on the said estates in Saint Christopher's, was become of less value than when originally made. That the produce of the said estates in Saint Christopher's had been consigned to the Defendant Cunyngham, in his own right as heir-at-law; and no part of the produce had come to his hands as trustee under the will. He desired to be at liberty to suspend his election, whether he would accept or refuse the trust till the will should be established; and insisted that

he was not compellable to set forth any account of the said plantation, or of the rents and profits thereof received by him, or how the same had been disposed of. But if the Court should be of opinion, that he ought to set forth such account, he submitted to be examined upon interrogatories in relation thereto.

Whereupon, and upon debate of the matter, and hearing the will of the said Testator, Robert Cunyngham, dated the 27th of October, 1743, the prayer of the Plaintiffs' bill; the answer of the said Defendant, William Coleman the elder; the answer of the said Defendant, Daniel Cunyngham; a letter from the said Defendant, William Coleman the elder, to the said Testator, Robert Cunyngham, dated the 5th of November, 1743; a letter from the said Testator, Robert Cunyngham, to the said Defendant, William Coleman the elder, and Company, dated the 20th of October, 1743; a letter from the said Defendant, Daniel Cunyngham, to Robert Wallis, dated the 7th of February, 1744; another letter from the said Defendant, Daniel Cunyngham, to the said Robert Wallis, dated the 6th of May, 1745, the decree dated the 13th of April, 1749, and the proofs taken in the cause, read.

His Lordship ordered, that the said decree be varied, and be as follows:—Declare that the said Testator Robert Cunyngham's will ought to be established, and the Trusts thereof performed; (and the court ordered and decreed the same accordingly;) and that it be referred to the said Master to take an account of what is due to the Plaintiff, Mary Cunyngham, for the arrears of the annuity of 200*l.* a year, given her by the said Testator's will; and the said Master is also to take an account of the said Testator's debts and incumbrances, affecting his moveables and real estate in Scotland, and of all other his debts, funeral expences, and legacies, and compute interest, on such of them as carry interest; and the said Plaintiff, Mary, is to stand in the place of such creditors, who have received, or shall hereafter receive, satisfaction for their debts, out of the said moveables, and real estate in Scotland, for such sums of money as the said creditors have received, or shall receive therefrom. And it is

further ordered, that the said Defendants, Daniel Cunyngham, and William Coleman the elder, do come to an account before the said Master, for the rents, profits, and produce of the said Testator's plantation in St. Christopher's, called Cayon Plantation; and of the lands, and houses, in Basseterre Town, affixed, or annexed thereto by the will, with the appurtenances received by the said Defendants, Cunyngham and Coleman, or either of them, or by any other person or persons; by their, or either of their order, or for their, or either of their use. In the taking of which account, all parties are to have all just allowances; and the said Master is to make an allowance of interest, accrued on the said mortgage made by the said Testator in his life-time, of the said Cayon Plantation, to the said Defendant Coleman, and out of what shall be coming on such account, of the rents, profits, and produce, of the said Testator's said plantation, called Cayon Plantation, and lands, and houses, in Basseterre Town, affixed, or annexed thereto as aforesaid, with the appurtenances, the several debts and incumbrances of the said testator, affecting his moveables and real estate in Scotland, are to be paid and satisfied. And it is further ordered, that the said Plaintiff, Mary Cunyngham, be paid thereout such of the said debts and incumbrances, as have been or shall be paid out of the said testator's said moveables and real estate in Scotland; and also such costs and damages as the said Plaintiff, Mary Cunyngham, has been put unto or sustained by reason of any action or suits brought by the said creditor's relating thereto, to be settled by the said Master, and also what shall be found due to her for the arrears of her said annuity of 200*l.* a year. And it is further ordered, that the said Defendants do pay and apply what shall be found due from them respectively on the said account accordingly; and also out of the rents and profits and produce of the said plantation, called Cayon Plantation, and the said lands and houses in Basseterre Town to be received, the said Plaintiff, Mary Cunyngham, is to be paid her said annuity of 200*l.* a year, as the same shall become due according to the directions of the said Testator's will; and after satisfaction of the said testator's debts, &c. it is ordered that the said Defendant Cole-

man do make his election before the said Master, whether he will continue to act in the trust under the will, and postpone the payment of his own incumbrance on the estate before-mentioned pursuant to the said testator's will: and if he shall elect so to do, it is further ordered, that the said Defendant, Daniel Cunyngham, do from time to time consign and send over the profits and produce of, &c. to the said Defendant Coleman, to be applied by him according to the said testator's will, and this decree. But if the said Defendant Coleman shall elect, not to continue to act in the said trust, and to postpone the satisfaction of his said incumbrances on the said estate, pursuant to the said will, it is further ordered, that in that case, it be referred to the said Master, to appoint a proper person in London, to whom the said Defendant, Daniel Cunyngham, shall consign and send over the profits and produce of the plantation, lands, and houses, before-mentioned, to be disposed of and applied, according to the directions of the said testator's will, and this decree. And the said Defendant Cunyngham, is accordingly, from time to time, to consign and send over the said profits and produce to such person so to be appointed.*

The principal question between the material parties to the suit in the Court of Chancery appears again, in 1758, to have become the subject of litigation in the Court of Session in Scotland. An abstract of the facts, and the judgment in the case, is given by Lord Kaims, in his Decisions, vol. iii. p. 25, in the following terms:—

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* This decree contains no direction, that D. Cunyngham should elect, either to take the Cayon estate under the will, subject to the charges, and leave the Scotch estate discharged of debts, to the Plaintiffs; or otherwise, that the Plaintiffs should be compensated out of the larger estate, for the value of the Scotch property if taken by D. Cunyngham. It seems that the Court of Chancery in England, and the Court of Session in Scotland, considered the acts done by the Defendant Cunyngham, or the matter of his answer, as amounting to an election.

CUNNINGHAMS v. GAINER, Jan. 17, 1758, Kaim's Decis. vol. 3, p. 25.

A person possessed of one estate in the island of St. Christopher's, and another in Scotland, executed a testament upon his death-bed in Scotland; by which he bequeathed to his son the estate in St. Christopher's, with the burthen of his debts; and by another clause, he bequeathed the estate in Scotland to his wife, and her heirs. A creditor of the defunct's having adjudged the estate in Scotland, the relict brought a suit in Chancery, against the son, and other trustees, for having the Scotch estate relieved of the debts out of the produce of that in St. Christopher's. The will was established by the Chancellor's decree, and the Scotch estate ordained to be relieved of the debts. The relict having claimed the lands conform to the testament, it was pleaded for the son, in a multiplepoinding, brought by the tenants, that the legacy was void, as the lands could not, by our law, be conveyed by a testamentary deed. Answered for the relict, that as the testament had been found valid by the law of England to convey the estate in St. Christopher's in favour of the son, who was residuary legatee of that estate, and had a lucrative succession, he was thereby barred from challenging the settlement made in the same deed of the Scotch estate. The Lords found, that the son could not quarrel the conveyance by legacy of the Scotch estate; and preferred the relict.*

1819.

KER *v.* WAUCHOPE.

On the 5th of May, 1819, the judgments of the Court below were varied by a declaration that the Appellants could have no claim to a life-interest

* The question of election has occurred most frequently upon the wills of persons who had been domiciled in privileged places, where the old customary laws of distribution prevail, as London, York, &c. Upon the general doctrine of Election and Compensation, in addition to the cases cited in the argument, see *Noys* v. *Mordaunt*, 2 Vern. Rep. 581, and the cases collected in Mr. Raithby's Note. See also *Cary* v. *Askew*, 2 Cox's C. C. 241; *Forrester* v. *Cotton*, 2 Eden's C. C. 532; *Unett* v. *Wilkes*, Id. 187; *Arnold* v. *Kempsford*, Id. 256; *E. of Northumberland* v. *M. of Granby*, Id. 489; and *Green* v. *Green*, 2 Meriv. 86.

in the personalty, either as next of kin *or in any other way*: subject to that variation they were affirmed. And the cause was remitted for judgment upon the question whether, as by the terms of the Duke's settlement the residue is declared not to be payable till after the death of his sisters, the residuary legatees are intitled to demand payment thereof immediately.*

1819.

KER *v.* WAUCHOPE.

* In the law which regulates *Election* and *Compensation*, and the doctrine of *Approbate* and *Reprobate*, the distinction between the cases where the bequests, gifts, or limitations are contained in one instrument, and where they are several, has been the subject of strong observation in the arguments of the principal case. Upon this question it is to be remarked that a similar principle is acknowledged, in applying what is called the Rule in Shelley's Case. If there be in a will or deed a limitation to A. for life, directly or resulting by implication, and in the same instrument a limitation to the heirs of A. the two limitations, by the operation of the rule above-mentioned, give an immediate executed estate of inheritance to the ancestor; but it is otherwise where the two limitations are in different instruments, although the one refer to the other, as where lands were given by deed to A. for life, and by a will a remainder in the same lands was given to the heirs of the body of A., although the estate for life given by the deed was recited in the will, it was held that they did not unite so as to give an estate tail to A. but that the heirs of his body took by purchase. *Fonnereau* v. *Fonnereau*, Doug. Rep. 470. Yet there is one case, *Hayes* v. *Foorde*, 2 Black. Rep. 698, in which the two limitations being on separate and distinct papers, viz. a will referring to a schedule which was annexed, both instruments having been published at the same time, with the same solemnities and attestation, and the jury by their special verdict (upon which the case was argued) having found as a fact that the schedule was part of the will, the Court considered them as several parts of the same instrument, and held the rule in Shelley's Case to be applicable. The grounds upon which these similar rules in different branches of law have been adopted, would be found, upon investigation, to differ perhaps materially. But the limits of a note do not admit of such an inquiry.