such maintenance exceed any sums which the authority could, compatibly with such public use, derive from licences for the supply of refreshments, grazing rents, or otherwise, the authority is not rateable in respect of the park, both because it, being dedicated to the use of the public, has no rateable value, and because the authority is not occupier of the park for rateing purposes. The case of *Liverpool Corporation* was decided by the English Court of Appeal, affirming a Divisional Court in which the present Lord Chief-Justice sat as a member, and though not technically an authority, so far as we are concerned, is a decision we should be slow to differ from unless we thought it clearly erroneous. I see no reason to doubt the general soundness of the judgment in *Liverpool Corporation*. It followed, of course, the *Lambeth* case, as it was bound to do, but extended its application in two matters which are relevant for consideration here. In the first place, the principle laid down in *Lambeth Overseers* was held wide enough to include the case of lands acquired by a public authority for public parks and the like under a general statutory power to acquire for those purposes such lands as they might think fit, and, in the second place, it was held that, though the public authority had statutory power to sell such of the parks as might come to be no longer required for the use of the public, that did not affect the non-rateability of the subjects, so long as they remained unsold and in fact occupied for the use of the public. Accepting as I do the general soundness of the decision in *Liverpool Corporation*, it appears to me to afford a good line of guidance for our determination in regard to all the subjects under consideration, both in Edinburgh and in Glasgow, which are not directly ruled by the principle laid down in *Lambeth Overseers*. I may add a few words about the case of *Ferrier* (1892, 19 R. 1074), upon which the appellants' counsel naturally based an insistent argument. I do not think *Ferrier's* case in any way embarrasses the view to which your Lordship proposes here to give effect. It is true that the subjects there under consideration are among those now before us. But it seems to be equally clear that the arguments now presented to us were not then presented to our predecessors in this Court. The two English cases to which I have specially referred are both later in date than *Ferrier*, and though some earlier decisions had then been pronounced in England in a similar sense—*e.g. Hare* v. *Overseers of Putney*, 1881, 7 Q.B.D. 223—they were not cited or referred to.

Having made these observations of a more or less general character, it is needless that I should repeat in detail what your Lordship has so fully stated in regard to the application of general rules to each of the particular subjects, and I am content to express in a word my entire concurrence.

LORD MACKENZIE—I concur.

The Court dismissed both appeals.

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COURT OF SESSION.

Friday, January 28.

FIRST DIVISION.

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

Succession — Approbate and Reprobate — Faculty — Power of Apportionment — Invalid Exercise — Election by Beneficiaries.

A testatrix, who had a power of apportioning among her children certain funds under her father's will, exercised the power in a will in which she also disposed of her own separate estate and of estate falling under her antenuptial contract of marriage. The mode in which she exercised the power was by directing her trustees to hold the residue of her estate in certain shares, giving her children a liferent interest only and the fee to their issue. She added a declaration that these provisions were to be in "full satisfaction . . . . of all provisions, rights, and claims competent to" her children "against me or my estate or under the said antenuptial contract," and that "what I have done is in exercise of the power competent to me under the trust-disposition of my father." Certain of the children having successfully challenged the apportionment on the ground that it was *ultra vires, held* (by a majority—*diss.* Lord Johnston) that those children were not put to their election between their mother's settlement as a whole, and forfeiting all interest in her own estate while receiving under his will the estate coming to them from their grandfather.

Opinions (*per* the Lord President) that a case of election will only arise (1) where a gift is subject to a condition that the donee does or forbears to do a certain thing and the donee infringes the condition, or (2) where a gift to a person who has independent rights in the subject of the gift is made part of a general scheme and the donee by the assertion of those rights

upsets the scheme; and (*per* Lord Kinnear) that where the donee of a power makes an *ultra vires* disposition of the subject of the power in the belief that he is acting within his rights by a will conferring other benefits on the object of the power, the appointee will not be put to his election should he challenge the appointment unless the deed expresses or clearly implies an intention to that effect, and unless the result of the election is to give legal effect and operation to the will so expressed or implied.

On 17th July 1909 a special case was presented to the Court by Alexander Crum Ewing and another, testamentary trustees of the late Humphrey Ewing Crum Ewing of Strathleven, merchant in Glasgow, *first parties;* the Rev. Paget Lambart Bayly and others, testamentary trustees of the late Mrs Jane Coventry Ewing Crum or Bayly, widow of General John Bayly, C.B., and a daughter of the said Humphrey Ewing Crum Ewing, *second parties;* the Rev. Paget Lambart Bayly, who was a son of the said Mrs Jane Coventry Ewing Crum or Bayly, as an individual, *third party;* Mrs Helen Tolmie Dick Bayly or Douglas, wife of Charles John Cathcart Douglas of Haylee, Largs, and others, daughters of the said Mrs Jane Coventry Ewing Crum or Bayly, *fourth parties;* and Archibald John Angus Douglas and others, grandchildren of the said Mrs Jane Coventry Ewing Crum or Bayly, *fifth parties.*

The following *narrative of the facts* of the case is taken from the opinion of the Lord President:—"This special case submits for our opinion and judgment a question arising upon a power which was given in the settlement of the late Mr Crum Ewing. Mr Crum Ewing's trust-disposition and settlement was made in the year 1887. The only portion of it with which I need trouble your Lordships is a part of the clause beginning 'In the tenth place.' That clause provides that the residue of the testator's estate is to be divided into three parts or shares. No question arises as to two of those parts, but the clause after dealing with one of those two parts proceeds—'As regards another of the said one-third parts or shares of the said residue and remainder, I direct that the same shall be held and retained by my trustees for behoof of the said Mrs Jane Coventry Crum or Bayly,' who was a daughter of the testator, 'and her children.' Then there are provisions giving Mrs Bayly, and after her death her husband John Bayly, a liferent, 'And, subject to the life interest of the said Mrs Jane Coventry Crum or Bayly and any life interest conferred on or falling to the said John Bayly, I direct that the capital of the said last-mentioned one-third part or share shall be divided and paid to and among the child or children of the said Mrs Jane Coventry Crum or Bayly, in such proportions, among such children and the issue of any of them who may have predeceased leaving issue, and subject to such restrictions, provisions, and limitations as she may direct by any deed or writing to take effect at her decease; and in the event of no such appointment, then equally to and among the child or children of the said Mrs Jane Coventry Crum or Bayly, share and share alike, if more than one child.' And then there is a provision as to what is to happen in the case of any child dying in the lifetime of Mrs Bayly leaving issue.

"Mrs Bayly enjoyed her liferent and eventually died leaving a trust-disposition and settlement. She had money of her own of which she could dispose, and the part of her settlement with which we have to do is the following:—'In the fifth place, upon the decease or second marriage of my said husband, in the event of his surviving me' (which event did not happen) 'or upon my decease, in the event of his predeceasing me, I direct my trustees to hold and retain the whole residue of my means and estate, and to divide the same, so far as then available (the remainder to be divided when it becomes available), into eight equal shares, and to set aside and hold and invest the same in their own names for the purposes after-mentioned, viz. (first) four eighth shares for behoof of my son the said Paget Lambart Bayly, in liferent for his liferent alimentary use only, and his children in fee.' The provisions as to the other shares I shall summarise briefly. One eighth share was to be held for a daughter Mrs Douglas, in the same way for her liferent only and for her children in fee; one eighth for another daughter Mrs Denroche Smith, for her liferent and her children in fee; and two-eighths for an unmarried daughter Jane Coventry Ewing Bayly, 'whereof one eighth share shall be held and applied as hereinafter directed in the sixth place, and the other one eighth share shall be held for behoof of the said Jane Coventry Ewing Bayly in liferent for her liferent alimentary use only and her children in fee.' And then there is a declaration that the 'sons and daughters shall have power to apportion the capital of their respective shares among their children in such proportions and subject to such conditions and restrictions, specially including the restriction of the right of any child or all the children to a liferent merely,' as they may appoint. There is also a further clause—'And I declare that the provisions hereinbefore conceived in favour of my children and their issue shall be in lieu and full satisfaction to my said children respectively of all legitim, and every other right or claim competent to them through my decease against my estate in any way, and also in full to them and their issue of all provisions, rights, and claims competent to them against me or my estate under the said antenuptial contract' (in another part of the deed she had recited an antenuptial marriage contract to which she was a party) 'and I declare that these presents are granted in the exercise of all powers of disposal, apportionment or otherwise,

competent to me under the said antenuptial contract and the said trust-disposition and settlement of my said deceased father."

The *questions of law* were, *inter alia*—"(4) In the event of the said apportionment by Mrs Bayly being held to be wholly invalid, are the children of Mrs Bayly entitled to immediate payment of the capital of the said one-third of residue equally among them, share and share alike? (5) In the event of it being held that the children of Mrs Bayly are entitled to immediate payment of the fee of the said one-third share of residue, (*a*) are the said children, as a condition of enjoying any further provisions under the trust-disposition and settlement of Mrs Bayly, bound to renounce the said rights of fee, and to accept in lieu thereof rights restricted to liferents in the proportions and subject to the conditions set forth in the said trust-disposition and settlement?"

Argued for the second and fifth parties—The fourth parties having challenged the apportionment of their grandfather's estate by their mother's will, could not at the same time take benefit under that will. If the apportionment was bad, it was impossible to say that the testatrix would have made the same disposal of the residue of her estate, and therefore her whole disposition was bad—*Lord Inverclyde's Trustees*, 24th June 1909, not reported. Where a fund was dealt with as a whole, on the principle of approbate and reprobate it was impossible to accept part and reject part, and therefore in the present case the liferent to children must affect the estate coming to them from their grandfather, as well as the estate coming to them from their mother. There was clearly a case of election here—*Bonhotes* v. *Mitchell's Trustees*, May 27, 1885, 12 R. 984, 22 S.L.R. 648. There being a particular scheme in the testatrix's mind, *non constat* that if impugned any part of it should be salved—*Dundas* v. *Dundas*, December 22, 1830, 4 W. & S. 460.

Argued for the fourth parties—Election depended on the rule that it was made a condition that acceptance of the gift should prevent challenge of an invalid gift. In *Lord Inverclyde's Trustees*, *cit. sup.*, as also in *Bonhotes* v. *Mitchell's Trustees*, *cit. sup.*, there was a condition implied putting the beneficiary to an election. The testatrix here provided that these provisions were to be in full satisfaction of all claims, &c., competent to her children against her or her estate or under her marriage-contract, but she did not make it a condition that they were to be in lieu of provisions under her father's will. The question as to whether such a condition was to be implied or not depended on whether the invalid provision was made knowingly or not, the doctrine being limited to *res aliena scienter legata*—*Douglas' Trustees* v. *Douglas*, June 27, 1862, 24 D. 1191; *M'Donald* v. *M'Donald*, November 1, 1876, 4 R. 45, *per* Lord Curriehill, p. 52, 14 S.L.R. 26.

At advising—

LORD PRESIDENT—. . . [*After narrative of facte given supra*] . . . —Now the first question for our consideration is whether there has or has not been a good exercise of the power given to Mrs Bayly. This is a case in which there is no question that the donee of the power meant to exercise it, because Mrs Bayly expresses her intention to do so in the clause which I read last; and accordingly as there is no doubt on this matter the whole question comes to be—Is the power well exercised? I have come to the conclusion really without much difficulty that it was not well exercised. . . . . .

Now there remains really only one other question in the case, and that is whether in the circumstances the children are put to their election. I consider they are not. First of all, as regards what is meant by the doctrine of election, it seems to me that a person can be put to election only in one or other of two ways. A person who gives a gift to another may make it a condition of that person's receiving the gift that he does or forbears to do a certain thing, and then of course the gift cannot be accepted without the condition. But a person may be put to his election in this way also: Where something is given to a person as part of a general scheme, and it is apparent that that general scheme cannot be worked out as the donor planned if the person to whom the gift has been given, or a class of which that person is one, insist upon other independent rights which he or they have, then that person may be put to his election. The underlying idea there is very clear. You are not to take a portion of the testator's bounty and at the same time by your action prevent the testator's wishes being carried out and frustrate his scheme. In all those cases it is, I think, of the essence of the matter that the action of the legatee or donee in claiming something—the commonest instance of course is that of the legatee claiming legitim or insisting upon rights under a power as here—has the result of upsetting the whole scheme of the will. But if the scheme of the will is not upset, if it is separable, then I do not think that the legatee or donee is put to his election.

Now it seems to me that the present case does not fall within either the one or the other of these categories. Here there is a distinct declaration as to election and a declaration which does not apply to this fund, because what the testatrix says is that these provisions are to be in full satisfaction of all "provisions, rights, and claims competent to them" (that is, her children) "against me or my estate or under the said antenuptial contract;" but the clause does not mention the settlement of her father. Accordingly, so far as regards a direct behest that the children are to be put to election, none exists. That is probably sufficient to dispose of the case, because *expressio unius est exclusio alterius*. But further, as little does the case enter in my opinion into the second class of cases, because there is no reason whatsoever why Mrs Bayly's scheme as to her estate should not be perfectly well worked

out. There is no express massing of the estates as was the case in *Lord Inverclyde's* case. These parties will get their liferents in their various shares, and the grandchildren will get their fee of Mrs Bayly's estate, and that is not in any way disturbed by the fact that Mr Crum Ewing's estate is not massed with Mrs Bayly's. The two estates are quite separable.

This disposes of the whole matter, and I propose that we should answer the questions as follows— . . . . . the fourth in the affirmative, the fifth (*a*) in the negative, and (*b*) will be superseded.

LORD JOHNSTON—Mrs Bayly, a daughter of the late Hunphrey Ewing Crum Ewing, had three funds of which she was entitled to dispose. These were (1) a sum of £2000 held under her marriage contract, subject to a power of appointment to her, as the survivor of the spouses, to and among the children of the marriage; (2) a sum of £20,000 or thereby, being her share of her father's estate, held by his trustees, with power to her to apportion the same among the children and the issue of any of them who may have predeceased leaving issue, "and subject to such restrictions, provisions and limitations as she may direct by any deed or writing to take effect at her decease, and in the event of no such appointment then equally to and among" such children; (3) a sum of £10,000 or thereby forming her own personal estate.

Mrs Bayly did not execute separate deeds of appointment and settlement, but one comprehensive trust disposition and settlement, which was also a deed of appointment. She commenced by conveying to trustees all and sundry the whole estate "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 this estate she disposed of thus—She first appointed the whole of the marriage-contract fund of £2000 to her son the Rev. Paget Lambart Bayly absolutely. She then proceeded to deal, without discrimination, with the £20,000 held under her father's settlement, over which she had a power of appointment, and the £10,000 of her own personal estate as a massed fund. She did so in these terms, "I direct my trustees to hold and retain the whole residue of my means and estate, and to divide the same" into certain shares. These words taken by themselves would not expressly indicate that she was exercising a power of appointment. But this would have been implied, if necessary, on the principle of the case of *Hyslop* v. *Maxwell's Trustees*, 12 S. 413, and the series of cases that have followed upon it. But such implication is unnecessary having regard to the initial conveyance, and the subsequent declaration "that these presents are granted in the exercise of all powers of disposal, apportionment or otherwise, competent to me under the said antenuptial contract and the said trust-disposition and settlement of my deceased father." As she makes no appointment except of the marriage-contract fund of £2000, it follows of necessity that her disposal of the massed estate which she treats as her own, composed of the subject of the power under her father's settlement and her own estate, is her appointment under her father s settlement.

I pause for a moment to point out that Mrs Bayly had a clear and intelligible reason for treating differently her power under the marriage-contract and her power under her father's settlement. The former she wished to execute so as to give the whole fund to one object of the power. The other she wished to exercise so as to combine the fund which fell under it with her own estate, and give the same rights in it as she gave in her own estate.

As to this massed fund of her father's residue and her own personalty, what Mrs Bayly did, reading it as short as I can, and omitting all reference to provisions which do not touch the essence of the present case, was this—she directed her trustees to divide the same into shares "and to set aside and hold and invest the same in their own name for the purposes after-mentioned," viz., one-half for behoof of her son the said Paget Lambart Bayly in liferent for his liferent alimentary use only and his children in fee, and one-sixth each for behoof of her daughters, Mrs Douglas, Mrs Denroche Smith, and Mrs Dorman, for their respective liferent uses allenarly and their respective children in fee, with power of appointment among their children. But with regard to the shares so provided Mrs Bayly added a destination-over of the share of any child dying without issue to her surviving children in liferent allenarly and their children in fee, subject to a power of appointment to the deceaser among his or her surviving brothers and sisters and their children. The scheme of the combined testamentary settlement and appointment is thus simple enough, and it is clear that in her own mind Mrs Bayly drew no distinction between the subject of the power and her own estate or between the appointment and the settlement. There was in her mind one subject and one act.

[*His Lordship here gave his reasons for concurring with the Lord President in holding that the exercise of the power of appointment was bad.*]

But I am entirely unable to follow your Lordship in the reasoning by which you reject the demand of the grandchildren of Mrs Bayly that their immediate parents be put to their election whether they will abide by Mrs Bayly's deed of settlement as a whole, or, if they reject it as an invalid appointment under Mr Crum Ewing's settlement, and claim the rights they have under that deed in default of appointment forfeit their right under Mrs Bayly's settlement to any part of Mrs Bayly's own personal estate, at least until equitable compensation is made to them, the grandchildren, for what they lose by their parents' assertion of their right against Mrs Bayly's settlement. I must perforce, out of deference to your Lordship, with whom I understand Lord Kinnear concurs, suspect my own opinion, but nevertheless

I can find no answer to the grandchildren's contention which satisfies me, and I think, moreover, that to reject it is against authority.

Mrs Bayly's children had right under their grandfather's settlement not derived from Mrs Bayly, though subject to her power of appointment. Putting out of consideration their claim of legitim against her estate, so as not to confuse the issue, they took an interest in her estate only by her goodwill. She has made it as clear as words can make it that she intended that the funds falling under their grandfather's settlement and her own estate should go as one massed estate in the same way, and that while her children's interest in the whole fund should be restricted, an interest in the whole fund should be conferred upon her grandchildren who were strangers to the power conferred upon her by their grandfather. That appears to me to be the very case in which election is imposed upon the objects of a power, who take also benefits under the will of the donee of the power.

I should have unhesitatingly come to this conclusion unaided by authority. But it appears to me that the question is concluded by authority. Nothing could be more apt than the curt but distinct rubric in the leading case of *Whistler* v. *Webster* (2 Ves. jun. 367, and 2 R.R. 260). "Testator appoints to grandchildren under a power to appoint to children a fund, to go in default of appointment equally; the appointment being bad, the children having legacies must elect." And I may quote as elucidating the principle on which this decision, and the decision to which I am compelled in the present case, rests, the words of the Master of the Rolls, Sir Richard Arden—"The question is very short—whether the doctrine laid down in *Noys* v. *Mordaunt* and *Streatfield* v. *Streatfield* has established this broad principle, 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. 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." And again—"If the instrument is such as to indicate what the intention was, the only question I will ask is, Did he intend the property to go in such a manner? I will not ask whether he had power to do so, and whether he would have done it if he had known he could not without a condition imposed on another person. Whether he thought he had the right, or, knowing the extent of his authority, intended by an arbitrary exertion of power to exceed it, no person taking under the will shall disappoint it."

Adapting that statement of the principle to be applied, I ask what intention has Mrs Bayly disclosed in the settlement which she has left. I think that that intention unmistakably was, that the subject of the power conferred upon her by her father and her own personal estate should go in the same way, on the same devises, to the same persons, and under the same conditions and restrictions.

But I understand it to be contended that, notwithstanding this, Mrs Bayly does not show any intention of compelling her children to an election if she is found to have gone beyond her powers in making an appointment which defeats their rights. And in support of this a reference is made to the final declaration appended to her provisions for her children and grandchildren, and a distinction is sought to be drawn between one set of its provisions and another, from which it is sought to be inferred that whereas Mrs Bayly expressly puts her children to election in the matter of legitim, &c., she must be understood not to put them to election in the matter of her appointment, because she has not expressly done so. I think that that clause, properly read, is on the contrary a strong support, if support was needed, for the construction which I have placed upon the main provisions of the deed, and is certainly in no way hostile to it. It is made up of two parts, and they bear respectively on different estates or rights with which she was dealing. She had her own personal estate. Against that her children had their claim of legitim. She had also apparently come under some obligation regarding her own estate under her marriage-contract, unconnected with the £2000 provided by her father, over which she had a power of appointment. Now the claims of her children to legitim and under her marriage-contract required to be satisfied. And though it would have been implied from the universality of her settlement, it was good conveyancing to make this satisfaction express. Accordingly she declares "that the provisions hereinbefore conceived in favour of my children and their issue shall be in lieu and full satisfaction to my said children respectively of all legitim and every other right or claim competent to them through my decease against my estate in any way, and also in full to them and their issue of all provisions, rights, and claims competent to them against me or my estate under the said antenuptial contract."

But then she was also dealing with the £2000 provided by her father in her marriage-contract, and the £15,000 or thereby bequeathed by his will, over which she had powers of appointment. In these cases there was no question of satisfaction, and no call for discharge. All that was necessary was, if she wished to express what must have been implied from the whole purview of her preceding provisions, viz., that she intended to exercise her powers of appointment. And this she does in appropriate words. She declares "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 of my said deceased father."

I have founded my opinion upon a leading case in England, but I think that the principle to be deduced from it has long been adopted in Scotland. I need only refer, as an example, to the case of *Bonhotes* v. *Mitchell's Trustees* (12 R. 984), from which I am unable to distinguish the present. Lord Craighill in delivering the judgment of the Court (which consisted of Lord Justice-Clerk Monoreiff, Lord Young and Lord Rutherfurd Clark) said: "The marriage-contract rights were absolute, and without the consent of the beneficiaries could neither be revoked, diminished, nor qualified. Mr Mitchell, however, though of his own power he could do none of these things, could dispose of his own property as he pleased, and any condition which he imposed directly or indirectly would be binding upon those by whom the provisions he left were to be received. If therefore it is his will, according to the true meaning of his trust deed, that the marriage-contract provisions were to be satisfied in the way pointed out in the fifth article of his settlement, it will receive effect; and this, I think, was Mr Mitchell's intention. . . . His will was that the daughters are to take their marriage-contract provisions, not as they were given by the marriage contract, but as he in his trust deed directed them to be paid. If the daughters agree there will be homologation, if they refuse there will be repudiation; or, in other words, a forfeiture of the provisions left to them by their father's settlement." Subject to the interpretation of the word "forfeiture," these words, *mutatis mutandis*, would have accurately described the situation which arises in the present case.

But it is said that there is another class of cases under which the present falls in which it was held that the doctrine of election did not apply. I have very carefully examined these cases, and think that the contention based on them is founded on a misapprehension of their circumstances and result, and that they are in no way applicable to the present question. These cases are *Carver* v. *Bowles*, 34 R.R. 102, and the series of cases which have followed upon it in England, and *Douglas' Trustees* v. *Douglas*, 24 D. 1191, and *M'Donald* v. *M'Donald*, 4 R. 45, in Scotland.

Carver v. *Bowles* decides three points, the second of which was, that while the appointment was bad so far as it attempted to restrict the interests appointed to the objects of the power, and to confer interests upon those who were strangers to the power, it was yet good as an appointment, the restrictions and conditions being to be ignored. But this conclusion was reached because the form of the appointment was an express and absolute appointment to the objects of the power, with a mere attempt to subject those absolute interests to conditions. For cases of that description *Carver* v. *Bowles* is a leading authority But it does not apply to the present case where there is no absolute appointment or, as we should say, appointment of the fee, to objects of the power, subject to restrictions or conditions, but merely an appointment of life interests to objects of the power, with an appointment of the fee to strangers to the power.

The third question determined in *Carver* v. *Bowles* was that, having regard to the decision on the second question above explained, the objects of the power were not put to their election. But, as has been clearly shown by James, M.R., in *Wollaston* v. *King*, L.R. 8 Eq. 165, and Fry, J., in *White* v. *White*, 22 Ch. Div. 555, the reason of this is, that the objects of the power were not put to claim against the will, but took both the interests conferred upon them under the will. As the decision in the second part of *Carver* v. *Bowles* does not apply to the present case, it follows that neither does it come under the decision in the third part.

It is not very easy to find one ground of judgment in the opinions of the Judges who decided *M'Donald* v. *M'Donald*. From one point of view it may be brought under the rule of *Carver* v. *Bowles*. If so, it would be no authority in the present case. But from another point of view it may be referred to the consideration that Colonel M'Donald was already vested in the absolute right under the entail during his father's life, and therefore could not be put to his election by a deed which only took effect afterwards, and more particularly as he could not elect with effect, having been placed under the fetters of the entail. And I am inclined to think that this was the real ground of judgment. But whichever way the decision is viewed, it is clear that it has no application to the present case.

Nor do I think that *Douglas'* case has any nearer application. In it, again, different grounds seem to have appealed to different judges. But I think that the true ground of judgment was that General Douglas was not put to his election because he could not elect with effect. No doubt Lord Cowan uses expressions which might be held to indicate that his Lordship considered it necessary in order to raise a question of election that the testator should have been aware that one part of the property of which he was disposing was not his to dispose of, and that it must appear that, knowing his own incapacity to dispose of it, he intended nevertheless to put his beneficiary to election. I doubt whether, divorced from the circumstances with which he was dealing, that was Lord Cowan's general view. Further, it must be recollected that when *Douglas'* case fell to be decided the result of reprobation was assumed to be forfeiture. The alternative of equitable compensation had not, so far as I know, been appreciated, and certainly not developed, in our law at that date. And I can understand an intention *scienter* being deemed necessary if forfeiture was to be the result of reprobation. But I am

satisfied that Lord Cowan's expressions must be read, not as of general application, but *coram subjectam materiam*. Were it otherwise, I think it would be almost impossible ever to make out a case of election, and that the true doctrine is that stated by the Master of the Rolls in the case of *Whistler* v. *Webster*, to which I have already referred. In the present case it is impossible to predicate whether Mrs Bayly knew that she was exceeding her power and intended to do so, or acted in ignorance of its true limits. All that we do know is that she manifested an unmistakable intention that two funds with which she was dealing were to go in the same way. Those who are able to effectuate her wish must do so, if they are to take that which proceeds from her mere bounty. But if I were at liberty to speculate, I should be inclined to assume that Mrs Bayly did know that she was doing, with one hand, more than she had power to do, but at the same time that she might effectuate her wish by what she had power to do and did with the other. I cannot imagine that a firm of such known reputation as the solicitors who prepared her settlement did not fully appreciate the situation and advise their client accordingly. I would not think it proper to say as much did not the whole scheme of the deed and the appropriateness of its details convince me that it is the case.

The result of my opinion is that a case of election and equitable compensation arises under Mrs Bayly's settlement. But then a question of difficulty and importance, not yet decided in Scotland, though, I think, concluded in England, would remain, viz. whether an appointment of a life interest to an object of the power, leaving the fee to go unappointed, can be sustained. The Rev. Paget Lambart Bayly abides by his mother's settlement, and it may result that he takes his liferent of one-half the fund which is the subject of appointment, provided he is willing to allow, as he is, his one-fourth of the unappointed fee to be disposed of according to his mother's will. This question was only slightly touched on in argument, and looking to what I understand is the opinion of your Lordships, it is unnecessary that I consider it.

LORD KINNEAR—Upon the first question I agree entirely with your Lordship that the power of appointment has not been validly exercised, and I do not desire to add anything to the reasoning upon which your Lordship has come to that conclusion. But since the other question raises a point upon which the Court is not agreed, I think it right to explain shortly the grounds upon which on that question also I agree with your Lordship.

I think that Mrs Bayly's will raises no question of election for her children. She makes a will by which she disposes of her own estate and at the same time she undoubtedly intends to exercise a power by which she was enabled to dispose among her children of a portion of her father's estate. We are all agreed that the exercise of that power is invalid, and therefore that the part of her father's estate which she intended to dispose of must be carried by her father's will according to the intention which he has expressed. So far as that part of the estate—what Lord Johnston has described as the massed estate—goes, Mrs Bayly's direction is void and of no effect. The question is whether that puts the children, to whom she has well and effectually left a part of her own estate, to elect between, on the one hand, taking this estate under their mother's disposition, and as a condition of their so taking giving effect to her disposition of their grandfather's estate, or, on the other hand, taking their rights under their grandfather's disposition and apart from their mother's appointment, and in consequence forfeiting the benefits given to them by their mother's will. The argument is, that if they do not accept Mrs Bayly's exercise of the power of appointment they lose any benefit which she intended for them under her own will.

That does not raise the question of election in the simple form in which it arises when a testator disposes of that which he knows not to be his own, and by the same instrument confers benefits on the true owner of the property. In that case the bequest to the true owner raises directly the plea of approbate and reprobate if he attempts to take the bequest and at the same time claims his own property against the will. But the rule is more difficult of application to a complex settlement such as that in question. It has been held in *Douglas* v. *Douglas's Trustees*, 24 D. 1191, and in *M'Donald* v. *M'Donald*, 4 F. 49, that when a person having a power of appointment exercises it in a way which he erroneously believes to be within the power, when it is in truth beyond it, and by the same will confers benefits on the proper objects of the power, they will not be put to an election unless the necessity for making the election is created by the expressed or clearly implied intention of the will, and unless the result of the election will be to give legal effect and operation to the will so expressed or implied. The question must always come to depend upon the intention expressed in the deed itself; and it is an element of material importance to consider whether the testator whose deed is in question was or was not aware that he was exercising a power which had not really been committed to him. That does not involve any speculation as to what he would have done in the event of his knowing what he did not know. The question is always what has he done. He has given his own property, which he was entitled to give. He has at the same time given, under conditions, other property which he had no title to touch. The question is, Did he mean the beneficiaries under his own gift to take it only on condition that they gave effect to the dispositions which he had made, but which he by his own power could not make effectual?

Now I cannot see sufficient ground in

the conditions of this settlement for supposing that Mrs Bayly intended to put her children to an election. In the first place, it does not by its terms suggest that any alternative is offered to the legatees. The testatrix sets out that she means to exercise the powers committed to her by her father's will, and she does so by making general dispositions applicable equally to all the property she has power to dispose of, whether her father's or her own. There is no room for question that according to the purport of her will she thought that she was validly exercising the power committed to her by her father's will. It turns out that her exercise of the power is invalid, and that her children, who are the objects of the power, must therefore take their grandfather's property by virtue of his own will, and not by their mother's. But no one of them could give legal effect to their mother's invalid exercise of the power unless by mutual agreement with all the others, and to exclude all the children from participating in their mother's estate would be subversive of her plain intention.

I am confirmed in this view by the declaration that the provisions in favour of her children are to exclude any kind of claim against her own estate, or against the estate settled in the antenuptial contract, read along with the immediately following declaration, that what she has done is in exercise of the power competent to her under the trust-disposition of her father. Therefore, having clearly before her mind that she was dealing with three separate properties—her own private estate, her marriage-contract estate, and her father's estate—she says—"If you accept the benefits given to you by me under this will you must take them in full of all claims against my estate or against the antenuptial contract estate;" and she excludes from that condition the third estate with which she was also dealing. It appears to me, therefore, as a mere matter of construction, that she did not intend to make it a condition of the acceptance of her legacies that the children should give up any claim they might have against her father's estate in the event of her appointment of her portion of that estate being ineffectual.

I cannot say that I have any difficulty in coming to that conclusion because of the decision in the case of *Lord Inverclyde's Trustees*. I do not examine that case in detail, because it is not reported, but it is enough to say that the judgment proceeded, as I think this judgment ought to proceed, upon the construction of the will which the Court were then considering, and that the terms of Lord Inverclyde's will were as clearly in favour of the construction which required that his children should be put to their election as I think the terms of the will in the present case are against it.

The Court answered question four in the affirmative and question five (*a*) in the negative.

Counsel for the First Parties—Moncrieff. Agents — Fraser, Stodart & Ballingall, W.S.

Counsel for the Second and Fifth Parties — Macmillan — J. R. Dickson. Agents — Webster, Will, & Company, S.S.C.

Counsel for the Third Party — Hunter, K.C.—Black. Agents—Forrester & Davidson, W.S.

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

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.

M'EWAN *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (16), *Second Schedule* (9)—*Recording of Agreement—Power of Sheriff to Postpone Recording where Simultaneous Application for Review by Employers on Ground of Recovery.*

A workman on 20th May 1909 presented an application craving the Court to grant warrant to the sheriff-clerk to record a memorandum of agreement. The employers thereupon presented an application for an arbitration to have the compensation payable under said agreement ended as on 30th April 1909, or otherwise to have it diminished. The Sheriff-Substitute, acting as arbiter, on 30th June allowed a proof in the application for arbitration, and appointed it to proceed on 7th July. The workman moved for warrant to record the memorandum "in respect its genuineness was not disputed and no other question of fact arose." The Sheriff-Substitute refused the motion and allowed proof, appointing it to proceed also on 7th July.

Held that the Sheriff-Substitute had acted rightly, and that he was not bound to register the memorandum without awaiting the result of the proof in the counter application. *Diss.* Lord Johnston, who was of opinion that the Sheriff-Substitute was bound to grant warrant to register the memorandum, but that he ought to have superseded extract until his award in the counter application for review was determined.

Opinion (by the Lord President) that the arbiter might also have sisted the application to register until the determination of the application to vary, or, though not so conveniently, might have registered the memorandum but superseded extract until such time as there was a determination in the application to vary or end.

Authorities examined.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Schedule I (16)—"Any weekly payment may be