whether, although this is undoubtedly the state of the vessel as she appeared when surveyed, she might not, with very little mechanical contrivance, be made entirely water-tight as to the space in question: and I observe that Mr Mumford, when asked the question whether these openings might not be made water-tight by being covered by tarpaulins, does not answer the question, but contents himself with saying that there is no evidence of any fastenings having been provided or adopted for that purpose. If it had appeared that the nature of the construction of these openings was such that any ordinary appliances might have secured and protected the cargo below, I should have thought that the existing state of the vessel was a mere evasion of the Act. But we are left without any evidence on that matter, and the Crown has asked for a judgment on the case as it stands. The defenders, on the other hand, entirely deny that they have used or can use this space for the purposes of the stowage of perishable cargo. They say, and I have no reason to doubt the statement from the evidence before me, that the main object of covering the space in question is to protect the deck cargo, namely, the cattle, which form a main staple of their trade between the Clyde and Ireland. The clause in the statute can only be read as applicable to perishable cargo, which requires to be protected during its transit; and there seems little doubt on the description of the vessel which is given us that, as it stands, the space in question would not be a proper or legitimate place in which to stow perishable cargo.

Something was said in the debate as to the effect of the closing in of the space in question in a case of general average. I think it unnecessary to deal with this illustration, because I think it inapplicable. It may quite well be, looking to the more modern views on the subject, that the removal of the deck cargo from a position where it would impede the navigation of the vessel, and the additional protection afforded by the covering, might entitle the owner to the benefit of general average, although the space might be entirely unfitted for the stowage of perishable cargo, or for the berthing of passengers.

This is not so clear a case as that of the 'Dantzig,' but I concur in the Lord Ordinary's judgment.

LORD COWAN—There is no averment on record that this erection was capable of being rendered water-tight the moment the vessel went to sea, and that the provisions of the Act might thus be evaded. There is no such case here at all; and, looking to Mr Mumford's report, it is impossible to arrive at any conclusion except that of this being a "two-decked" rather than a "three-decked" vessel. It could not be safely loaded down to a point at which, had it been really "three-decked," there would have been no danger in loading it. I concur on the whole case in your Lordship's views.

LORDS BENHOLME and NEAVES concurred.

The Court pronounced the following interlocutor:—

"Refuse said note, and adhere to the interlocutor complained of, with additional expenses; and remit to the Auditor to tax the same, and to report: *Quoad ultra* continue the cause.

Counsel for Pursuers—Lord Advocate (Young), Q.C., Solicitor-General (Clark), Q.C., and Rutherford. Agent—W. J. Sands, W.S.

Counsel for Defenders—Watson and Lancaster. Agents—Webster & Will, S.S.C.

Tuesday, February 25.

FIRST DIVISION.

[Lord Mure, Ordinary.

JOHNSTON *v.* JOHNSTON.

Disposition—Approbate and Reprobate—Election.

A husband, in his trust-disposition and settlement provided, "in respect of the provisions in favour of my wife hereinafter contained, I recommend and enjoin her, in the event of her surviving me, to discharge or abstain from exacting" a certain liferent to which she had right. In a subsequent clause of the deed the husband gave to his wife the liferent of the whole remainder and residue of his estate. The husband being dead—*held* that his widow must make her election between these two liferents.

This was an action of declarator, count, reckoning, and payment, at the instance of John Johnston, Glasgow, against Mrs Marion Waddell or Johnston and others. The only question which came before the Court at this stage was, whether if the defender—who was the pursuer's mother—accepted of certain provisions in her husband's settlement, she was bound to discharge or abstain from exacting certain liferent to which she was otherwise entitled. The facts of the case, in so far as they bear upon this point, are clearly set forth in the following interlocutor and note of the Lord Ordinary:—

"10*th December* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record and proof, with the joint minute of admissions, and whole process—Finds that according to the true meaning and intention of the trust-disposition and settlement of the late William Johnston, executed in the year 1865, the defender Mrs Johnston is entitled to take the benefit of the provision of residue made to her in liferent under the said deed, only on the footing and condition *inter alia* of her discharging or abstaining from exacting the liferent of the lands of Easter Cardowan, conveyed by the said William Johnston, her husband, in 1856, to himself and his wife in conjunct liferent, and to the pursuer and his heirs and assignees whomsoever in fee. And before further answer, appoints Mrs Johnston to state within three weeks from this date whether she elects to take the liferent of the residue provided to her by her husband's settlement, or to claim the liferent of the said lands of Cardowan; and reserves in the meantime all questions of expenses.

"*Note.*—The question upon which parties are here at issue has been raised in the following circumstances. In the year 1856 the late William Johnston, the pursuer's father, purchased, with funds belonging to himself, but which he appears to have acquired through his wife, the defender Mrs Johnston, the lands of Easter Cardowan, the conveyance of which was taken to himself and his wife 'in conjunct liferent for their liferent use allenarly, and John Johnston (the pursuer) their

son, and his heirs and assignees and disponees whomsoever, in fee.' On this disposition the parties were infeft, and the instrument was recorded on the 6th of December 1856.

"In the month of January 1858 the pursuer's father, in conjunction with the pursuer and his mother, and on the narrative that he had purchased the lands of Easter Cardowan with his own money, and had desired the conveyance to be made out temporarily in favour of himself and his wife in liferent, and of his son (the pursuer) in fee, 'until the present trust should be constituted,' executed a disposition in favour of the trustees therein named, including the pursuer, of the lands of Easter Cardowan, with directions—1st, For payment to himself and his wife, and the survivor of them, of the rents and profits of the said lands during their lives; 2d, After their death to grant to the pursuer the liferent of the lands during his life for his alimentary support; and the trustees were also authorised either to allow the pursuer to possess the lands for his own liferent behoof, or they might assume possession, and let the same at such rent as they could obtain, and pay the rent to the pursuer for his alimentary behoof; and 3d, After the death of the pursuer, the trustees were authorised and directed, subject to certain discretionary powers thereby conferred on them, to sell the property, and, in the event of the pursuer being survived by a widow and children, to apply the interest of the proceeds on their account; and on the death of the widow, to divide the whole proceeds equally among the children, and failing children, among the brothers and sisters of the pursuer therein named and their children. The deed also contains a clause by which the pursuer declares his acceptance of these provisions as in full of all he can claim from his father's estate in name of *legitim* or otherwise, which by acceptance thereof are thereby discharged. Infeftment followed upon their disposition, and the instrument was recorded in the Register of Sasines on the 16th September 1858.

"Under this trust-deed and a relative deed of assumption executed by the pursuer and two others of the three surviving trustees in 1866, the property, since the death of William Johnston in June 1867, and for about eighteen months prior to that date, has been under the management of the trustees, the defenders in the present action; and it further appears that since shortly after the execution of the deed the pursuer has occupied the lands as tenant at a rent, first of £60, and afterwards of £100 a-year.

"On the death of William Johnston it was ascertained that he had left a trust-disposition and settlement of his affairs, which was executed in March 1865, and relative codicils. This deed proceeds upon the narrative that the testator had 'already made partial provisions for behoof of my sons John Johnston and William Johnston, and my daughter Janet Johnston, by conveying to the said John Johnston the lands of Easter Cardowan or Blackfauld, and by conveying to the said William Johnston the lands of Blackhill and Provanmills and by conveying to the said Janet Johnston a tenement of houses situated at Thistle Street, Glasgow, or, in other words, by purchasing and taking the conveyances of said properties.' The whole of the rent of the property is then conveyed to trustees; and after making provision for payment of debts, and conferring on the truster's widow the liferent of his whole household furniture and plenishings of every description, there is the following clause:—'*Third*, In respect of the provisions in favour of my wife, the said Mrs Marion Waddell or Johnston hereinafter contained, I recommend and enjoin her, in the event of her surviving me, to discharge or abstain from exacting from the said John Johnston and William Johnston her liferent rights in the lands of Easter Cardowan or Blackfauld conveyed to the said John Johnston as aforesaid, and the lands of Blackhill and Provanmill conveyed to the said William Johnston as aforesaid.'

"The provision in favour of Mrs Johnston referred to in this clause was the whole residue and remainder of the testator's estate, which is given to her in liferent; and after her death the capital, subject to certain large legacies to the truster's daughters and grandchildren, is appointed to be divided between the pursuer and his brother.

"At the meeting of trustees which took place in November 1867, after the death of Mr Johnston, it appears to have been intimated to the meeting, at which the pursuer was present, that Mrs Johnston the defender did not intend to exact any rents from the lands for the current half-year, 'but that in future she in the meantime thought she might ask both her sons to pay.' The rents of Cardowan exclusive of the mineral rents, have accordingly been drawn by Mrs Johnston, and apparently without objection on the part of the pursuer, till the date of the present action; which seeks to have it declared that the pursuer since July 1867 has been and is entitled to the rents and profits of the property, and to occupy and use it during his life, and that the defender Mrs Johnston has no right or title to draw or exact any part of those rents; and there are petitory conclusions framed with a view to carry out these declaratory conclusions.

"The ground on which it is maintained, on the part of the pursuer, that he is entitled to decree in terms of these conclusions, is that the defender Mrs Johnston cannot both approbate and reprobate her husband's settlement: and that she cannot therefore, in respect of the injunction contained in that deed, exact the rents of Cardowan, if she accepts the provision of residue made to her by the settlement. In answer to this plea the Lord Ordinary did not understand that it was contended, on the part of the defender, that if, by the settlement, the giving up of the rents was made the condition in respect of which the liferent of the residue was given to her, the rules of approbate and reprobate did not apply. But it was maintained that the words of the clause in question imported a recommendation merely, and were not sufficient to amount to an express condition, or to impose an obligatiou upon the defender to elect.

"The Lord Ordinary has, however, been unable to adopt the view thus contended for by the defender. Because, in construing a deed of this description, which was evidently framed so as to regulate the whole succession, the Lord Ordinary understands it to be settled, that if the words used are sufficient to indicate a clear intention on the part of the testator to make the grant of the one provision the equivalent for the other, and that the party to be benefited is not to take both, or to insist upon any legal claim which may tend to defeat the general plan of the settlement, the intention must receive effect. It was so ruled, as the Lord Ordinary conceives, in the cases of *Dundas*, Jan. 14, 1829, 7 S.

p. 241; *Bennet*, July 1, 1829, 7 S. p. 817; and *Harvey's Trustees*, June 28, 1860, 22 D. p. 1310. And applying this principle of construction to the present case, the Lord Ordinary does not think that the words used can be held to amount to anything more than a recommendation, which the defender was entitled to act upon or not at her own discretion. Because she is not only recommended, but enjoined, 'in respect of the provisions hereinafter mentioned,' to discharge or abstain from exacting her liferent of the rents conferred by the deed of 1856, which is described in the narrative of the deed of 1865 as containing a 'partial provision' for his son the pursuer. The main difficulty in the case appears to the Lord Ordinary to arise from the use of the expression 'recommended.' For if the word 'enjoin' had alone been used, there would, it is thought, have been little doubt that it amounted to a distinct direction to the defender to abstain from drawing the rents if she took the residue provision. Because that word, in its ordinary acceptation, as explained by the best authorities, is understood to amount to a direction; and even when used as here in conjunction with a milder expression, is, in the opinion of the Lord Ordinary, sufficient, in dealing with a question of intention, to make it an implied condition of the will that the beneficiary to whom the direction applies was not to take both of the provisions. In these circumstances the case appears to come within the operation of the rule explained by Mr Bell (1 Comm. p. 146), as based on the judgment of Lord Elden in the case of *Kerr* v. *Wauchope*, 1 Bligh, p. 21, where 'an alternative is offered to the party, and a necessity raised for making an election, either to accept or comply with the condition, or to forego the intended benefit.'

"But while such is the conclusion at which the Lord Ordinary has arrived as to the meaning and intention of the settlement, it does not follow that the pursuer is at present in a position to ask for decree in terms of the declaratory conclusions of the summons; for these seem to be framed upon the supposition that the defender, by accepting the residue, has already forfeited her liferent of the rents. She has, however, in the opinion of the Lord Ordinary, not as yet deliberately done this, because she has never yet been put to her election; inasmuch as the intimation made at the meeting of trustees, of her intention to draw the rents in the meantime, was not then objected to, and she was not till the date, or shortly before the date, of this action, made aware that her right to take both provisions was to be disputed. The Lord Ordinary has therefore appointed the defender to declare her election within a specified time, as there appears to be nothing to prevent her, if so advised, from still electing to take the rents of the two properties to which the direction appplies, instead of the residue, and it will in a great measure depend upon the course she adopts in this respect whether the pursuer will be entitled to succeed in the present action.

"The Lord Ordinary had at first some doubts whether this action was so framed as to admit of the defender being required under it to declare her election, as there is no conclusion to that effect. Having regard, however, to the course adopted in the case of *Harvey's Trustees*, 22 D. p. 1310, and 1 M. p. 345, and in the earlier case of *Loudon*, 23d May 1811 (Hume, p. 23), there seems to be no incompetency in appointing the election to be now made; and it is desirable, in a family difference of this description, not to put parties to the expense of a separate action if that can be avoided."

At advising—

Lord President—I have no doubt that the Lord Ordinary has acted wisely and appropriately in considering in the first place whether Mrs Johnston has been put to her election by the trust settlement of Mr Johnston, for that is a point which it is necessary to dispose of before entering upon the merits of the case.

There is no doubt that the right of life-rent which Mrs Johnston has of the lands of Easter Cardowan is an absolute right of life-rent, and Mr Johnston could not by his settlement take that right away. But it was quite competent for him to make another provision for her, and to provide that if she took it she must give up the life-rent. The question is, did Mr Johnston do this? The third purpose of his trust disposition and settlement is this—"In respect of the provisions in favour of my wife, the said Mrs Marion Waddell or Johnston, hereinafter contained, I recommend and enjoin her, in the event of her surviving me, to discharge or abstain from exacting from the said John Johnston and William Johnston, her liferent rights in the lands of Easter Cardowan or Blackfauld conveyed to the said John Johnston as aforesaid, and the lands of Blackhill and Provanmill conveyed to the said William Johnston as aforesaid." Then follows an unimportant intervening provision, and then he gives to his wife in liferent the whole residue and remainder of his estate. This is undoubtedly the provision referred to in the third purpose, which I have just read, and in regard to this provision he enjoins her, in event of her accepting it, to discharge the liferent. Now the word "enjoin" is the expression of some one having power and authority, and the power which the testator had was to prevent his wife taking the one provision unless she gave up the other. I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—Solicitor-General and Thoms. Agents—Millar, Allardice, and Robson, W.S.

Counsel for the Defender—Watson and Balfour. Agent—Wm. Officer, S.S.C.

Friday, February 7.

FIRST DIVISION.

SPECIAL CASE—LORD HERRIES (MAXWELL'S EXECUTOR) AND ADAMSON.

Apportionment Act, 33 *and* 34 *Vict., cap.* 35, *sec.* 2—*Heir and Executor—Forehand Rent—Entailed Estate.*

In a case where an entailed estate was forehand rented, and the heir in possession died in July, *held* that the rent for the period between his death and the term of Whitsunday preceding was divisible between his executor and the next heir of entail.