A still stronger case might be that of payments from the Common Good into a fund for defraying the election expenses of such candidates in the next municipal election as belonged to the party of the majority in the Corporation. The judgment of the Court below lays down that such an act as paying for election expenses can lawfully be done by an individual with his own money, and if we accept the proposed test it follows that the Corporation might lawfully do the same with the Common Good. This appears to me sufficient to show that the proposed test cannot be the true one.

The true test must be obtained from a consideration of the position of the Corporation with regard to the funds of the Common Good. It is a civic body holding these funds impressed with the duty of using them for the benefit of the burgh.

Both its own position and the nature of its duties bring limitations to the freedom of its use of the funds. It may not use them in a way unfitting a civic body nor apply them to purposes which are not rightly for the benefit of the burgh. Within these limitations it has, no doubt, very wide discretion.

The case of the defenders is that by interfering with the municipal elections in the neighbouring burghs they will secure to tend to secure the election of representatives pledged to support the annexation scheme, or in other words to vote in favour of supporting the bill when the question should come up before the municipal council of the burgh. It is not open to them to say that starting candidates with this object and paying their election expenses will not affect the municipal representation in these burghs, because their justification for spending the Common Good in this way is that it will have that effect and thus benefit Glasgow. But it must be borne in mind that the candidates elected will govern the burghs in all municipal matters. They are not elected for a single vote upon the bill. Can anyone pretend that it is compatible with the position of a corporation that it should spend its funds in influencing the choice of another burgh of those who are to manage its municipal affairs in its own interests. To my mind it is an utterly illegitimate use of its funds and one wholly contrary to public policy.

It must not be thought, however, that I should have considered such payments permissible even if the candidates elected had merely to vote on the question of the bill. In some aspects this appears to me to be the worst feature of the case. Parliament attaches great importance in matters of this kind to the opinion of the burghs which it is sought to annex, and it rightly looks to the result of the municipal elections as indicating this opinion. That it should be permissible for the Corporation of Glasgow to use the funds of its Common Good to affect the results of such an election and to make those results different to what they would have been if the election had not been interfered with by them, is really to try to mislead Parliament as to the true and unbiassed views of the inhabitants of the burgh. Indeed it is very possible that the candidates whom the Corporation of Glasgow had started, and whose election expenses it had paid, might be called by the Corporation as witnesses for the bill and presented to the committee dealing with the bill as persons whose testimony should have greater weight attached to it by reason of their being the chosen representatives of the people of the burghs.

I am therefore of opinion that the averments in condescendence 8 are relevant, and that payments of election expenses and otherwise in connection with the starting and running annexation candidates in the burghs that it was proposed to annex are not legitimate payments out of the Common Good of Glasgow, and that the interlocutors appealed against ought to be reversed, and that of the Sheriff-Substitute restored, and that the respondents should pay the costs of the appeal here and below.

Their Lordships, with expenses to the appellant, reversed the interlocutors appealed against, restored that of the Sheriff-Substitute, and allowed a proof.

Counsel for the Appellant—Macmorran, K.C.—J. B. Paton. Agents—Bird, Son, & Semple, Glasgow; Inglis, Orr, & Bruce, W.S., Edinburgh; John Kennedy, Westminster.

Counsel for the Respondents—The Lord Advocate and Dean of Faculty (J. A. Clyde, K.C.)—Macquisten, K.C.—T. A. Gentles. Agents—Sir John Lindsay, Town Clerk, Glasgow; Campbell & Smith, S.S.C., Edinburgh; Martin & Co., Westminster.

Thursday, May 6.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Moulton.)

BROWN'S TRUSTEES *v.* GREGSON.

(In the Court of Session, March 19, 1919, 56 S.L.R. 333, and 1919 S.C. 438.)

Succession—Election—Approbate and Reprobate—Foreign—Provisions in a Settlement Null by the Law of the Country in which Situated.

A testator domiciled in Scotland conveyed his estate to trustees in trust for his seven children equally, six of them to take in fee and the seventh, a daughter, in liferent, the fee going to her issue. The estate included immoveable property in Argentina, and the courts of that country declared the testator's provisions with regard to it null and void as being contrary to the laws of that country. These laws prohibit any trust in heritable property. The seven children consequently took that property *ab intestato*, and the daughter further claimed her legitim. Her issue now claimed that the other six children of the testator could not take benefit under the settlement without bringing into

account their shares of the Argentine property.

Held (*dis.* Viscount Cave, *rev.* judgment of First Division) that the six children were not put to their election, on the ground, *per* Viscount Haldane, Viscount Finlay, and Lord Moulton, *contra* Viscount Cave, that they were unable, under the law of Argentina, to make their shares of the property in that country available to the trust; *per* Lord Dunedin, that what was proposed would not "give legal effect and operation to the will."

This case is reported *ante ut supra.*

The claimants Christina Isabella Brown and others appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—By his trust-disposition and settlement James Brown of Barlay, domiciled in Scotland, left the entirety of his property, of whatever nature and wheresoever situated, in trust, as regarded the residue, for his children and the issue of such as should have predeceased him. To his trustees he gave a power of sale, but there was no trust for conversion. He directed that the provisions for his children were to be accepted in full of legitim and any other rights which they might assert by reason of his decease, and that if any of them should repudiate the settlement thus made and claim their legal rights, or in any way prevent it from taking effect, they were to forfeit all title to any share of his estate which he could dispose of by law. He enabled his trustees to grant a power of attorney for managing and realising his estate in South America. By a codicil he directed his trustees, instead of paying over her share to Mrs Gregson, his daughter, to hold it for her in liferent and after her death to divide it among her children who should then be alive, and the issue of any who had predeceased her, *per stirpes.*

Besides his property in this country the testator owned land in the Argentine Republic. The law of that country, which of course governs the disposition of immoveables there, only permits a testator to dispose by will of one-fifth of his immoveables in Argentina, the remaining four-fifths passing to his children as of right on his death. That law, in addition, does not permit trusts or contracts which restrict the free disposal of land by its owner. Nor can a testator appoint heirs to his heirs of such land, and the heir who becomes owner cannot bind himself not to dispose of the land.

After the death of the testator proceedings were taken in the Courts of the Argentine Republic to ascertain whether his testamentary disposition of his immoveable property was valid, and, on the intervention of the Attorney-General of the Republic, the trust-disposition and settlement was declared to be null in so far as it purported to affect such immoveables, as being contrary to the laws of the Republic regulating the transfer of heritable estate to and by the heirs to it.

Mrs Gregson has since claimed, not only her share under Argentine law in accordance with this declaration, but also a share by way of legitim in the movables under the law of Scotland. To these shares she is entitled, and she makes no claim at all under the trust-disposition. The interest, however, of her children is one to which they have a title which is independent of hers. The appellants, who are five of the children of the testator, are claimants before the Court of Session in the action of multiplepoinding in which this appeal arises. The purpose of the action, which was brought by the trustees, is to ascertain the persons entitled to the trust estate, so far as it remains in their hands undistributed.

The effect of the judgment of the Argentine Courts has been that the Argentine immoveable property vested in seven children who survived the testator, in equal shares.

The Court of Session has already decided on a special case, the judgment in which is not questioned, that Mrs Gregson's children's rights as flars in a one-seventh share of the residue under the general disposition are not affected merely by their mother's action. As the result the residue on which the trust-disposition was capable of operating is divisible into seven portions, to five of which the appellants are entitled, to one of which a now deceased son had become entitled, and to another of which Mrs Gregson's children are entitled. The question which remains is as to how the amounts of these seven shares ought to be ascertained. The respondents, who are Mrs Gregson's children, contend that the appellants are put to their election between their claim under the distribution directed by the will and their claim to the Argentine immoveables as taken by them independently of it. The appellants maintain that to apply the principle of election would be to do circuitously what the Argentine law forbids to be done at all by making the land to which it applies subject to a trust for the children of children, which is forbidden both as a gift of this nature and as an admissible qualification of the title of the children to the land, which must by the Argentine law be free from any restriction on the power to dispose of it freely.

The Lord Ordinary decided that the appellants could not be put to their election in the fashion claimed. The First Division recalled his interlocutor to this effect, and held that the appellants and the representatives of the deceased son, who, though not appearing in the proceedings, were in the same position as the appellants, could not claim a share in the fund *in medio*, consisting of assets the disposal of which was governed by Scottish law, without bringing the value of their shares in the Argentine immoveables into account for the purpose of a division under the scheme contained in the trust-disposition.

I think the question thus raised is one of considerable nicety. Principles which at first sight seem to conflict have to be interpreted and reconciled. In *Dundas* v. *Dundas* (4 W. & S. 460) this House decided what to-day is beyond question. A Scottish testator had executed a deed of settlement

purporting to convey to trustees his whole property, including land in England. The deed was probative in Scotland, but as it was executed in 1818 before only two witnesses in place of three, as then required by the English law as to wills of land, it was therefore inoperative by English law. It was held that the heir to the land in England nevertheless could not hold it against the provisions of the settlement and at the same time claim a provision made for him in that settlement. The reason given was not that the Scottish Courts could control the title of the heir, but that they could exclude him, unless he chose to bring his land in, from participation in the assets within their jurisdiction, on the ground that the heir was not entitled at once to approbate and to reprobate the terms of the testator's settlement.

As I have said, that was obviously within the competence of the Scottish Courts, at all events so far as insistence on compensation went. The heir was by the law of England free to deal as he pleased with the land in England, and he could if he chose accept the terms which the settlement sought to impose on him as the condition of participation in the other assets of which the testator had effectively disposed. But suppose that the law of England had done more than merely regulate the formalities of the kind of will that was required to deprive the heir of his title to succeed. Suppose that the English law had been to the effect that the heir should not use his land in such a fashion as to give effect to the purposes prescribed by the testator.

This further question arose in *Hewit's Trustees* v. *Lawson*, 18 R. 793, 28 S.L.R. 528. There by a Scottish disposition a testator had sought to make English realty available for charitable purposes, and his disposition was consequently *pro tanto* bad under the Mortmain Act, which, as it then stood, declared void every gift to charitable use of land or any estate or interest in it. The Court of Session held that the heir was not put to any election, because the Court must be satisfied, in order to put him to it, that it was in his power by waving his objection to the will or refusing to make a claim adverse to it, to perfect the right of those who would make title under the will. Where he was prohibited altogether from making over English land for charitable purposes he therefore could not be called on to make such a surrender of other assets as would indirectly bring about this result.

The language of the then Mortmain Act was sweeping. It extended to every sort of interest arising out of English land. Every gift in a will which dealt with such an interest, in whatever country that gift was made, was struck at. The law applicable was the law governing the disposition of the land. It was not to be merely conjectured that the testator had intended by imposing the penalty of a forfeiture of other benefits to make his heir give the land for a purpose which would have been contrary to the provisions of the Act. Such an intention was not to be attributed to the testator, unless indeed he had plainly gone so far as to make the surrender of the land by the heir a definite condition of the right to participate in his estate. The doctrine of election, which extends only to an obligation to compensate, did not go so far as this. It really turned on a different principle, which was, however, inapplicable when the heir was not left by the *lex loci* at liberty to treat the testator's direction as one which he was free to carry out.

I think that this is the underlying meaning of the decision in *Hewit's Trustees* v. *Lawson*. The result turned on the character of the law of Mortmain, which did not merely require formalities for the validity of the devise, as with the general law relating to wills of English land which was considered in *Dundas* v. *Dundas*, but prohibited the gift by laying down a principle relating, not to evidence merely but to substance—a principle invalidating altogether this class of gift.

In the earlier case of *Douglas* v. *Douglas* (24 D. 1191) the Court of Session had taken an analogous view in refusing to put to his election an heir of entail who, had he attempted to carry out an alteration directed by the testator in the destination under which he held, must have found himself precluded by law from doing so. The Court decided that in such a case the beneficiary was not put to his election, inasmuch as he could not make the election to do what was supposed to be demanded.

I think that the result here also is that such a demand by the testator was held not to be implied as an absolute condition. If he says in distinct language that the beneficiary is not to take at all if he cannot fulfil a condition, the fulfilment of which is impossible by law, such a condition may prevail, but it is not to be assumed as imposed in the absence of distinct language to that effect.

The doctrine of election rests on a different foundation. It is a principle which the Courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. It is not merely the language used to which the Court looks. A testator may, for instance, have obviously failed to realise that any question could arise. But the Court will none the less hold that a beneficiary who is given a share under the will in assets, the total amount of which depends on the inclusion of property belonging to the beneficiary himself which the testator has ineffectively sought to include, ought not to be allowed to have a share in the assets effectively disposed of excepting on terms. He must co-operate to the extent requisite to provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share to which he is *prima facie* entitled, to an extent equivalent to the value of his own property if withheld by him from the common stock. As was said by Cairns, L.C., in *Cooper* v. *Cooper* (7 E. & I. Ap. 53, at

p. 67), this condition arises, not as on a "conjecture of presumed intention, but it proceeds upon a rule of equity founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will." Such a principle is different from that under which a condition of forfeiture arises, for there an intention clearly expressed by the testator is requisite. And it is, I think, because the principle has not to be based on such an expression of intention that the Court can mould its application. As Lord Eldon pointed out in *Ker* v. *Wauchope* (1 Bligh. 1) the limitation of the principle to compensation as distinguished from forfeiture is a subordinate principle which has been engrafted on the main one in order to make sure that what is ordered does not go beyond what substantial justice requires.

According to the authorities I have already discussed, the principle, being one the application of which the Court has a discretion to mould, ought not to be applied when the testator could not effectively impose the condition on the beneficiary otherwise than by imposing an absolute condition which he has not expressed. On principle I think that this is right. Not only do the authorities referred to imply it, but it was in accordance with the doctrine as I have stated it that Chitty, J., *in re Lord Chesham* (31 Ch. D. 466), decided that where a will purported to bequeath for the benefit of the testator's younger sons chattels which were settled in trust to go and remain as heirlooms with a house belonging to his eldest son, and then made the eldest son his residuary legatee, the latter was not to be put to his election. For it would have been a breach of trust for the trustees of the settlement to allow him to make over the chattels, and without their assent he was powerless to do it. His desire was to have the residue under the will, and he was allowed to do so without being compelled to elect to make compensation. The learned judge laid down that a court of equity will not decree something to be done which would amount to a breach of trust, or be a mere idle act that could only lead to litigation. The reason why the eldest son could not make an assignment was because he had no assignable interest. "Election," said Chitty, J. (p. 476), "means free choice. . . But when he takes under the will there is nothing for him to give up, for there is nothing which he can give up."

I think that the authorities which I have cited confirm the view that the real ground on which an election to submit to a deduction by way of compensation is compelled is the equitable principle of administration with the restriction I have now referred to.

If this be so, the question in the present case is simply whether the law governing the title to the testator's Argentine land permits the appellants to comply with the directions of the trust-disposition. It seems to me clear that it does not. It is said that the appellants could sell their land or convey it to the trustees under the disposition. But they could not by doing so bring it effectively under the scheme of the instrument. If they were to try to do so, the trustees would either not get the land itself, or would get it free from any binding trust. The law of the Republic strikes at such a transaction as the settlement directs, and does not allow the title to be made which the testator directed. It is plain that it is this law which must govern the validity not only of the disposition but of the trusts sought to be engrafted on the title to land, and of the directions to be carried out with regard to it. In this state of matters to say that the appellants were bound to elect, or that they are reprobating the instrument by not doing what the law will not allow them to do, appears to me, both on principle and authority, to be wrong.

I think that we ought to reverse the judgment of the First Division and to restore the interlocutor of the Lord Ordinary of 3rd September 1918. The appellants should have their costs here and before the First Division.

VISCOUNT FINLAY — This is an appeal from the decision of the Inner House reversing Lord Hunter's decision. The question is as to the application of the law of election or "approbate and reprobate," as it is termed in Scotland, and whether certain beneficiaries under the will are entitled to compensation out of the residue of the estate in respect of the loss of an interest given to them in land in the Argentine. The Lord Ordinary held that the appellants were not bound to make such compensation, while the Inner House held that they were.

The testator James Brown had a large estate, real and personal. Part of it consisted of various parcels of land in the Argentine, valued at £110,000, and he had also some heritable property in Scotland and moveable property in both countries, which made the estate of the total value of about £200,000. By the trust-disposition and settlement dated 5th March 1910 the testator appointed trustees to whom he left the whole of his property on certain trusts. The fourth of these trusts was in favour of his children who should survive him, equally, and it was declared that this provision was to be in full of legitim and all other legal rights, with a forfeiture clause as follows:—"And if any of them shall repudiate this settlement and claim their legal rights, or shall in any way prevent this settlement taking effect, then such child or children shall forfeit all right to any share of that part of my estate, means, and effects which I may dispose of by law, and they shall have right only to their respective legal provisions, and the share or shares of such child or children shall in that event accresce and belong equally to my other children or their issue."

The trustees were given power to sell the trust estate or any part of it, and were authorised to grant a power of attorney, with full powers for the management and realisation of the estate in South America. The trustees were further authorised to hold the land in South America, and the settle-

ment went on to provide—"But if they shall not have sold the same within six years after my death, I recommend them to sell as soon as conveniently may be thereafter, unless there be then an exceptional depression in its value. . . ." The proceeds of management and realisation were to be from time to time transmitted to the trustees in Scotland.

The testator died on the 12th March 1910, and was survived by seven children, one of whom was Mrs Gregson. The fourth codicil to the will provided that Mrs Gregson should have a liferent only in her share of the residue, which was to be held by the trustees, and upon Mrs Gregson's death equally divided among her children then alive and the issue of any predeceased. There are two such children, both minors, and they are respondents in this appeal. The other children of the testator were the appellants and Oswald Stanley Brown, who was killed in action on the 22nd December 1915.

Mrs Gregson repudiated the provisions of the will in her favour, and took her legitim. She thereby forfeited all rights under the will in her favour, and the income which she would have received by way of liferent became during her lifetime payable to the other members of the family. As was decided by the First Division on a special case, the forfeiture of her life interest did not affect the reversionary interest of her two children as fiars in one-seventh of the residue. The contest on the present appeal is between these two children of Mrs Gregson as respondents and the appellants.

Proceedings were taken in the Argentine to have it declared what was the effect of the trust-disposition and settlement upon the land in the Argentine. In these proceedings it was decided, and the decision has not been questioned, that the testamentary dispositions in favour of the trustees of the will are invalid so far as land in the Argentine is concerned, as being contrary to the law of that country, which does not admit of trusts in land, and that the land vested in the seven children of the testator in equal shares absolutely by descent *ab intestato*. All the seven children, including Mrs Gregson, thus took an absolute interest in the Argentine land, each share being one-seventh. The provision in favour of Mrs Gregson's children failed, as no such reversionary trust interest is permitted by law in that country, and these children now claim that this should be made good to them by the appellants.

The present proceedings were taken by the trustees under the will as pursuers in order to have the decision of the Scottish Courts as to the distribution of a balance of £6474, 4s. 11d. on the testator's estate other than the Argentine property. The condescendence annexed to the summons set out the question as follows:—"Owing to the foresaid decision of the Courts of the Argentine Republic regarding the said Argentine immoveable estate, and to Mrs Gregson having claimed her legitim, a further question has now arisen. The seventh defenders maintain that the final division of the trust estate should be made upon the footing that the first six defenders are entitled only to one-seventh each of the six shares of the Argentine immoveable estate taken by them or their author as aforesaid, and that the value of the remaining seventh of the said six shares should be taken into account in computing the amount of the share of the trust estate to be held for Mrs Gregson's children. The first six defenders maintain that the Argentine immoveable estate should not be taken into account in the distribution of the residue of the truster's estate. The present action has accordingly been rendered necessary."

All the members of the family were made parties, and the condescendence put in on behalf of the present appellants states their case thus—"These claimants maintain that as a condition of claiming one-seventh each of the free moveable estate of the testator, to which they maintain they are entitled under and in terms of his will, they are not put to any election, and in particular they are not bound to waive or surrender, or to realise and pay over, any part of the one-seventh shares of the testator's Argentine immovable estate to which they are entitled as aforesaid by the law of the Argentine Republic, and also by the provisions of the testator's trust-disposition and settlement and codicils; and that in respect (1) that the bequest of the Argentine immoveable estate in question is null and void and should be held *pro non scripto*, and (2) that in any event they have never made, and are not now making, any claim inconsistent with the scheme of the testator's testamentary writings. Further, they maintain that they are not put to their election, because in respect of the rules of the Argentine law above set forth it is not possible for the claimants to waive or surrender their shares of the Argentine immoveable property or any part thereof to the purposes of the testator's testamentary writings, nor is it possible for the trustees to hold and administer the said immoveable estate under and in terms of the said testamentary writings."

This case has been the subject of most careful and able argument, and after very full consideration I have come to the conclusion that Lord Hunter's decision was right and that his interlocutor should be restored. The present case does not appear to me to be one in which the doctrine of election has any application.

The disposition made by the will and codicil with regard to the Argentine land was by the law of the Argentine a nullity. This appears clearly from the terms of the Argentine judgment, printed in the appendix. The trustees under the will took nothing, and the children of the testator took by succession *ab intestato*. The reversionary interest in favour of the Gregson children disappeared. This was not brought about by any action on the part of the appellants, but automatically by virtue of the Argentine law. The appellants did not ask for any such decision; all that they did was to appear and submit to the decision of the Court. If by any action of theirs the codicil in favour of the Gregson

children had been invalidated, the case might have borne a different aspect, but nothing of the kind took place. Mrs Gregson, on the other hand, urged on the Argentine Court the view that the testamentary dispositions as regarded the Argentine land should be declared null.

The result of which the respondents complain was not caused by any act of the appellants, and indeed it appears to be clear that it was impossible for them to undo the effect of the Argentine law in this respect so as to give effect to the provisions of the will and codicil as to the land. Three modes of doing so have been suggested—(*a*) It was suggested that the appellants might sell the Argentine land and hand the proceeds to the trustees. This would be something quite different from what the testator contemplated by his will and codicil. He gave the trustees a power of sale, but it is obvious that he contemplated that the land might be retained by them in their own hands for some considerable time. A sale, possibly at great disadvantage, for the purpose of settling the proceeds is at variance with the whole tenor of the will. What he provided in favour of the Gregson children was that to the extent of the one seventh, a liferent in which he created in favour of their mother, the children should have a reversionary interest. No assent on the part of the appellants could make this possible, as all trusts in lands are illegal in Argentina, it being considered vital that the owner for the time being should have the absolute power of disposition. The immediate sale of the land, and the settlement of the proceeds of the sale of the land, is something quite different from the interest in the land *in specie* for which the testator provided until the trustees should think a sale expedient. (*b*) It was suggested in the second place that the appellants might convey the land to the trustees as individuals, taking from them a back-letter for the purposes of the will. I think the evidence is clear that any *simulatio* of this kind would be invalid. It would be a manifest attempt to evade the provisions of the law against trusts of land. (*c*) A third suggestion was made, namely, that the appellants should convey to the trustees so much of the Argentine land as would be equivalent to what the Gregson children would have taken under the testator's codicil, and that the trustees should execute as regards this land a declaration of trust in Scotland which, as regards all of them subject to the jurisdiction of the Scottish Courts, could be enforced against them personally by proceedings in Scotland. It is quite true that the Courts in Scotland or in England may with regard to persons within their jurisdiction make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here *in personam* so long as it is not contrary to the *lex situs* which with regard to real property must be the governing law. The law on this point was laid down by Lord Cottenham, L.C., in the case *ex parte Pollard in re Courteney* (1840, 1 Mont. & Ch. 239, pp. 250-251)—"It is true that in this country contracts for sale or (whether expressed or implied) for charging lands are in certain cases made by the courts of equity to operate *in rem;* but in contracts respecting lands in countries not within the jurisdiction of these courts they can only be enforced by proceedings *in personam*, which courts of equity here are constantly in the habit of doing, not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."

As the law of the Argentine forbids all trusts of lands there, it appears to me that it would be contrary to the comity of nations for a foreign court to endeavour by its jurisdiction *in personam* to make the land of the Republic subject to a system of trusts which its law prohibits. Some of these suggestions are further open to objection upon a broader ground applicable to each of them. The view of the case which I have submitted as the result of the law as to election would lead to a result substantially in conformity with the wishes and intentions of the testator as far as they can be collected from his testamentary disposition, at all events much more in conformity with them than would be reached under any of the suggestions made by the respondents. What the testator desired was the division of the Argentine estate, as well as the rest of his property, between his seven children equally, but with the settlement of Mrs Gregson's one-seventh upon her for life and then to her children. Mrs Gregson has taken her seventh absolutely, and if she permits it to descend to her children a result not substantially in disaccord with the testamentary disposition of the testator will be reached; if they are to be disinherited it will be by her act. If the contention of the respondents should prevail it would follow that in addition to the one-seventh which Mrs Gregson has taken the appellants would have to provide another one-seventh for Mrs Gregson's children, so that Mrs Gregson and her children between them would receive two-sevenths of the Argentine property, while the other six children of the testator would have their shares diminished to provide this second one-seventh for the Gregson children. Nothing can be imagined more opposed to the desires of the testator so far as they can be collected from his testamentary dispositions, and it would be remarkable if the law of election and compensation should entail any

such departure from the general scheme of the testator with regard to the disposition of his property.

There are three authorities to which very special reference has been made in the course of the argument — (1) *Douglas* v. *Douglas* (1862, 24 D. 1191), with the comments on that case by Lord Shaw in the recent case of *Pitman* v. *Crum Ewing* (1911 A.C. 217, at p. 239, 1911 S.C. (H.L.) 18 at p. 31, 48 S.L.R. 401, at p. 406; (2) *In re Lord Chesham* (1886, 31 Ch. D. 466); and (3) *Hewit's Trustees* v. *Lawson* (1891, 18 R. 793, 28 S.L.R. 528). The case of *Douglas* v. *Douglas* was thus explained by Lord Shaw in the passage to which I have already referred—"The true reason of the case was that the doctrine of 'approbate and reprobate' cannot be introduced where it is impossible for the person against whom it is pleaded effectively to exercise the election demanded." The last paragraph of the rubric in the case of *Douglas* is this — "Opinions that a party cannot be said to reprobate a deed who is not put to his election by the will, expressed or implied, of the grantor of the deed, and who is not free to approbate, and capable of approbating *cum effectu*."

In that case it was impossible to give effect to the arrangements made by James Monteith with regard to his brother Archibald's estate. So here it was impossible by the law of the Argentine to give effect to the trust for a reversionary interest in favour of the Gregson children. The attempt in the present case is to apply a doctrine of *cy près* to the doctrine of election. The children of the testator, it is said, although they cannot render effectual the testator's devise of Argentine land on trust for the Gregson children may do something else which would have a similar effect. No instance has been cited to your Lordships of any case of election in which such a doctrine has been laid down, and it appears to be on principle erroneous. For election there must be a free choice, and here it is the law which automatically does what is complained of and it is out of the power of the appellants to give effect to the provisions of the will.

The same principle is illustrated in *Lord Chesham's* case. There the testator had affected to dispose of certain chattels which turned out to have been settled as heirlooms in trust to go along with the mansion-house. It was held in a very elaborate judgment of that most distinguished equity Judge, Chitty J., that no case of election or compensation arose, as compliance with the will as to these chattels was by law impossible. He said at p. 476—"But when he takes under the will there is nothing for him to give up, for there is nothing which he can give up. It seems to me to be absurd to say that he is put to his election merely for the purpose of making a deduction from his residuary legacy."

In the third of the cases cited, *Hewit's Trustees*, the testator gave legacies to his nephew, who was also his heir, and directed that the residue of his estate, part of which consisted of real property in England, should be divided amongst English charities. By the law of England under the statute of Mortmain, as it then stood, no interest in the land or its proceeds could pass to charity. The legacy was void and the land would pass to the heir, and if the heir refused it it would be treated as undisposed of. It was held that the heir could not be put to his election. Lord M'Laren in giving the judgment of the Court said, p. 804—"In order to put a legatee to his election it must be in his power by waiving his objection to the will or adverse claim to perfect the right of the testamentary disponee. There is certainly no case in which a legatee who has not the right of perfecting the right of the disponees has been called on to give an equivalent benefit." This appears to me to be right and it is exactly applicable to the present case. The appellants could not in any way make good the gift of a reversionary interest on land in the Argentine to the Gregson children. It was a mere nullity.

As the appellants cannot in any way make the provisions of the will as to the Argentine land effective, it follows that there is no case for compensation out of the other estate which passes to them under the will.

Upon the whole it appears to me that the appeal should be allowed and the interlocutor of Lord Hunter restored, the appellants to have their costs here and in the Inner House.

VISCOUNT CAVE—The facts in this case have been fully stated, and I proceed at once to consider the question of law raised by this appeal, that is to say, whether under the doctrine of election or (as it is commonly called in Scotland) of "approbate and reprobate," the appellants are disabled from claiming any share of the fund *in medio* representing the undistributed balance of the testator's moveable estate in Scotland without making their shares of his immoveable estate in the Argentine Republic available for division in accordance with the general scheme of his trust-disposition and settlement.

The doctrine referred to has been frequently considered in this House, and was stated by Lord Eldon in *Ker* v. *Wauchope* (1819, 1 Bligh 1, at p. 21) as follows—"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 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 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." The same doctrine has been affirmed by this House in a number of later cases, including *Dundas* v.

Dundas (1830, 2 W. & S. 460, 2 Dow & Clark 349) and *Pitman* v. *Crum Ewing* ([1911] A.C. 217, 1911 S.C. (H.L.) 18, 48 S.L.R. 401), and is now fully established as a part of the law of Scotland.

On the other hand, it is, I think, equally clear both on principle and on authority that when the person whom it is sought to put to his election cannot by any lawful means dispose of the estate belonging to him in his own right in such manner as to give effect to the testator's intention as expressed in the instrument in question, the doctrine of election does not apply. In *Douglas* v. *Douglas* (1862, 24 D. 1191, at p. 1208) Lord President Inglis, then Lord Justice-Clerk, stated his opinion that in order to make a proper case of election the facts of the case must be such as to satisfy three conditions—"In the first place," he said, "I think the party who is put to his election must have a free choice, and that whichever alternative he chooses he shall have a right absolutely to that which he has chosen without the possibility of his right being interfered with or frustrated by the intervention of any third party. In the second place, the necessity of making the election must arise from the will, express or implied, of someone who has the power to bind the person put to his election. And, in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied." It is not, I think, the meaning of the third condition as laid down in the above opinion that the mere expression by the person put to his election of his willingness to give effect to the will or other instrument must be sufficient to give legal effect to the instrument, but only that a person who cannot by any lawful act on his part give effect to the instrument is not thereby disabled from taking a benefit under it. Effect was given to this exception in *re Lord Chesham* (1886 L.R. 31 Ch. D. 466) and *Hewit's Trustees* v. *Lawson* (1891, 18 R. 793, 28 S.L.R. 528), and it is obviously both just in itself and consistent with the principle of the general doctrine.

In the present case the main argument put forward by the appellants is, that while they "approbate" the testator's settlement and are ready and willing to surrender their shares in the Argentine land to the trustees of that settlement for the purposes of their trust, they are prevented from so doing by the law of the Argentine Republic, where the land is situated; and accordingly that the third condition laid down by Lord President Inglis is not satisfied, and no case for election arises. It is obvious that such a plea requires close examination. The share of each of the appellants in the Argentine land is of an estimated value exceeding £18,000; and if they are permitted to retain those shares and also to share equally with the fiars of Mrs Gregson's share in the remainder of the testator's estate, they will be placed (subject to an observation which I will make hereafter) in a position of great advantage. I have therefore thought it right to examine with care the evidence of Dr Palacies, a barrister experienced in Argentine law, upon which the appellants rest their case. That evidence satisfies me beyond any doubt that a conveyance of the appellants' share in the land to the trustees upon the trusts of the settlement would be invalid under the Argentine law, and indeed that result seems to follow from the judgment of the Argentine Court by which the testator's settlement was declared null and void. The same evidence appears to show, though less clearly, that a conveyance to the trustees, not as trustees but as individuals, the trustees executing a back-letter or other document undertaking to hold the land for the purposes of the will, would be liable to be recalled by the granters on the ground that the possession thereby given to the trustees would be, not a real possession, but a "simulation of ownership" and contrary to the spirit of the Argentine Civil Code. On the other hand, I do not think it is proved that a simple conveyance to the trustees without any back-letter or other document limiting their complete control of the property for all the purposes of Argentine law would be ineffectual merely because they would be liable as trustees to account to the Scottish Courts for their dealings with the estate. This point was not put to Dr Palacies, and I am not prepared to assume without evidence that such a conveyance, which would not appear to violate any principle of the Civil Code, would be invalid.

But even if it be assumed that a direct grant by the appellants of their shares in the Argentine land to the trustees, in whatever form it might be made, would be ineffective, there is another method by which, as pointed out by the learned Judges of the First Division, the property could be made available for the purposes of the trust-disposition and settlement. By the settlement the testator empowered his trustees to sell his estate or any part of it and to give a power of attorney for realising his estate in South America, and while he authorised his trustees to hold his land in that country he recommended them, if they should not have sold the land within six years after his death, to sell it as soon as conveniently might be thereafter unless there should then be an exceptional depression in its value, and directed that the net proceeds of such realisation should be transmitted to his trustees in Scotland. By the codicil settling Mrs Gregson's share the trustees are directed to "invest" it in their own names—a direction which assumes that it will be turned into money. It is plain, therefore, that—as Lord Mackenzie says—what was in the testator's mind was conversion of the land and not enjoyment in specie. Now, if I correctly understand the evidence as to Argentine law, there is nothing whatever in that law which prevents a holder of land in the republic from entering into a binding contract to sell it or from executing a power of attorney enabling another person to sell it for him, and I see no sufficient reason why the appellants, who are absolute owners of their shares, should

not give effect to the dominant purpose of the settlement by selling their shares or giving a power of attorney for that purpose to a nominee of the trustees and remitting the proceeds to this country.

Against this it is objected, first, that this course would impose upon the appellants the liabilities of vendors; and secondly, that there is no equity which compels them to give effect to the testator's intention otherwise than by a simple relinquishment of the estate. The former objection would be amply covered by an indemnity which could be given by the trustees on behalf of the testator's estate. The second objection is more serious, and it is on this point that I have found the case most difficult to determine—the more so as the conclusion at which I have arrived differs from that which commends itself to some if not all of your Lordships; but after full consideration I am not satisfied that the duty to elect is limited in the manner suggested. The equitable doctrine of election is founded not on any technical ground but on a consideration of what is fair and just, and I think that it should receive a liberal interpretation. Lord Eldon, in the passage above cited from *Ker* v. *Wauchope*, 1874, L.R., 7 H.L. 53, at p. 67, treated the rule as one of "conscience." Lord Cairns in *Cooper* v. *Cooper*, L.R., 7 E. & I. Ap. 53, at p. 67, referred to it as proceeding not upon an expressed or presumed intention but upon "the highest principles of equity." And Lord Robertson, in *Douglas Menzies* v. *Umphelby*, Law Reports, [1908] A.C. 224, at p. 232, stated that the doctrine "rests on no artificial rule but on plain fair dealing." If this be so, it seems to follow that no formal objection to the application of the rule should prevail, and that if there is any method by which a claimant under a will or other trust instrument can without illegality or breach of trust give effect in substance to the intention of the trust instrument as affecting his own property he ought to adopt it. This view is supported by the consideration that where a beneficiary put to his election has elected in favour of the trust instrument, he is held to be a trustee of the property in his hands, and is therefore bound to dispose of it as the trustees of the trust instrument may reasonably direct — See *Dewar* v. *Maitland*, L.R., 2 Eq. 834, and Trustee Act 1893, section 31. Upon the whole I am of opinion that in the present case it is within the power of the appellants to make their property in the Argentine available for the purpose to which it was destined by the testator's settlement, and accordingly that the doctrine of election is not excluded.

In reaching the above conclusion I have not omitted from consideration two points which, though not pressed upon your Lordships in argument, were mentioned in the course of the discussion, namely, (1) that the shares of the Argentine land which the appellants have taken as heirs of the testator are precisely the shares which the testator provided by his settlement that they should receive; and (2) that the share claimed by Mrs Gregson may not improbably pass by succession or testamentary disposition to her children, and that if this should happen and the doctrine of election should be held applicable, they would succeed to a double portion of the testator's estate. The answer to the first point appears to be, that as the testator's disposable estate has been reduced by the action of Mrs Gregson, his settlement takes effect upon what remains—that is to say, upon six-sevenths only of the Argentine land—and the rights of the beneficiaries must be ascertained upon that footing. As to the second point, it was admitted—and I think properly admitted—on behalf of the appellants, that Mrs Gregson and the persons (whoever they may be) who will succeed under the settlement to her share must for present purposes be treated as separate and independent beneficiaries, and that no valid legal argument can be founded upon a speculation as to what may happen to her estate on her death.

For the above reasons I am of opinion that the interlocutor of the First Division is right, and I would dismiss this appeal.

LORD DUNEDIN—I have had the advantage of reading the judgment which has been delivered by my noble and learned friend on the Woolsack. I concur in that judgment, and I have really only one sentence to add.

I think the respondents fail here because what they propose should be done fails to comply with the third requisite which Lord President Inglis laid down in *Douglas* v. *Douglas* when he said that the result of election must be to give legal effect and operation to the will as expressed or implied. That cannot here be done in terms, and I do not think a sort of *cy près* doctrine is one that falls to be applied in such a case.

LORD MOULTON—The facts of this case are simple. By his original will the testator James Brown left his property in trust in the first place for purposes which are not material to the matter under consideration in this appeal, and after they had been accomplished directed that the residue should be equally divided among his seven children, with a provision that if any of them should repudiate that settlement and claim their legal rights such child should forfeit all right to any share of the trust fund. By a codicil he varied this division of the residue by directing that with regard to the share of one of his daughters, viz., Mrs Gregson, the trustees should pay the income to her during her life, and on her death the capital should pass to her issue. The aim of the testator therefore was originally an equal division of the residue, and this was modified only in one respect by the codicil, namely, that while the equal division should be preserved in respect of the *stirpes* of his children, the shares should go direct to them in the case of all but Mrs Gregson, but that in her case the trustees should hold her share during her life subject to paying her the income, and should hand over the *corpus* of her share to her children only after the termination of that life interest.

The estate of the testator consisted to a

large extent of land in Argentina. By the laws of Argentina no trusts are recognised in respect of land, and accordingly on the death of the testator the children succeeded automatically to the possession of the land in equal shares, and the provisions of the will were of no effect since they involved the creation of a trust ownership of the lands. The inherent failure of the trust-dispositions of the will applies equally to the shares of the children of the testator and to the share of the children of Mrs Gregson, who, it has been decided, claim as independent legatees.

On the death of the testator Mrs Gregson elected to take legitim and thus debarred herself from taking any other interest under the will. But she became owner of her share of the land in Argentina by virtue of the Argentine law in the same way as the other seventh shares in that land passed automatically to the other children. The present claim is on behalf of the issue of Mrs Gregson (who is still alive), who claim that the other six children should surrender to the trusts of the will the shares which passed to them on the death of the testator under the Argentine law as a condition of taking their share of the residue of the property in Scotland. The Lord Ordinary found against this claim, but on appeal the Court of Session recalled his interlocutor and found in favour of the claim of the respondents.

It is evident that if this finding is supported the effect will be to render more unequal the division of the testator's property among his children. This, of course, is not conclusive, but it is not to be forgotten that the justification of the doctrine of election is that it is carrying out what it is supposed the testator (judging from the provisions in his will) would have intended to happen under the new state of things. I am convinced that he would not have so intended.

In the first place, it is evident that it is impossible for the appellants to surrender their shares of the Argentine land to the uses of the will. By the law of Argentina this is impossible. The way in which the Judges of the Court of Session proposed to effect it is by the children granting a conveyance of the land in favour of the trustee, the latter granting *unico contextu* the appropriate declaration of trust. To my mind such a proceeding would be an evasion of the Argentine law, and I cannot think that it is permissible to our Courts to lend themselves to a sham which would in reality place the Argentine lands in the hands of a nominal owner whose true position was only that of a trustee. It must be remembered that the refusal of Argentina to permit lands to be held by a trustee is based on grounds of public policy. They insist that the person in whose name the lands stand shall be the true owner. Our ideas of land tenure may not agree with theirs, but we are bound to accept and act loyally up to the laws as to land which obtain there. I am therefore of opinion that the proposed solution of the question is quite unacceptable.

Nor do I see any other way in which the lands could be made, effectively, subject to the trusts of the will. The terms of the will are such that it is clear to me that it was the intention of the testator that they should be capable of being held as lands until favourable conditions arose for converting them into money, and I can see no reason why these matters should be passed by in considering whether or not the lands could in substance or in form be put under the trust provisions of the will so as to carry out the intentions of the testator.

I therefore come to the conclusion that it is impossible for the appellants by any act of their own to render the lands subject to the trusts of the will. The lands have become theirs, not by their own act but automatically by the effect of the Argentine law, and as they cannot undo this in such a way as to allow the trusts of the will to operate upon them, the doctrine of election does not apply to them.

I am of opinion therefore that this appeal should be allowed, that the interlocutor of the Lord Ordinary should be restored, and that the respondents should pay the costs here and in the Court below.

Their Lordships, with expenses, reversed the interlocutor of the First Division and restored that of the Lord Ordinary.

Counsel for the Appellants—A. Moncrieff, K.C.—The Hon. W. Watson, K.C.—J. S. Leadbetter. Agents—Thurburn & Fleming, Keith; Macpherson & Mackay, Solicitors, Edinburgh; John Kennedy, Westminster.

Counsel for the Respondents—Wm. Chree, K.C.—T. Graham Robertson. Agents—Alex. Morison & Co., W.S., Edinburgh; Holmes, Son, & Pott, London.

Friday, May 7.

(Before Viscount Finlay, Viscount Cave, Lord Dunedin, Lord Atkinson, and Lord Moulton.)

SHANKLAND & COMPANY *v.* ROBINSON & COMPANY.

(In the Court of Session, July 18, 1919, 57 S.L.R. 9.)

Contract — Essential Error — Representations Made by Seller Rendered Untrue—Seller's Duty of Disclosure.

A prospective bidder for articles about to be sold at an auction sale saw the sellers as to whether there might be difficulty in obtaining possession of the articles owing to Government impressment, and he was informed that the Government had been satisfied and the sale was to be allowed. Subsequently a subordinate Government official intimated that he wanted the articles for the Government, but his action was repudiated on application to his superior officer. This incident was not disclosed to the prospective bidder, who attended the sale, when the articles were knocked down to him. After the sale the Government intervened to prevent removal, and shortly after impressed. *Held (rev.*