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.

This was a case arising out of the Apportionment Act, 33 and 34 Vict., cap. 35, sec. 2, and the question between the parties, who were the executor of the late Honourable M. C. Maxwell of Terregles, and the *curator bonis* of the present heir of entail in possession, was—

"Whether the first party, as executor of the late Honourable Marmaduke Constable Maxwell, is entitled to a proportion of the rents of the entailed estate of Terregles, payable at Martinmas 1872, corresponding to the period between Whitsunday 1872 and the day of the death of the said Honourable Marmaduke Constable Maxwell on 16th July 1872?"

Authorities—*Murray Kinnynmond* v. *Cathcart and Rocheid*, Nov. 6, 1739, Kilk. 563; *Marquis of Queensberry* v. *Duke of Queensberry's Trs.* Feb. 18, 1814, F.C. 575; *Campbell* v. *Campbell*, July 18, 1849, 11 D. 1426; *Blaikie* v. *Farquharson*, July 1849, 11 D. 1456; *Swinton* v. *Gawler*, June 20, 1809; *Ker* v. *Turnbull*, M. 5430, 5 B. S. 876; *Elliot* v. *Elliot*, M. 15,917; *Petty* v. *Mackenzie*, Nov. 21, 1805, Hume, 186; Ersk. ii. ix. 64.

At advising—

LORD PRESIDENT—The late Mr Marmaduke Constable Maxwell was heir of entail in possession of the estate of Terregles till his death on July 16, 1872, and the present question is between his executor and the next heir of entail. The rents payable on the estate were forehand rents, and the crops to which, if the rents had been payable at the ordinary legal terms, they would have belonged, were not yet reaped. The terms of the lease, however, are distinct. The rent was to be "payable half-yearly, by equal portions, at the terms of Martinmas and Whitsunday, beginning the first term's payment at the first term of Martinmas after the entry for the half-year preceding, and for the next half-year at the Whitsunday thereafter, and so on half-yearly and termly during the lease, with interest and penalty during the not-payment." As the entry was to be at Whitsunday, it is plain that the payment to be made at the Martinmas following was not for the crop then reaped, and so the lease bears that it was for the half-year previous—it was rent payable for a period of time, and not for a crop. In like manner, under another form of lease introduced by Mr Maxwell himself, the rent is said to be for the half-year preceding, and so on half-yearly and termly—a form of words which means the same thing. Now, on the part of the heir of entail, we have had argument on the authorities applicable to postponed rents, which seems to me to have no bearing on this case. In such a case as that, the question is determined by reference to the legal terms, and the rule in forehand rents being different, the application of that principle to this kind of rent has never been recognised. As Lord Kilkerran says in the case of *Murray Kinnynmond*—"If, by the convention of parties, annualrents, for example, be made payable before the legal term, the executors will have the benefit of that convention; and the case would be the same in a forehand payment of rents of lands, for there is no instance of what is both due and exigible not going to executors." Now, no doubt this does not solve the question as to the Apportionment Act, but it shows how the parties agreed that the rents falling due at Whitsunday 1872 should belong to the executor. Now, this rule of law would not have been applicable to an entailed estate if forehand rents had been a novelty—if the previous heir of entail had himself introduced them,—for he would, in that case, have been taking an undue advantage to himself. But that is not the case here, for forehand rents are the law and custom of the estate adopted by the entailer. On the authority of the decisions in the case of the *Queensberry* estates, this is like a fee-simple succession, and the question here is, Are forehand rents for periods of time, not crops, subject to the second section of the Apportionment Act? Mr Marshall says they do not accrue during the period at the term of which they are payable; that a rent cannot be growing due during half-a-year. This argument is fallacious, whether we look at the terms of the Act or of the leases. The rent is payable at Martinmas for a half-year, and the same at Whitsunday; that must be a current rent accruing, growing as much in the one case as in the other. The object of the Act was to simplify the law of apportionment—to make everything in the nature of income apportionable,—and so it is made matter of enactment that everything payable in the nature of income is to be held as accruing, whether it does so of its own nature or not. In short, whatever is of the nature of income, payable at the next term, is held to be growing due day by day. I am clearly of opinion that the rent payable at Martinmas must be divided between the heir and executor, and consequently that the question must be answered in the affirmative.

Counsel for Lord Herries—Kinnear and Watson. Agents—Mackenzie & Kermack, W.S.

Counsel for Adamson—Marshall. Agents—Campbell & Espie, W.S.

Saturday, February 8.

SECOND DIVISION.

[Lord Mure, Ordinary.

M. P. CAMERON *v.* GORDON AND OTHERS.

Process—Reclaiming Note—Court of Session Act, 1861 (31 *and* 32 *Vict. cap.* 100).

Question—whether an interlocutor, which has become "final," under § 28 of the Court of Session Act, may be reviewed by reclaiming note against a subsequent interlocutor, under § 52.

An objection was taken to the competency of a reclaiming note, on the following ground:—On July 8, 1868, the Lord Ordinary pronounced an interlocutor in the cause, against which none of the parties reclaimed. On July 23, 1872, certain of the claimants in the multiplepoinding moved the Lord Ordinary for immediate payment of a share of the fund *in medio*. This motion was refused, on the ground that it could not be competently granted, having regard to the terms of the prior interlocutor of July 8, 1868, which had rendered the whole cause *res judicata*, whereas the Lord Ordinary was practically now asked to reconsider his judgment.

Against this latter interlocutor refusing the motion, leave was given to reclaim on July 30, 1872.

For the reclaimer it was argued—The Act 31 and 32 Vict. cap. 100, sec. 52, runs as follows:—"Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the