

is costs reasonably incurred to allow one manuscript copy for the use of the Court. There is some inconvenience in four Judges having to make use of one and the same copy, but then we agree to submit to that when we dispense with printing. But it is useful to have one copy rather than the Sheriff's notes. One of the Judges may read it, and if he thinks necessary hand it on for perusal to the others. We only then require one copy. I regard it, then, as a matter reasonable, and not touched by the Act of Sederunt.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

The Court approved of the Auditor's report.

Counsel for Pursuer—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondents—James Reid. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, July 2.

SECOND DIVISION.

GILLON v. RAMAGE & FERGUSON.

Process—Issue—Reparation—Master and Servant.

Form of issue *adjusted* in an action of damages for personal injuries (laid at common law and under the Employers Liability Act 1880, 43 and 44 Vict. cap. 42) where the pursuer averred that he had been injured at defenders' works through their fault while in the employment either of the defenders, or of certain contractors who were carrying on their work in the defenders' works.

This was an action of damages for personal injuries. The pursuer averred that while in the employment of the defenders, within their ship-building-yard at Leith, or in the service of two parties named who had contracted with the defenders for the rivetting of a ship in process of construction, he was injured by the fall of certain iron plates, which took place in consequence of either the defective condition of the barrel of the winch by which they were lowered into the hold of the vessel, and which was supplied by the defenders, or of an improper mode of carrying on the work. The defenders denied that the pursuer was in their employment, that the winch was defective, or that their mode of work was improper, and averred that the pursuer was in the employment of independent contractors, the parties named.

The action was laid alternatively at common law and under the Employers Liability Act 1880, was raised in the Sheriff Court at Edinburgh, and was appealed by the pursuer to the Court of Session for trial by jury.

The pursuer proposed this issue—"Whether the pursuer while working in the defenders' works, Leith Docks, was on or about the 10th day of February 1885 injured by the fall of certain plates through the fault of the defender, to the loss, injury, and damage of the pursuer."

The defenders objected to this issue, and con-

tended that it should read—"Whether the pursuer, while working in the employment of the defenders, in their works at Leith Docks," &c. They cited *Morrison v. Baird & Co.*, Dec. 2, 1882, 10 R. 271.

The Court, in respect of the alternative averments by the pursuer of his having been in the employment of the defenders, or of the alleged independent contractors, approved of the issue as proposed.

Counsel for Pursuer—Guthrie Smith—A. S. Thomson. Agent—Walter R. Patrick, Solicitor.

Counsel for Defenders—A. T. Young—Orr. Agents—Adam & Winchester, S.S.C.

Friday, July 3.

FIRST DIVISION.

[Lord Lee, Ordinary.]

AITKEN v. ASSOCIATED CARPENTERS AND JOINERS OF SCOTLAND.

Statute 34 and 35 Vict. cap. 31 (Trade Union Act 1871).

Section 4 of the Trade Union Act 1871 provides:—"Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, . . . any agreement for the application of the funds of a trade union . . . to provide benefits to members."

An action was brought against a society of the nature of a trade union, concluding for reduction of a resolution of the society by which the pursuer was expelled, for decree of declarator that he was still a member and entitled to all the rights, benefits, and privileges of membership, and that he had been unlawfully expelled, and that the defenders were liable in damages, and concluding for £500 as damages. The Court *dismissed* the action on the ground that under section 4 of the statute it could not be maintained in a court of law.

This action was raised by Thomas Aitken, joiner, Maxwelltown, Kirkcudbright, against the Associated Carpenters and Joiners of Scotland, of which society he was a member, and against James Beveridge, 263 Argyle Street, Glasgow, the general secretary of the society, as representing and acting for and on behalf of the society. The pursuer sought to reduce (1) a minute or resolution alleged to have been made and passed by the Edinburgh (United) Branch of the Associated Carpenters and Joiners of Scotland, declaring a previous proposition to be carried, whereby a fine of £5 sterling was imposed on the pursuer for an alleged contravention of the rules of the society; and (2) a minute or resolution alleged to have been made and passed by a vote of the said Associated Carpenters and Joiners of Scotland, by which the pursuer was deprived of membership of the society. The summons further

concluded that whether these several writs should be reduced or not, it should be declared that the pursuer had, since the date of the writs, continued to be, and then was, a member of the society, and entitled to all the rights, benefits, and privileges of membership; that by said minute or resolution second above mentioned the pursuer had been unlawfully and without just cause expelled from and deprived of membership of the society, and of all rights, benefits, and privileges attaching to such membership, and that the defenders were liable in compensation to the pursuer for the loss, injury, and damage sustained and to be sustained by him by and through his being deprived of membership. Then followed a conclusion for £500 damages.

The pursuer averred that the imposition of the fine, and the resolution depriving him of membership, were illegal, oppressive, and malicious, *ultra vires*, and inept.

He further averred that by the defenders' illegal expulsion of the pursuer, and their refusing to recognise his membership, and to accord to him the rights, benefits, and privileges thereof, the defenders were liable to him in compensation for the loss, injury, and damage thereby sustained; that he had also suffered much in his feelings and health from the disgrace of expulsion, which had lowered him in the estimation of the members and the public, and had otherwise injuriously affected him and his family.

The defenders made the following statement, viz.—“The society known as ‘The Associated Carpenters and Joiners of Scotland,’ is not incorporated or registered under any statute, and it has no *persona standi in judicio*. The general secretary does not represent the society in the questions raised in this action, and the rules do not authorise the society to sue or to be sued in name of the general secretary. One of the objects of the society is, ‘the protection and advancement of the general interests of the trade.’ The society (though unregistered) is a trade-union within the meaning of the Trade Union Acts 1871 and 1876. Many of its rules are in restraint of trade, and its funds are available for the support of strikes. Large sums of money were, in point of fact, expended in the support of strikes, as appears from the printed accounts of the society, which are produced herewith and referred to. Every member on joining the society signs a declaration in the terms set forth in the rules, whereby he, *inter alia*, binds and obliges himself to conform to the rules, and agrees that the said declaration shall be the basis of the contract between him and the society. By section 4, rule 5, in all cases where the executive committee require to consult the members of the society on any particular question, the majority of votes is declared to be decisive, unless otherwise specified. The pursuer, who had signed the said declaration, and was bound by the rules, was expelled by the vote of a majority of the society, and the said vote is binding upon him, and is not appealable to any Court.”

The defenders pleaded—“(5) The Association and its rules being directed to support strikes, and being otherwise in restraint of trade, the action is incompetent, and should be dismissed. (6) The pursuer, having been expelled by the vote of a majority of the members, their resolution is final and binding upon him, and cannot

be reviewed by any Court.”

By the Trade Union Act 1871 (34 Vict. c. 31) it is provided, sec. 2—“The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.”

Sec. 3—“The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust.”

Sec. 4—“Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, . . . Any agreement for the application of the funds of a trade union; (a) to provide benefits to members.”

The Lord Ordinary (LEW) on 17th February 1885 pronounced this interlocutor—“Finds it admitted that the defenders, called as the Associated Joiners and Carpenters of Scotland, are a voluntary society, constituted in terms of the rules produced, and finds that said society is a trade union within the meaning of that term as defined in the Trade Union Acts 1871 and 1876: Finds that no action lies at the instance of a member of said society for enforcing a claim to membership, or for reducing a resolution to expel such member: and finds, further, that an action directed to enforcing or recovering damages for the breach of an agreement on the part of said society to provide benefits to members is incompetent: Therefore to that extent sustains the preliminary defences, dismisses the action, and decerns, &c.

“*Opinion.*—The leading conclusion of this action is for reduction of a resolution or minute passed by a vote of the Associated Carpenters and Joiners of Scotland, and recorded in their monthly report for July 1883, whereby the pursuer is said to have been expelled from that society, but the summons also contains conclusions to have it found that the pursuer is still a member, and is entitled to all the rights, benefits, and privileges of membership; and further, for damages in respect of his illegal expulsion.”

“These conclusions are directed against the society (which is not alleged to be incorporated) under its descriptive name, ‘and James Beveridge, the general secretary of said society, as representing and acting for and on behalf of said society.’ Since the record was closed, however, the members of the executive committee of the society have been sisted as defenders in terms of a minute lodged by them, and the plea that all parties interested are not called was, of consent, held as obviated.

“Two pleas have been urged before me as excluding the action, viz., the fifth and sixth. The former is to the effect that ‘the association and its rules being directed to support strikes, and being otherwise in restraint of trade, the action is incompetent and should be dismissed.’ The latter is, that ‘the pursuer having been expelled by the vote of a majority of the members, their resolution is final, and binding upon him, and cannot be reversed by any court.’ It was explained, however, at the debate, that what is maintained under this plea, in so far as affording a preliminary objection to the action, is,

that apart from some claim upon the funds or property of the society, no action lies at the instance of a member of such an association to prevent expulsion, or recover damages for being improperly expelled.

“The questions thus raised are of general importance, and in disposing of them it is necessary to decide what is the legal position and character of this association. An individual member, in order to maintain an action at law upon his alleged rights as such member, ought to be able to show that some patrimonial interest or legal right is concerned in the vindication of his membership. The authority cited at the bar in support of this proposition was the judgment of the Master of the Rolls (Jessel) in the case of *Rigby v. Connal*, L.R. 14 Chan. Div. 482, which seems to make it clear that according to the law of England the foundation of jurisdiction in an action to prevent improper expulsion is, ‘the right of property vested in the member of the society, and of which he is unjustly deprived by such expulsion.’

“But the law of Scotland is not deficient in authority upon the principles and limits of jurisdiction in civil actions. In fact, nowhere has there been more occasion than in Scotland during the last fifty years to consider questions upon that subject. And the result of many decisions, to which it is unnecessary now to refer, is very distinctly brought out in the second report of *M. Millan v. The Free Church of Scotland*, July 19, 1861, 23 D. 1314. That was the case of a minister of the Free Church, who had been, as he alleged, unlawfully deposed from the office of the ministry, and thereby deprived of emoluments to which he was entitled. The action was one of reduction and damages, and the conclusions for reduction were held to be competent to the effect of examining the claim of damages; but ultimately the claim of damages was rejected as untenable, and therefore the action was dismissed (24 D. 1282). Lord Deas states the principle upon which the conclusions for reduction could not be sustained, to the effect of preventing the association (for the Free Church was held to be an association standing upon contract merely) expelling one of its members, or of ordaining them to receive him back as a member of the association—‘It is not because the office of a clergyman is a holy office—it is not because they who elected him did so by divine authority—it is not because the church he belongs to is a Christian church—it is not because the object of the association is a religious object—that we decline to interfere further than I have indicated. It is simply because this Court deals only with civil or patrimonial interests and consequences, and while vindicating or giving redress for these, refuses to go beyond them; it is upon the same ordinary principle that if no civil interests are involved we refuse to interfere at all. Men may associate themselves together for innumerable purposes, under rules and regulations, which may be called, if you please, a contract or agreement, but of the breach or observance of which the law will take no cognisance. It is of no moment whether these purposes be trivial or important, temporal or spiritual, scientific or religious, so long as they do not involve civil or patrimonial rights.’

“There are, it is true, many questions involving

no pecuniary or patrimonial interest which are competent to this Court. Erskine gives, as examples of such questions, the election of magistrates of burghs, and commissioners of supply (i. 3, 18). These are public offices. But there are also questions of personal *status*, which, as affecting civil rights, are equally competent to the Lords of Session. It is, however, ‘without doubt,’ as Erskine says, that ‘private right or property is the chief and most proper subject of their jurisdiction,’ and there is no authority that I am aware of for their interference in regard to the mere membership of voluntary associations. Non-membership may carry disagreeable consequences. It may practically exclude the individual from a certain kind of society, or from enjoying the custom of certain people or certain employers. In the present case (apart from all question of interest in the funds of the society) it may deprive the pursuer of the privilege of working along with the members, and may thus practically exclude him from employment in many quarters. But the advantages of association on the principle of government by numbers are coupled unavoidably with some inconveniences, and among these inconveniences must be mentioned the risk of a majority going wrong. If their error affects no civil right of which the law takes cognisance, and merely involves the continuance of an association terminable at will, or unrecognisable by the law, a court of law cannot interfere, for it has no means of compelling obedience to its decisions. In short, the principle of voluntary association outside the law, while it may secure the maximum of freedom for the body, involves necessarily the sacrifice of individual rights, and of all claim to the interposition of the law in favour of the individual and against the association.

“The question in the present case is, whether the pursuer has set forth any right connected with this association which the law can vindicate, or any wrong on the part of the defenders which the law can redress. In so far as his claim relates to the rights and privileges of membership, I think that it fails for want of averment that there is any right of property in which, as member of the association, he has interest, or that there is any privilege attached to membership which the law can recognise and enforce. As to the benefits of membership, if this relates to the benefits provided to members by the rules constituting the contract, I am of opinion that the law laid down in the case of *M. Kernan v. The United Operative Masons' Association*, 1 R. 453, and also in the subsequent case of *Shanks v. The same Association*, 1 R. 823, excludes the claim. It was settled in these cases that the combined result of the common law and of the Trades Union Act 1871 was that no Court could entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement for the application of the funds of a trade union to provide benefits to members.

“It cannot be disputed that this association is a trade union within the meaning of the term, as defined by the statute 1871, as amended by the Act of 1876. It is clearly a combination between workmen and workmen, and imposing restrictions on the conduct of business. It imposes restraints on a member in accepting employment, and it

limits his freedom in many ways—for example, in refusing to watch a struck shop or job. The association, apart from the Act 1871, is an unlawful combination, and although by that Act the purposes of the union are declared not unlawful by reason merely that they are in restraint of trade, it is expressly enacted that ‘nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements,’ and one of the agreements specified is ‘any agreement for the application of the funds of a trade union, *inter alia*, to provide benefits to members.

‘No doubt in these cases the action was for enforcing a claim to a specific benefit alleged to be due under the rules. In the present case the claim is general. But the action is none the less excluded; because it is only in so far as there is an alleged agreement to apply the funds to provide benefits that the pursuer has any case at all. He may argue that he is entitled to the qualification of membership, in order that the governing body of the association may be called on to exercise their discretion in regard to his claims as a member. But that is just the kind of argument which is of no avail against a voluntary association dissolving the bond of union or expelling a member. Unless there is some present right or interest to be vindicated, the Court cannot interfere. Interference merely to secure membership, and contingent interests dependent on membership, is beyond the province of any court in the case of an association which exists, by consent, upon the basis of self-government, and which is not bound together by any tie, public or private, which the law can enforce.

‘The only other point is as to the claim of damages. It is unnecessary to decide whether no claim of damages is competent to the pursuer. If he has suffered as suggested from the false and calumnious representations of any individual member of the association, or of the secretary of the association, he may have his remedy. But the only question raised by this action, and which requires to be noticed in dealing with the preliminary defences in the reduction, is, whether any claim of damage has been stated against the association, or the members of the executive committee, or the general secretary, ‘as representing and acting for and on behalf of the said society,’ which can affect in any degree the competency of the reductive conclusions and the title of the pursuer to insist in these. I am of opinion that that question must be answered in the negative. If a wrong was done to the pursuer by the majority who voted for the resolutions complained of, or by individual members who instigated that vote, he should lay his action against the wrongdoers, or such of them as he considers responsible and may select. But his claim to have the resolution of expulsion set aside, and to have himself declared a member, is not aided in any way by the conclusion for damages against the association. In point of form, however, I do not find it either necessary or proper at this stage to dispose of the merits of the pursuer’s claim of damages. It is sufficient to find that no action lies at the instance of the pursuer, upon the allegations on record for enforcing a claim to membership of

the association mentioned in the summons, or for reducing the alleged resolution of expulsion; and further, that in so far as the action is directed to enforcing or recovering damages for the breach of any agreement on the part of the said association to provide benefits to members, the same is incompetent for the reasons already stated. I therefore to this extent and effect sustain the preliminary defences and dismiss the action with expenses.”

The pursuer reclaimed, and argued—This was an action to reinstate the pursuer in his position as a member of the society, which was quite distinct from an action to enforce a claim upon the funds—*Reg v. Stainer*, 1 Crown Cases, 230. Membership itself was a valuable right which carried benefits which were not pecuniary, *e.g.*, if the pursuer ceased to be a member he would not get employment. Section 4 of the Act therefore did not apply, and unless section 4 directly applied the pursuer took the benefit of the general enactment in section 3. Section 4 was merely a rider on section 3. There was here an averment of *ultra vires* which made the cases of *M’Kernan* and *Shanks* inapplicable, because in those cases there was an express reservation of the present question. Though in the case of *Rigby v. Connell*, no doubt Jessell, M.R., used the term “property” in a limited sense, it had never been held in Scotland that the Court only had jurisdiction in regard to questions of patrimonial right. A beneficial interest, or even wounded feelings, was sufficient—*M’Millan v. Free Church*, July 9, 1862, 24 D. 1282; *Amalgamated Society of Railway Servants for Scotland v. Motherwell Branch*, June 4, 1880, 7 R. 867; *Wolfe v. Matthews*, L.R., 21 Ch. D. 194, *per Fry*, J

Argued for the defenders—This was a voluntary society, unregistered, and of the nature of a trade union. So far as the pursuer sued for a benefit from the funds his action was excluded by section 4 of the Act. *Quoad ultra*, he had averred no relevant ground of action—*Forbes v. Eden*, Dec. 8, 1865, 4 Macph. 143, at p. 157, *aff.* April 11, 1867, 5 Macph. (H. of L.) 36, at p. 50. There was no averment, apart from money benefits, of any interest which the pursuer had—*Rigby v. Connell*, L.R., 14 Ch. D. 482, was in point. The only civil right that the pursuer could claim was the benefit he would take as a member of the society—*Duke v. Littleboy*, 49 L.J., Ch. 802. As regarded the conclusion for damages the defenders cited *Eisten v. North British Railway Co.*, July 13, 1870, 8 Macph 980.

At advising—

LORD PRESIDENT—The change which was introduced by the Act of 1871 was that whereas previously by the common law trades unions had been unlawful associations as being in restraint of trade, they are now declared to be lawful to this extent, that they are not to be unlawful merely because they are in restraint of trade, so as to render void or voidable any agreement or trust. But there was no change effected with regard to the constitution of these societies, which remain voluntary associations of which the law can take no cognisance as collective bodies.

The 5th section of the Act provides that the Friendly Societies Acts, 1855 and 1858, The

Industrial and Provident Societies Act 1867, and The Companies Acts, 1862 and 1867, "shall not apply to any trades union, and the registration of any trades union under any of the said Acts shall be void," the object apparently being to make careful provisions that trades unions shall have no corporate capacity whatever.

It is next to be observed that section 4 contains a special provision that nothing in the Act "shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements." Then there is a specification of these agreements which is pretty exhaustive, and includes under 3 (a) any agreement for the application of the funds of a trade union to provide benefits to members. What then is the nature of this trade union? It does not appear to differ from any other. The funds are raised by subscription, and are applied partly towards the promotion of the trade, and partly to provide benefits for the members of the society. The only advantage therefore that a member of the society has is either in combining with the other members for the purpose which they think useful, of regulating the relations of workmen towards their masters, or for the purpose of providing funds for the members. Here we have a complaint by one of the members that he has been fined and expelled. He says that this was done in violation of the byelaws, or whatever they are called, of the trade union. Now, I think that the spirit and object of the Act was to take these byelaws out of the cognisance of the ordinary tribunals. It deprived the Court of the power of interfering, or rather it deprived the members of the society of the benefit of appealing to the Court. That, I think, is the general effect of section 4. On the ground that he was wrongfully expelled, the pursuer seeks to reduce the proceedings of the society by which he was expelled, and also asks that "it ought and should be found and declared that the pursuer has, since the date of the said several writs, continued to be, and now is, a member of the said society, and entitled to all the rights, benefits, and privileges of membership thereof." So far as I can see, the only patrimonial loss which the pursuer has sustained, and the only civil right that has been invaded, is the prospect of coming on the funds of the society in the event of sickness, old age, or permanent incapacity from working. But that is precisely the sort of thing that is prohibited by section 4 from being enforced in a court of law.

I was much struck by a very forcible observation made by Mr Campbell. He said that the pursuer could not maintain an action for the recovery of money in the event of his being held entitled to any sum, and therefore, he asked—what would be the effect of pronouncing a decree of reduction and declarator in the terms asked by the pursuer? The Court could not enforce it; the society would simply refuse to recognise it. That is not a position in which the Court can allow itself to stand with regard to any person. So much with regard to the conclusions for reduction and declarator.

Then, as regards the conclusion for damages, is that not within section 4? This pursuer has been deprived of the chance of making a

particular claim on the funds of the society, and this is his attempt by means of an action of damages to procure part of those funds. Under whichever branch therefore of the section it falls, I think it is perfectly clear that this is one of the cases which it was intended should be excluded from the Act.

I further think that the statute, if it required interpretation, has been very authoritatively expounded in the cases of *M'Kernan*, Feb. 6, 1874, 1 R. 453, and *Shanks*, March 11, 1874, 1 R. 823.

I am therefore clearly of opinion that the Lord Ordinary is right.

LORD MURE—I think it has been well settled by the two decisions to which your Lordship has referred, that any action which points directly at getting a benefit in money from the funds of a trade union is incompetent in this Court. The only question therefore that we have to consider is whether the facts of this case point to its being an action to recover a benefit in money. There are first of all reductive conclusions in which certain writs are sought to be reduced, and then the pursuer asks that, whether decree of reduction is pronounced or not, "it ought and should be found and declared that the pursuer has, since the date of the said several writs, continued to be, and now is, a member of the said society, and entitled to all the rights, benefits, and privileges of membership thereof." That being the nature of the conclusion, it is seen from Cond. 14 that it is the pursuer's alleged illegal expulsion that has led to his losing benefits which he otherwise might have had. In these circumstances I think the case clearly falls within the decisions of *M'Kernan* and *Shanks*.

LORD SHAND—I am also of opinion that this action is excluded by the decisions in the cases of *M'Kernan* and *Shanks*.

Take, first, the conclusion for damages—the words of the statute are express, and the provision is to the effect that no action shall be competent in this Court "with the object of directly enforcing or recovering damages for the breach of any of the following agreements." Then follows an enumeration of the different classes of agreements. We have here a complaint that the expulsion of the pursuer from the society was a breach of contract, and a claim for damages is made. That, in my opinion, is just one of the things struck at by the Act.

Then with regard to the other branch of the case, in which the pursuer claims the *status* of membership, that claim is made simply in order that he may retain the benefits which membership gives. I think it is impossible to take this action as being anything but an action to reinstate the pursuer for the purpose of giving him the benefits of membership.

It was maintained in the very able argument with which Mr Thomson opened the case that the *status* of membership, which was something distinct from the benefits which attach to membership, was here involved. But I am unable to regard the action as anything but an action for the recovery of a pecuniary benefit, and I therefore think it is excluded by the terms of the statute.

LORD ADAM concurred.

The Court adhered.

Counsel for Pursuer—Nevay—A. S. D. Thomson. Agent—R. Broatch, L. A.

Counsel for Defenders—Jameson—D. Campbell. Agents—J. & J. Galletly, S. S. C.

Saturday, July 3.

SECOND DIVISION.

(Before Seven Judges.)

SHEPPARD'S TRUSTEE *v.* SHEPPARD AND OTHERS.

*Heritable and Moveable—Succession—Trust—
“Conversion Indispensable to the Execution of the Trust.”*

A testator conveyed his whole estate, heritable and moveable, to trustees, with directions to give to his wife the liferent of the residue after paying debts, &c., and after her death and the majority of the youngest child “to divide the whole residue of my means and estate, and to dispense, convey, make over, and deliver” the same to his children, equally among them, share and share alike, the issue of a predeceasing child taking the parent's share. The trust-deed contained also a power of sale. The truster was survived by his widow and five children. The widow survived him for thirty-four years, and was predeceased by three of the children. The estate consisted both of heritable and moveables, the former being at the date of the widow's death of more than double the value of the latter. After the widow's death a question arose as to whether the quality of the beneficiaries' interest in the heritable estate was heritable or moveable. *Held (diss. Lord Justice-Clerk and Lord Young)* that a sale of the heritable was not “indispensable to the execution of the trust,” and that conversion was not operated.

James Sheppard, house painter in Edinburgh, died in 1849 leaving a trust-disposition and settlement by which he conveyed, *mortis causa*, his whole heritable and moveable estate to certain parties as trustees for certain purposes. The purposes of the settlement were, *inter alia*, as follows—*Thirdly*, To convey to his wife, in case she should survive him, the whole residue of his estate, heritable and moveable, to be possessed and enjoyed by her during her lifetime, burdened with the maintenance and education of such of his children as might be unprovided for at the time of his death: “*Fourthly*, In the event of my said wife predeceasing me, or in case she should survive me, in the event of her death before the arrival of the period for the final distribution of my means and estate after mentioned, I hereby direct my said trustees to set apart the free annual proceeds of my said means and estate for behoof of my said children, and any other child or children that may be procreated of my body, of the present or any subsequent marriage, and to expend the same, or such portions thereof as they shall consider proper, in their maintenance, and also in the education of such of them whose education may not have been completed;” with power to the trustees to pay over to the children

the whole or part of their shares of the free annual proceeds of the estate, or to accumulate the sum till the period of division. “*Fifthly*, In case my said trustees shall consider it for the advantage of any of my said children, either before or after attaining the age of twenty-one years . . . before any final division of the trust-funds shall have taken place, I hereby authorise and empower my said trustees . . . to advance such sums of money to them as they shall think expedient; but declaring that such sum or sums so advanced to any of my said children shall not exceed their equal share of my said means and estate, and whatever money any of my said children shall receive in this respect before a final division shall take place over and above their share of the annual free proceeds of the said trust-estate, shall always be imputed *pro tanto* of their shares of my said means and estate, whenever that division shall take place.” *Sixthly*, He empowered his trustees, in the event of his wife's death, to lay out whatever money they might be possessed of belonging to the estate, which they might not immediately require, for answering the purposes of the trust, either at what interest could be got for it or in the purchase of heritable property or stock of any lucrative concern. *Seventhly*, “Upon the decease of my said wife, and if at that time the whole of my said children shall have attained the age of twenty-one-years complete, or as soon thereafter as they shall have all attained that age, if they shall not have then already reached it, I hereby direct my said trustees . . . with the least possible delay, to divide the whole residue of my means and estate, and to dispense, convey, make over, and deliver to my said children presently in life, and to any other child or children, whether sons or daughters, that may be procreated of my body, of the present or any subsequent marriage, and be in life at the time of my death, and the issue of such of them as shall have predeceased me, equally among them, share and share alike, the issue of such child predeceasing me taking the parents' share only, and to the heirs and representatives of my said children, the whole residue of my means and estate, after the other purposes of this trust shall have been served, and the necessary expenses of executing the same defrayed; and such payments as shall have been made to any of my said children in virtue of the powers herein committed to my said trustees shall, previous to such division, be assumed as part of my said means and estate, and deducted from the shares falling to those who may have received such advances.” The deed then proceeded to give certain powers to the trustees, among these being, to enter into possession of the trust-estate, and to uplift the rents, mails, and duties, and grant discharges, which power to remain in abeyance during the lifetime of the truster's widow; and also to output and input tenants, and grant tacks and leases, not exceeding nineteen years, of the heritable estate; “As also with power to sell and dispose of all or any part or portion of the said trust-estate and effects in such lots and portions as they, my said trustees, shall consider most advantageous, and that either by public roup or private bargain, and to grant and enter into all necessary deeds for accomplishing and completing the said sales and the conveyance of the said subjects to the purchaser or pur-