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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 dispone, 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 heritage 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 heritage 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 shall 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 dispone, 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, maills, 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-

chasers, containing all necessary clauses, and binding me, my heirs and successors, in absolute warrandice and other usual clauses, and to execute all and whatever other deed or deeds may be necessary for rendering the said sale or sales effectual, in the same manner and as amply as I could have done myself;" as also to borrow money on the security of the trust-estate for the purposes of the trust, and to grant deeds containing all clauses necessary for that purpose.

The only trustee at the date of this case was Mr Traquair, W.S. The truster was survived by his wife and by three sons and two daughters, viz., Thomas Sheppard, farmer at Hilltarvit, Fife, James Sheppard, Andrew Meldrum Sheppard, Mary Gray Sheppard or Robertson, wife of James Robertson, farmer, Denbrae, Cupar-Fife, and Margaret Henrietta Sheppard. James Sheppard died unmarried and intestate on 30th September 1865. Andrew Meldrum Sheppard died on 10th August 1877 without issue, or having made up any title to any estate which had belonged to his deceased brother, but leaving a settlement by which he bequeathed his whole moveable estate to Catherine Elliot Goodsir or Sheppard, his wife, whom he appointed his executrix. Prior to their marriage Mary Gray Sheppard or Robertson and James Robertson entered into an antenuptial contract of marriage, by which the former conveyed to trustees for certain purposes the whole estate which then belonged to her, or which she might acquire during the subsistence of the marriage. Mrs Catherine Elliot Goodsir or Sheppard was married a second time to Francis Spence Neillings, with whom on 11th August 1882 she entered into an antenuptial contract of marriage, whereby she conveyed to certain trustees for certain purposes her share of her husband's estate under his settlement.

The truster's widow died on 16th August 1883. Mary Gray Sheppard or Robertson had also predeceased her. The heritable estate left by the truster at the time of his death consisted of certain shops and other premises at 107 George Street, 38 Castle Street, and 29 South Frederick Street, Edinburgh, part of the Snuff-Mill Park, Cupar, with houses thereon, and certain ground at Osnaburg, in Fife. The value of these subjects was then estimated at about £3500. During the thirty-four years of the liferentrix's survivance the value of the subjects in Edinburgh had greatly increased, so that at the time of her death it was estimated at about £9000. The residue of free moveable estate left by the truster amounted to a little over £4000.

The period of division of the truster's estate having thus arrived by the youngest child being of age and the death of the liferentrix, the present Special Case was adjusted between Traquair as trusteee under the will, of the first part, Thomas Sheppard, the eldest son, of the second part, and the respective marriage-contract trustees of Mrs Robertson and Mrs Neillings, of the third part. The party of the second part maintained that the terms of the truster's settlement did not operate conversion of his heritable estate, and therefore that the shares thereof which had vested in his deceased sons James and Andrew Sheppard fell to him as their heir-at-law. The parties of the third part maintained, on the other hand, that the terms of the trust-deed did operate conversion of his heritable estate, and that James Sheppard's whole share and interest in his father's estate fell to be divided equally among his surviving brother and sisters and Andrew Meldrum Sheppard's executrix.

After hearing counsel, the Second Division, in respect of the importance of the question of law submitted for decision, appointed the Case to be argued by one counsel on each side before themselves and three Judges of the First Division.

The questions of law were—"(1) Is the whole trust-estate to be dealt with as moveable, and to be divided among those entitled thereto on the footing that it is moveable? Or (2) Is it to be held that conversion of the truster's heritable estate was not operated, and that the party of the second part is entitled to the shares of the heritable estate to which his deceased brothers would have been entitled if they had still survived?"

Argued for the party of the first part—The Case fell under the highest authority on the subject of constructive conversion—that of Lord Chancellor Westbury in *Buchanan* v. *Angus*, 4 Macq. 374. This not being an absolute and unconditional trust for sale, for there was no direction to sell, but merely a power of sale given to the trustees, the question to be asked was, Was the exercise of the power of sale indispensable to the execution of the trust, and it was for the other party to show that it was so. It was, on the contrary, clear that the trust could be executed without sale. The number of heritable properties and the number of beneficiaries were the same, and if the properties were not of equal value, the moveable estate might be utilised to equalise the deficiencies. The language of the deed did not show an intention that conversion should take place. It was long settled that "divide" did not imply an intention to convert, and "pay over" occurred in *Buchanan* v. *Angus*, where there was held to have been no conversion. The subsequent authorities were conflicting. Including *Buchanan* there were four cases in which there was held to have been no conversion, and three in which there was held to have been conversion, viz., (1) No conversion—*Auld* v. *Anderson*, December 8, 1876, 4 R. 211; *Hogg* v. *Hamilton*, June 7, 1877, 4 R. 845; *Duncan's Trs.* v. *Thomas*, March 16, 1882, 9 R. 731; and *Aitken* v. *Munro*, July 6, 1883, 10 R. 1097. (2) Conversion—*Boag* v. *Walkinshaw*, June 27, 1872, 10 Macph. 872; *Fotheringham's Trs.*, July 2, 1873, 11 Macph. 848; and *Baird* v. *Watson*, December 8, 1880, 8 R. 233. In *Auld* v. *Anderson* the direction was to divide, and the opinion was expressed that that could be competently done by *pro indiviso* conveyance of the heritage to the whole beneficiaries. *Hogg* v. *Hamilton* also contained a direction to divide. In *Duncan's Trs.* v. *Anderson* there was in the deed a similar direction to that of the sixth purpose of the present deed with reference to this investment of accruing income. In *Aitken* v. *Munro*, conversion was again avoided, though there was much more serious practical problem of division for the trustees to solve than here, for there were in that case eleven beneficiaries. The deed there also contained "divide." (2) Conversion Cases—*Boag* v. *Walkinshaw* was distinguished by the fact that the question was as to the conversion of property acquired after the date of the will, and that the testator had directed the property acquired before that to be sold. In

Fotheringham's Trustees the practical difficulty of division was greater than here, there being nine beneficiaries. In *Baird* v. *Watson* the division was on the ground that conversion was indispensable to the execution of the trust, and in that view it could be reconciled with the other decisions. It was for other parties to show that sale was indispensable. They must make out that the testator intended that his heirs should take money only and not heritage.

Replied for the parties of the third part—On a sound construction of the deed it was clear that it was the intention of the testator that there should be not a formal but a real division. Each child was to have his or her own share unconnected with any other chiid. Some of the clauses of the deed were inconsistent with anything but conversion. If the power in the fifth purpose had been acted upon, then the child to whom an advance had been made would get an advantage in excess of his or her share when the division came. Equalisation could not in that case be made without a sale of the heritage. To authorise division by *pro indiviso* conveyance there would require to be in the trust-deed something to show that the beneficiaries were bound to take it in that form. It was not possible to "divide" by a *pro indiviso* conveyance—*Advocate-General* v. *Blackburn's Trustees*, November 27, 1847, 10 D. 166; *Advocate-General* v. *Williamson*, December 23, 1850, 13 D. 437; *Boag, supra; Fotheringham, supra.* They did not dispute the soundness of the principle laid down by Lord Westbury in *Buchanan* v. *Angus*, for that left open in every case the question what circumstances were sufficient to show that sale was indispensable to the carrying out of the intention of the testator. When "divide" was used there was implied a separation of the interests of the beneficiaries, which was more than a mere making over of title from the trustees to them. The deed said first "divide," and then "make over" the divided portions. This implied a duty on the trustees first to convert the estate into divisible form—*i.e.*, money—before conveying it to the beneficiaries. They could not discharge their trust by conveying the heritage to them *pro indiviso*, and say, "There, now divide it among yourselves." Each beneficiary was not bound to have an estimate value of its share, but to have the share itself in tangible form. When a testator directed his trustees to divide he did not mean it to be done by the beneficiaries, but by the trustees. The cases of *Boag*, *Fotheringham*, and *Baird* were in point.

At advising—

LORD PRESIDENT—The late James Sheppard died in 1849, survived by a widow, three sons, and two daughters. His estate consisted at the time of his death partly of heritable property and partly of moveables, all of which he conveyed *mortis causa* to trustees for behoof of his widow and children. By the death of the widow in August 1883 the trust practically came to an end, all the purposes of the trust having been accomplished except the division of the estate among the children. In proceeding to make this division the surviving trustee, Mr Traquair, finds it necessary to have the question decided which is raised in the Special Case, viz., Whether, by the operation of the trust-settlement and according to the intention of the truster, conversion of the heritable estate into money is required? The heritable estate consisted at the time of the truster's death of certain house property in Edinburgh and in the county of Fife, then worth about £3500, but now increased in value by judicious management to £9000. The free moveable estate amounted to a little more than £4000.

By the provisions of the trust-settlement the widow is to enjoy a universal life interest, and for securing this the trustees are directed, within twelve months after the truster's death, to "dispone, convey, and make over" the whole estate to her in liferent, for her liferent use allenarly. The ultimate division of the fee is not to be made until the concurrence of two events—the death of the widow, and the coming of age of the youngest of the children. But in the event of the widow predeceasing the latter event, the trustees are directed to employ the free income of the estate, or so much as may be necessary, in the maintenance and education of the children, the widow having been charged with this burden during her survivance. The words directing the ultimate distribution are, "to divide the whole residue of my means and estate, and to dispone, convey, make over, and deliver" to the children equally, with the usual conditional institution of issue of children predeceasing the truster. In the event of there being any savings or any money in the hands of the trustees not immediately required for trust purposes, between the widow's death and the period of division, the trustees are empowered "to lay it out either at what interest can be got for it, or in the purchase of heritable property or stock of any lucrative concern as they may deem most advantageous for my family." There is no direction to sell, but there is the following power—"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 shall consider most advantageous;" "as also to borrow money on the security of the trust-estate, or any part thereof, for the purposes of this trust: But declaring, as it is hereby expressly provided and declared, that in carrying any such sale or sales into effect, or borrowing money as aforesaid, it shall not be competent to nor in the power of my said trustees to do any act or deed which may in any way affect or limit the enjoyment of the aforesaid liferent right or interest in my said means and estate to be created in favour of my said wife after the same shall have been conveyed to her in terms thereof."

The specialties arising from the terms of this deed appear to me to be that the whole estate, heritable and moveable, conveyed to the trustees is directed to be conveyed by them within twelve months to the widow in liferent, and though there is a power of sale and borrowing, the liferent estate of the widow is carefully secured against any such sales or loans affecting the subject of her liferent while she survives, and while the trustees are thus practically debarred from selling during the survivance of the widow they are empowered and encouraged to employ any money that may be uninvested in their hands in the purchase of additional heritable property. These specialties afford a certain presumption against an intention on the part of the truster that his trustees should convert the heritable property into money.

Turning from the terms of the deed to the history of the trust, it is important to observe that the trust continued in operation for thirty-four years by reason of the widow's survivance; that the heritable property left by the truster has remained intact throughout the whole of that period, and has largely increased in value, and that a sale, if made now, would probably be disadvantageous owing to the present depression of such property in the market.

On the other hand, there is an express direction that when the period of distribution arrives the trustees shall divide the estate equally among the children. Construing these words literally, it seems very difficult, if not impossible, to divide the heritable estate in specie, and there can be no doubt that the simplest and most convenient course of procedure would be to realise the whole estate, heritable and moveable, and convert it into money for the purpose of equal distribution.

But if the true construction of the deed and the history of the trust are such as not to make conversion indispensable, the law as now established affirms that there shall be no conversion, and the heritage shall be conveyed to the beneficiaries in specie. Such conveyance, except in very special circumstances, can only be effected by a conveyance to the whole beneficiaries as joint proprietors *pro indiviso.*

If the question thus stated were open I should think it worthy of very serious consideration. But according to the state of the authorities I feel myself bound to pronounce against conversion.

The doctrine established by the House of Lords in *Buchanan* v. *Angus* is, that where there is no positive direction to sell, but only a discretionary power of sale given to the trustees, the question is whether the exercise of that power is "indispensable to the execution of the trust." This is the language of Lord Fullerton in the case of *Blackburn's Trustees*, adopted by the Lord Chancellor (Westbury) as being, in his opinion, most appropriate to express the rule applicable to such cases. It is in vain to represent *Buchanan* v. *Angus* as a case depending on specialties, for both the Lord Chancellor and those noble and learned Lords who agreed with him intended to establish, and did establish, a rule of general application. They were by no means indifferent to the difficulty of giving effect to a direction to divide the whole estate between the testator's brother and sister, "equally betwixt them, share and share alike."

The brother had predeceased his sister during the subsistence of the trust, unmarried and intestate. The sister had also died before the period of division without having served heir to the brother, but leaving a trust-settlement disposing of her estate. The competition was between the heir-at-law of the brother and the trustees under the sister's settlement, and the question was whether the right vested in the brother under the testator's settlement was heritable or moveable. This Court decided that it was moveable. But the House of Lords reversed the judgment, and held that it was heritable, or, in other words, that no conversion was operated by the provisions of the testator's settlement. The Lord Chancellor pronounced judgment on the clear and distinct ground that the interest of the predeceasing brother in the heritable estate of the truster was "one just and equal *pro indiviso* half of the residue of the trust-estate in so far as it consisted of heritable property; that it remained in the *hæreditas jacens* of Major Smith (the brother), and now belongs to the present appellant as his heir-at-law." The judgment of reversal contains a declaration in identical terms.

This important judgment, pronounced more than twenty years ago, has been followed in practice and constantly referred to as the leading authority on all questions of conversion, in proof of which I need not do more than refer to the recent cases of *Auld* v. *Anderson*, Dec. 8, 1876, 4 R. 211, and *Aitken* v. *Munro*, July 6, 1883, 10 R. 1103.

In the present case the eldest son, Thomas, survives, and is the party of the second part in this Special Case. The second son, James, died without issue and intestate during the subsistence of the trust. The third son, Andrew, subsequently died during the subsistence of the trust, without issue, and without having served heir to his brother James, but bequeathing his moveable estate to his wife, who survived him. The eldest son, besides claiming his own one-fifth share of the whole estate of his father, claims also, as heir-at-law of his deceased brothers James and Andrew, their two-fifth parts of their father's estate, so far as it consists of heritage. I consider myself bound by the authorities above cited to hold that the right and interest of each of the deceased sons of the truster was one just and equal fifth part *pro indiviso* of the residue of the trust-estate, so far as it consisted of heritage, and that it remains in the *hæreditas jacens* of each of the said deceasers, and now belongs to their brother Thomas as their heir-at-law.

I am therefore of opinion that the first question must be answered in the negative, and the second in the affirmative.

LORD JUSTICE-CLERK—The question which we have to determine is, whether the testator has in the settlement before us expressed his intention that the residue of his estate shall be converted into money and divided equally among his children and their families. I can have no doubt that such was his intention, and that his settlement has sufficiently expressed it.

It is stated in the Case that the testator's property consisted of shops in George Street, Castle Street, and Frederick Street, Edinburgh, and of some house property in Fife. These were worth about £3500 at the testator's death, but it is stated that the Edinburgh property is now worth £9000. The personalty is valued at about £4000.

The testator was survived by three sons and three daughters. The present dispute relates to the shares of two of the sons who have died without issue. These, in so far as they consist of a proportion of the heritable property, are claimed by the surviving son, as heir-at-law of his deceased brothers, on the ground that the shares in question were heritable in succession. It is contended, on the other hand, that the testator's intention has been sufficiently indicated that his estate should be converted into and divided as money.

The simple ground on which I come to the conclusion that such was the intention of the testator is mainly that he has directed his trustees to divide the residue of his estate, and that no other mode of division can be reasonably imputed to him. I have no intention of going over the old Revenue cases, as these have been fully

considered, and have received much judicial elucidation in many cases since their date. It has been fully fixed, as indeed the case of *Buchanan* v. *Angus* established, that in all such cases the intention of the testator is the only rule. If it appear to be clear, as I think it does in the present case, that the testator meant his property to be divided as one estate, and that the practical inconvenience, indeed impossibility, of carrying out the directions of the settlement without converting the heritage were manifest, I come without hesitation to the conclusion that such was the result contemplated by the testator.

I have already stated that of the property left by the testator, valued altogether at £13,000, two-thirds consisted of house property. This is described in the case as follows:—"Certain shops and other premises at 107 George Street and 38 Castle Street, Edinburgh; subjects at 29 South Frederick Street, Edinburgh, and certain subjects in Fifeshire, viz., Part of the Snuffmill Park at Cupar, with the houses thereon, and a dwelling-house and some ground at Osnaburg." The testator directs that this miscellaneous collection of houses shall be divided equally, share and share alike, among his five children; and the question we have to decide is whether he intended that these should be parcelled out, *in forma specifica*, among his children, or whether it was contemplated that the property should, by the exercise of the power of sale, be reduced into a shape in which his directions could be reasonably carried out.

At the debate two suggestions were made to avoid this difficulty, both of which seemed to illustrate its magnitude. The first was to divide the heritable property specifically, and to equalise the shares by adding to each unequal shares of the personal property. The second was that adopted by the House of Lords, under different circumstances as I think, in the case of *Buchanan* v. *Angus*, namely, to convey these tenements as they stand *pro indiviso* to the respective beneficiaries.

As to the first, it involves difficulties, both theoretical and practical, greater than that which it is invoked to solve. It seems enough to point out that it implies a power on the part of the trustees to deal arbitrarily with the shares of the succession, which they are instructed to make equal, for which there is no warrant in the settlement, and to determine at their own hand how much of the succession of each shall be heritable, and how much moveable, which there is no reason to suppose the testator for a moment contemplated. As to the second, it certainly comes recommended by high authority, and I cannot of course dispute its authority, and indeed see no reason to do so if I could. No doubt it fixes that a conveyance *pro indiviso* may be sufficient implement of a direction to divide a mixed succession where the intention to that effect can be deduced from the terms of the settlement. There were but two beneficiaries in the case of *Buchanan* v. *Angus*—they were brother and sister—and I am far from saying that such a result may not in many cases be entirely consistent with a reasonable execution of the intentions of the testator. There is no doubt an anomaly, which I do no disrespect to that important and weighty judgment in pointing out, in a mode of division which preserves the divisible subject undivided. But the case of *Buchanan* presented none of the difficulties which lead me to my conclusion in this case. Here there are five beneficiaries, and the heritable property to be divided is so varied and scattered that a *pro indiviso* fifth share to each would be so utterly inconvenient and unavailing that no man providing for his family can be presumed to have intended it, and I infer that such was not and could not be his intention.

This principle has been applied in a series of cases in this Court—in particular, there are four recent cases in this (the Second) Division, which cannot, I think, be distinguished from the present. They are *Fotheringham's Trs.*, July 12, 1873, 11 Macph. 848; *Nairn's Trs.*, November 10, 1877, 5 R. 128; *Boag*, June 27, 1872, 10 Macph. 872; and *Baird*, December 8, 1880, 8 R. 233. In all these cases there was no specific direction to sell, but the intention of the testator was held to be sufficiently indicated by the inconvenience which would plainly attend the fulfilment of the trust if the heritage were left unconverted.

The present case is one of the simplest examples of the rule, and presents no speciality. The words of the settlement in regard to the distribution of the residue are as follows—[*reads*]. It is clear that the testator meant that all the families should share equally. He goes on to provide that the shares of the daughters in the whole estate should be exclusive of the *jus mariti* of their husbands, evidently contemplating a moveable fund, and then there is a careful and comprehensive clause conferring a power of sale on the trustees so far as may be necessary for the fulfilment of the purposes of the trust.

It is, however, said that there are decisions the other way, and special reference was made to the case of *Duncan's Trs.*, March 16, 1882, in this Division, in 9 R. 731, and that of *Aitken*, July 6, 1883, in 10 R. 1097.

Where the question involved in each individual case depends on the intention expressed or implied by the words used in the instrument it is to be expected that decisions should present some variance according to the precise words which are the subject of construction. The case of *Duncan's Trs.* proceeded on a specialty which gave colour to the whole settlement. There was in that case an injunction to the trustees that if land was sold the price should be reinvested in the purchase of other lands, and this provision, which was thought, not without reason, to be wholly inconsistent with an intention that the heritage should be converted, was the hinge upon which the whole case turned. The case of *Aitken*, 10 R. 1019, is no doubt more in point, for although there were in the settlement in that case some peculiarities which were founded on, it cannot be disguised that the judgment cannot stand with the cases to which I have referred. But the opinions delivered in the First Division show so much hesitation and variety that I cannot look upon them as overturning the grounds of judgment in these cases, and Lord Deas plainly intimated that he differed from the judgment. Lord Shand said that he would have done so but for the case of *Duncan's Trs.*, which, as I have shown, proceeded on a specialty, and the Lord Ordinary (Lord Adam) was of a contrary opinion. I do not think it would be right to go back on four unanimous and deliberate judgments on this authority.

But in the case of *Fotheringham* the residue, consisting chiefly of house property, was directed

to be divided into nine shares, and with the decision in *Buchanan* v. *Angus* fully in view, the Court rejected the plea of a *pro indiviso* conveyance. Lord Neaves said, "The primary direction is to divide. There is not to be a general conveyance *pro indiviso*."

Lord Mure—I agree in the opinion of your Lordship in the chair, because I think this case comes under the principle of the rules given effect to in the case of *Buchanan* v. *Angus*. In that case, as I read the report of it, the rules of the law of Scotland and the decisions in the Scotch Courts applicable to the question of constructive conversion of trust property were all very carefully examined and explained, and the law was there distinctly laid down by the Lord Chancellor in these terms—"But if, instead of an absolute and unqualified trust or direction for sale, the right to sell is made to depend on the discretion or will of the trustees, or is to arise only in case of necessity; or is limited to particular purposes, as, for example, to pay debts; or is not, in the appropriate language of Lord Fullerton in the case of *Blackburn*, 'indispensable to the execution of the trust;' then in any of these cases, until the discretion is exercised, or the necessity arises and is acted on, or after the particular purposes are answered, or if the sale is not indispensable, there is no change in the quality of the property; and the heritable estate must continue to be held and transmitted as heritable. These principles are clearly deducible in Scotch law from the cases of *Durie, Blackburn, Williamson*, and *Pearson*, which have been cited at the bar." There must either, therefore, in a case of this description, and in order to effect a conversion, be an express direction to sell, or sale must be indispensable to the execution of the trust; and that expression is borrowed from the opinion of Lord Fullerton. If, therefore, neither of these things occurs, there can, as I apprehend, be no constructive conversion. Now, in the present case there is no direction to sell, but a mere power has been given to the trustees which has never been exercised, and the exercise of which is not indispensable to the carrying out of the trust. The case therefore falls clearly under the rule of the decision in *Buchanan* v. *Angus*. Because *pro indiviso* shares of heritage may quite easily be transferred in this case as they were directed to be in the case of *Buchanan* v. *Angus*, where the judgment of the House of Lords altering the judgment of this Court expressly deals with and disposes of "the said one just and *pro indiviso* equal half of the residue of the trust-estate of the said John Smith." Upon this point, therefore, no difficulty seems to have been felt, for the judgment there deals with the *pro indiviso* shares of the residue of heritable estate which the trustees were directed to "pay over" to the beneficiaries. Now, here we have substantially the same direction. There the trustees were to "pay over the residue." Here they are "to divide the whole residue;" and "to dispone and make over" to the children; and in compliance with that direction the heritable estate can here be made over in *pro indiviso* shares. In the case of *Buchanan* Lord Westbury says the intention of the testator is to rule in such cases. I quite adopt that view. I think the intention is to be gathered from the directions in the deed; and I cannot see that there was here, any more than in the case of *Buchanan*, any intention, either express or implied, that the trustees should sell this heritable property if that was not indispensable for the distribution of the trust-estate. I do not think that this was indispensable, and I am therefore of opinion that the shares of the heritage should be dealt with here as in the case of *Buchanan* v. *Angus*.

Lord Young—My brother Lord Mure and your Lordship in the chair are of opinion that this case is ruled by the principles established in the case of *Buchanan* v. *Angus*. I think it is very inaccurate language to speak of the principles "established" in *Buchanan* v. *Angus*. I should rather have said that they were "recognised" in the case of *Buchanan* v. *Angus*. And if I thought that these principles led to the decision which your Lordships have favoured, differing from the Lord Justice-Clerk, I should of course have agreed. But I do not think that the case of *Buchanan* v. *Angus* established any new principle, or any principle with which we had not long been familiar in these questions of conversion, and it has ever appeared to me that any difficulty presented by any of these cases was not in ascertaining the governing principle, but in the application of it to the very diverse and varying facts of the individual case. The principles are all quite old and quite familiar. The first of course is that you must take property as the deceased left it, and give it to his family or the other objects of his bounty as he left it. The interest in a question of converting it from the condition in which he left it is occasioned by our law of succession—chiefly by the law of primogeniture. It is never of any interest at all if those who immediately take under the will are alive to take upon the testator's death. They can take it in any form whatever that they can agree upon. They are the persons who are to take the whole estate, and in the appointed shares. It is when some of them die before the period of distribution, and the question arises between two sets of the heirs of a deceased person—the heir in heritage and the heir *in mobilibus*—that the question alone comes to be of the slightest interest. But there the interest of the deceased and the heir of the beneficiary who died without taking is held to be an interest in the estate as the deceased left it, if he has indicated nothing to the contrary, and without being heritable or moveable, according to the nature of the estate, it would pass to his heirs in heritage or *in mobilibus* accordingly.

Now, starting with that as the first rule—that in the absence of all indication to the contrary, and of intention to the contrary, the estate is to be taken as it was left, and the interest in it to pass accordingly to the heirs of the beneficiary dying before taking—the rule of conversion is founded upon this, that it may be otherwise if the giver has satisfactorily—that is, with reasonable accuracy and generally expressed clearness—indicated another intention. I have not looked at the case of *Blackburn's Trustees* for a long time, and not immediately with reference to this case. It is a very old case, but it is not so old that I do not have a distinct impression about it. I argued the case when a very young man, and I have referred to it frequently since, and

one expression which Lord Fullerton used, and which dwells in my memory, was, "The question is, Did the truster or the testator intend the person to take land or money?" Now, that is a question of intention, and I know of no principle other than that which Lord Mure has announced, namely, that you can only gather the intention of the testator from the language used by him who is the maker of the deed. That is not a principle established by *Buchanan* v. *Angus;* it is a question of intention—the intention being to be collected from the language of the deed expressive of it. But there authority is not of the highest importance, because the principle which alone authority can establish is clear enough; the difficulty is in the application of it. How are you to collect the intention? It is just the impression made upon the judicial mind by the language employed. If the testator in so many words directs the executors of his will to sell the heritage and to divide the price there is no difficulty about the intention there. He means that the price is to be divided. His intention is expressed in language which admits of no mistake, and therefore, although there has been no sale, yet the testator meant his beneficiaries to get money and not land. If one of them dies without getting anything, and the question is what his successors will take, their successors are his successors in money, and not his successors in land, because the testator meant him to get money and not land. But where there is not that express direction, may you not satisfactorily, and therefore safely—for we have no other test of safety except what is satisfactory to the judicial mind—collect the intention of the testator to the same effect? He gives a power of sale, and the whole scope and import of his will are such that you are satisfied of the intention that the power be exercised and money and not land be divided. If that is your conclusion on the language used, then you would answer the question put by Lord Fullerton by saying that he intended the object of his bounty to take not land but money. That is constructive conversion. It was according to his intention that they should have money and not land, and that if one of them died without getting anything the rights of his successors should be governed accordingly. Now, as I have said, there is no new principle there; it is as old as the hills—at least as old as this branch of the law. There is nothing established by *Buchanan* v. *Angus* on this subject at all. You would not readily imply that he intended his land to be turned into money and so divided, unless he says so, but the implication will be sufficient for doing that. I noted an expression which was used several times, "indispensable to the execution of the will," but if the direction to divide and distribute among any number of beneficiaries may be executed by conveying *pro indiviso*, I should like to have an instance of a case in which the execution of the power of sale was indispensable to the execution of the will. I cannot conceive of that. If there are twenty children, and one shop to be divided amongst them, share and share alike, the executor of the will, to whom the estate is conveyed for the purpose, having a power of sale, and being directed to divide it amongst them, share and share alike, there are surely very few men who would not say that the sale was indispensable to the execution of the will in that case, and that each of the children should take, not one-twentieth share of the shop, but a twentieth part of the price. Certainly I should conclude that such was the testator's intention — that he meant them to take money amongst them, and not the shop or land.

But it may be said it was not indispensable to the execution of the will, because the direction to the trustees to divide it, share and share alike, may be executed by conveying it to the whole beneficiaries *pro indiviso*, and letting them divide it themselves. It is said that in that case there is nothing indispensable to the execution of the will. But I cannot come to that conclusion. I therefore collect the testator's intention, and, satisfactorily to my own mind, applying it as judicially as I can, I think he meant that the shop property here should go to his five children, but that it was his intention, not that they should have one-fifth shares, and that the heirs of those who died should have one-fifth share of the shop property, but that the whole residue should be converted into such a shape as should be divisible, and thus that the trustees should be enabled to execute his direction by making the division themselves, or enabled to put it into a lump, and say to the beneficiaries, "Now, divide it for yourselves." I think the trustees are directed to divide. I do not feel hampered by the case of *Buchanan* v. *Angus*, or by any other case, the principles, as I have said, being well established before. The principles are well-known, the difficulty is in applying to each individual case as the individual case arises. I simply put the question to myself, "What did the testator intend? Did he intend them to take money or to take a share of house property?" I think he intended them to take money, and I am of that opinion on evidence as conclusive and satisfactory of the intention conveyed by the language used as the Court has acted upon in many other cases. Of course if there was a recent authority—a recent authority of the House of Lords—dealing with facts identical with the facts here, I should apply it. But we are not concerned with any such case; there is no such case; there are only cases establishing and illustrating the principle. The principles, as I have said, are perfectly clear, and the application of the principle to the facts of the individual case is not doubtful; therefore in the result I concur in the opinion of the Lord Justice-Clerk.

Lord Craighill—When this case was heard in the Second Division I was of opinion that there has been no constructive conversion. I am of that opinion still. (1) There was no conversion expressly directed; (2) that was not necessary for the fulfilment of the purposes obligatory on the trustees; and (3) the general tenor of the deed does not suggest that the intention of the testator was that there should be conversion, or, in other words, that the trust estate should be distributed as if all were moveable property. These are the results of my reading of the truster's settlement.

I. As to the first of these points there is no controversy. All parties are agreed that there was no express direction to convert. All that was given being authority or power "to sell and dispose of all or any portion of the said trust estate and effects." This is enough if there has

been a sale, but not enough for conversion if the power or authority to sell has not been exercised.

II. As regards the second point, it is incumbent on the third parties to show that the sale of the heritage was necessary for the fulfilment of purposes which were obligatory on the trustees. In saying this I make use of the words which in his statement of the law upon this subject were used by Lord Chancellor Westbury in moving the judgment of the House of Lords in *Buchanan* v. *Angus*. Now, what he required to be made out has, I think, not been established. There are two things which are referred to for the purpose of showing that the sale of the heritage was necessary for fulfilling the purposes of the trust, the first of which is the power given to the trustees to advance monies to beneficiaries on the credit or on account of their shares; but this power never was exercised, and consequently conversion for this purpose never became necessary in the administration of the trust. What might have been the result had money been advanced need not be determined. The fact that an event which might have resulted in conversion never occurred leaves the case where it would have been if a discretionary power to advance had not been committed to the trustees. The second of the things referred to is that the residue was to be divided in equal shares; but for this conversion was not required, as this could be effected by a disposition *pro indiviso* in favour of the beneficiaries—*Auld* v. *Anderson*, 4 R. 211; *Duncan's Trs.*, 9 R. 731; and *Aitken* v. *Munro*, 10 R. 1097, are authorities upon this point. These decisions are in the wake of the judgment of Lord Westbury in *Buchanan* v. *Angus*, who says that a division to be made betwixt beneficiaries "share and share alike" are words clearly applicable to a disposition of the property when given to persons as tenants in common, that is to say, using our own law language, to a disposition of property *pro indiviso*.

III. On the third of the points which I have specified I am as clear as upon the others. There is no ground whatever for the inference that while a sale of heritage might not be necessary for fulfilment of trust purposes, the will of the truster, as that is to be gathered from the trust-deed, was that there should be conversion. The opposite conclusion appears to me to be the true reading of the deed. (1) That which is to be divided among the beneficiaries of the fee is the residue which was to be liferented by the widow, and that was intended to be, and in fact was, partly heritage and partly moveable property. The words of direction are that the trustees should dispone, convey, and make over for her liferent "all and sundry the residue of my means and estate, heritable and moveable, above mentioned," and what was to be liferented is the thing of which the fee was to be divided among the destined beneficiaries—at least such is my inference, for there is no direction, nor indeed anything, which suggests that between the death of the widow and the fulfilment of the direction to divide and convey the fee, the *corpus* of the estate was to be changed or anything whatever was to be done by which the character of that estate was to be affected. On the contrary, the direction was that if the beneficiaries had reached the age of 21 the trustees were after the death of the widow to divide and convey "with the least possible delay." (2) There was to be, or at any rate there might be, a "disposition" in the distribution of the truster's estate, the words of direction being that the trustees shall divide "the whole residue of my means and estate, and dispone, convey, and make over" what is to be the subject of division. Thus heritage as well as moveables is or may be included in the division according to the contemplation of the truster. And (3) those who are to take after the death of a child or the issue of a child predeceasing the truster, are the heirs and representatives of the predeceaser. This shews that there might be a division of a child's succession into two parts, one of heritage, which would go to the heir, the other of moveables which would pass to the next-of-kin.

These considerations seem to me to exclude the inference that whether it was or was not required for fulfilment of the purposes of the trust, or whether the power to sell was or was not exercised, the intention of the testator was that his estates should be divided as if there had been conversion.

LORD RUTHERFURD CLARK and LORD ADAM concurred with the Lord President.

The Lords of the Second Division thereafter pronounced an interlocutor answering the first question in the negative and the second in the affirmative.

Counsel for Parties of the First and Second Parts—J. P. B. Robertson—Dickson. Agents—Traquair, Dickson, & M'Laren, W.S.

Counsel for Parties of the Third Part—Solicitor-General Asher, Q.C.—Rhind. Agent—William Officer, S.S.C.

Saturday, July 4.

FIRST DIVISION.

ROBERTSON *v.* WILSON.

Bankruptcy—Bankruptcy (Scotland) Act 1856, *sec.* 48—*Gazette Notice—Personal Bar.*

Sequestration was awarded in the Court of Session upon a petition presented by the bankrupt with concurrence of one of his creditors. The bankrupt failed to comply with the provisions of section 48 of the Bankruptcy (Scotland) Act 1856, in respect he did not insert the statutory notice of sequestration in the *London Gazette* until one day after the six days prescribed by that section. All the other provisions of section 48 were duly complied with. A meeting of creditors was held, a trustee was elected, caution was found, and the trustee's appointment was confirmed. The bankrupt thereafter presented a petition in which the Court were prayed to recal the whole proceedings at and following on the meeting. This petition was founded on the failure to record the statutory notice in the *London Gazette* in due time. Petition *refused.*

Andrew Ross Robertson, residing at 1 Marchmont Street, Edinburgh, with concurrence of a creditor of the amount required by the Bankruptcy Act, presented a petition for sequestration to the Lord