LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Answer the questions therein stated by declaring that the party of the first part is bound on collation to communicate to each of the parties of the second and third parts one-third of the sum of £5571, 13s. 4d., being the share of the moveable estate of the intestate Andrew Liddell Innes taken by the party of the first part on collation: Find and declare accordingly, and decern."

Counsel for First Party — Dundas, Q.C. — M'Lennan. Agents — Macpherson & Mackay, S.S.C.

Counsel for Second Party—W. Campbell —Anderson. Agents—Buik & Henderson, W.S.

Counsel for Third Party—Jameson, Q.C. —Crole. Agents—A. & S. F. Sutherland, S.S.C.

Wednesday, October 27.

FIRST DIVISION.

GALLOWAY'S TRUSTEES *v.* GALLOWAY.

Succession—Testamentary Writing—Construction — Division per stirpes or per capita—Heritable or Moveable—Conversion.

A truster directed his trustees at the death of his wife, whom he made liferentrix of his estate, "to pay or divide the then free residue of my whole means and estate, heritable and moveable, real and personal, to and among my children," four daughters, whom he enumerated by name—and the heirs of my son, the deceased J., and that equally between them, share and share alike." The trustees were empowered to sell the whole or any part of the estate. It consisted wholly of heritage, which was sold by the trustees after the death of the liferentrix. J., the testator's son, had two sons, both of whom were alive when the testator made his will, and survived him.

Held (1) that the residue was divisible *per stirpes* into five equal parts, of which the children of the testator took four and the heirs of J. one; (2) that the "heirs" of J. were his heirs *in mobilibus*, and that accordingly his two sons took equal shares of that part of the residue falling to them.

Opinion (*per* Lord Adam) that there had been conversion of the heritage into moveable succession.

Mr James Galloway of Clayslaps, Stirlingshire, died on 29th August 1892, leaving a trust-disposition and settlement, dated 13th March 1882, by which he conveyed to trustees his whole estate, heritable and moveable. After directing his trustees to pay his lawful debts, &c., to pay the liferent of the residue to his widow, with power to the trustees to make advances to her out of capital, and to pay to his son William a legacy of £40 in respect that he had already received a sum equal to his share in the residue, the truster proceeded — "I appoint my trustees at the death of my said spouse to pay or divide the then free residue of my whole means and estate, heritable and moveable, real and personal, to and among my children, Margaret Galloway, Mary Galloway, Janet Galloway, Agnes Christina Galloway, and the heirs of my son, the deceased James Galloway, and that equally between them share and share alike, the same being payable only on their respectively attaining majority."

The deed further conferred powers on the trustees, including the power to sell by private bargain or public roup the whole or any part of the estate.

The testator was survived by his widow and by his four daughters, who had all attained majority at the time of his death. His son James Galloway junior, who had predeceased the date of the settlement, left two sons, born in 1877 and 1879, who both survived the testator. The liferentrix, Mrs Galloway, died in August 1896. The estate consisted principally of two heritable properties, and after payment of the debts and other charges affecting his moveable estate, the latter was completely exhausted. The heritable properties were retained by the trustees until the death of the liferentrix, and were sold in 1897.

A special case to settle the question as to the distribution of the residue was presented by (1) Mr Galloway's trustees; (2) his four daughters; (3) James Forrester, the elder son; and (4) Robert Buchanan Galloway, the younger son of James Galloway junior.

The contentions of the parties as stated in the case were — "The second parties contend that on a sound construction of the trust-disposition and settlement the residuary clause imports an equal division, *per stirpes*, among the testator's children, the heirs of James Galloway taking the share of one child: Alternatively, and on the assumption of division *per capita*, they maintain that the term heirs falls to be construed *secundum materiam subjectam*, that the succession is wholly heritable, and that therefore the third party, as his father's heir in heritage, is alone entitled to participate with them. In either case the result, according to the contention of the second parties, is that the residue falls to be divided into five equal shares, of which they are entitled to four. The third and fourth parties contend that the estate is divisible into two equal parts, of which one falls to the second parties and the other to the heirs of James Galloway junior. Alternatively, the third party contends that the estate is divisible into five equal parts, of which four fall to the second parties and one to the heirs of James Galloway junior. In either case the third party maintains that the words 'heirs of my son, the deceased James Galloway,' must be read

with regard to the nature of the estate succeeded to, that the share of his grandfather's estate falling to the heirs of his father is purely heritable, and that, as being heir in heritage of his father, he is accordingly entitled to the whole of the said share. The fourth party, on the other hand, maintains that, looking to the terms of the testator's settlement, the words 'heirs of my son, the deceased James Galloway,' must be construed as meaning heirs *in mobilibus*, or otherwise that the said words were intended by the truster to describe, and ought to be construed as meaning, the children of the said James Galloway; alternatively, and on the assumption that the term 'heirs' falls to be construed *secundum subjectam materiam*, he maintains that, in virtue of the truster's settlement and the sale by the trustees, the succession is moveable. In either case he therefore contends that he is entitled to an equal share with his brother of whatever portion of the residue falls to the heirs of the said James Galloway. Alternatively to the contention that the residue is divisible into two parts, the fourth party accordingly contends that it is divisible into six parts, of which four fall to the second parties and one to each of the third and fourth parties."

The questions submitted for the judgment of the Court were — "(1) Is the residue of the trust-estate divisible into two equal parts, of which the second parties are entitled to one, and the heirs of James Galloway junior to the other? Or (2) Is the said residue divisible into five equal parts, of which the second parties are entitled to four, and the heirs of James Galloway junior to the remaining part? Or (3) Is the said residue divisible into six equal parts, of which the second parties are entitled to four, the third party to one, and the fourth party to one? (4) In the event of either the first or second question being answered in the affirmative, does the share falling to the heirs of James Galloway junior belong exclusively to the third party, or is it divisible equally between the third and fourth parties?"

Argued for third party — The word "heir" when used in settlements must be read according to the nature of the subjects which were being dealt with — *Blair* v. *Blair*, November 16, 1849, 12 D. 97; *Mitchell's Trustees* v. *Waddell*, Dec. 7, 1872, 11 Macph. 206. In the present case the subjects consisted wholly of heritage, and it could not be said that there had been conversion, since there had been vesting *a morte*, and the properties had not been sold till after the death of the liferentrix. Accordingly "heir" must be read as meaning heir in heritage. The cases in which "heirs" had been read to mean "children" were quite distinguishable from the present—*Matthew* v. *Scott*, February 21, 1844, 6 D. 718; *Baillie* v. *Seton*, December 16, 1853, 16 D. 216.

Argued for the second parties—1. It was true there was a presumption in favour of a division *per capita*, but that was easily rebutted—*M'Courtie* v. *Blackie's Children*, January 15, 1812, Hume 270; *Inglis* v. *M'Neils*, June 23, 1892, 19 R. 924. Here the persons named were all of one class, and nearer relations to the testator than the heirs of his deceased son, and that fact was in favour of a division *per stirpes*. 2. Alternatively, as "heir" must be read to mean "heir of heritage," there were only five to divide among, and so the same result was produced—*Aitken* v. *Munro*, July 6, 1883, 10 R. 1097,

Argued for fourth party—1. This was a case of an original bequest to the issue of a predeceasing son as members of the class to be favoured along with the surviving children. It was the general rule in such cases, when it was stated that there was to be equal division among all favoured, that the division was *per capita* — *Laing's Trustees* v. *Sanson*, November 18, 1879, 7 R. 244; *M'Courtie* v. *Blackie's Children*, *supra*. 2. The words of the deed "pay and divide" must clearly refer to sums of money to be paid at different dates, and not to heritable estate, and accordingly it must be held that there was conversion — *Brown's Trustees* v. *Brown*, December 4, 1890, 18 R. 185; *Kippen's Trustees*, March 20, 1889, 16 R. 668; *Baird* v. *Watson*, December 8, 1880, 8 R. 233; *Somerville's Trustees* v. *Gillespies*, July 6, 1859, 21 D. 1148; *Angus* v. *Angus*, December 6, 1825, 4 S. 279.

Lord Adam — The questions which we are asked to answer depend upon the construction of the settlement of the late Mr James Galloway. The position of his family at the date of his death, which took place in 1882, was as follows:—He had four daughters and one son William surviving, while another son James had predeceased him leaving two cnildren. That was the state of his family both at the time of his death and when the will was made, and it was with reference to that state of affairs that it was made. Mr Galloway by his settlement appointed certain trustees, to whom he assigned the whole of his estate, and left the liferent of the residue to his wife, to whom he authorised his trustees to make advances out of the capital should they think the income inadequate for her maintenance. The truster made a provision of £40 for his son William, in respect that he had already received a sum equivalent to his share of residue, and then followed the direction as to residue which gives rise to the present question—[*quotes*].

The first question is, into how many shares is the residue to be divided? On the one side it is maintained that it is to be divided into five equal shares, one going to each of the four daughters, and one to the heirs of the deceased son James. On the other side it was maintained that the division should be into six shares, each of the daughters and of the two grandchildren taking an equal share. It is also contended that the division should be bipartite, one part going to the four daughters and one to the two grandchildren. As to this last contention, in my opinion there is

nothing in it, and the real question argued is whether the division should be into five or six parts. I am of opinion that it should be into five. The direction is that the division should be made between the testator's four daughters, who are mentioned by name, and the heirs of his son equally between them, share and share alike. The testator knew that he had four daughters alive, and that one son had died leaving two children. It appears to me that if he had intended each of his grandchildren to take an equal share with his daughters he would have said so. I do not think that was his intention, and the question is purely one of intention, but that he intended his two grandchildren to take the portion which their deceased father would have taken. Accordingly, the division should be into five parts, and it follows that the "heirs" were intended to take each an equal share of the portion left them, the word used in the direction being not "heir" but "heirs of my deceased son."

If this be the right view, it is unnecessary to decide any question as to the conversion of heritable into moveable, but as it has been argued to us, I should say, if it were necessary to decide it, that this was a case of conversion. We have here a testator dealing with a mixed estate partly heritable and partly moveable giving a power of sale to trustees, and saying in the residuary clause "pay and divide" into equal shares, nothing being said as to "conveying." The clear inference is that payment should be made in money, and not by the conveyance of *pro indiviso* shares, which is the only other alternative. Another fact in the case which points clearly to payment in money, is that payment is to be made at half-a-dozen different periods as each party comes of age. How could a *pro indiviso* conveyance be made at these different periods.

I propose therefore that we answer the first question in the negative, the second in the affirmative, and the third in the negative, and that we affirm the last alternative of the fourth.

LORD M'LAREN—I concur in the view expressed by Lord Adam.

We have here an apparently very simple direction as to the division of the residue of the estate amongst the testator's four children, whom he names, and the heirs of a deceased son. If in interpreting a direction to divide we entertain the idea of unequal division by grouping the objects into classes, we might have a very great number of ways of dividing the estate—as many as there are possible combinations of the numbers of the objects.

But to my mind there is no necessity for interpreting this bequest according to any other than the ordinary rule, which is that when a property is to be divided amongst a definite number of objects, it is to be divided into as many equal shares — one share going to each object. Setting aside, therefore, the notion of a bipartite division, the remaining question is, whether the two children of the testator's dsceased son are to be treated as one object or as two objects. The question undoubtedly admits of argument *hinc inde*, but I have come to the conclusion—for the reasons stated by Lord Adam—that it was in the testator's mind that the heirs of his deceased son were to be treated as collectively constituting one number of the class among whom the residue was to be divided. If he had intended that the two heirs should each receive a share, the natural mode of expressing that would have been to name them as he named his own children. We should then have had a direction to divide amongst six persons named, and that would be a division *per capita*, but as the testator has set out by naming his own children, and has departed from the principle of enumeration when he mentions the children of his son, I think the reason is that he intended his son's heirs to form a single member of the body of persons among whom the estate is to be divided.

The question between the eldest son of James Galloway and his younger brother is not in my opinion covered by the analogy of such cases as *Blair*. It may be that if the residue of an estate is directed to be given to a class of persons designed as the heirs of the testator or of someone who is named, then in the absence of any further indication of intention the law will give the heritable part of the residue to the heir-at-law, and the moveable to the next-of-kin. But here the heirs of the testator's son are only to participate in a division along with other persons, and the division is of the residue of a property without distinction of heritable and moveable. It seems to me impossible to apply the principle of *Blair's* case to a division of this kind, and I think that whoever the testator may have meant by heirs of his son, he meant that one person only, or one class of persons only, were to participate in the division—I mean, either the eldest son or all the sons together. Keeping in view the facts of this case—that this is a division of residue—and that the deed directs not a conveyance of estate but a payment of money value, on the principle of equal division among the testator's children, I have no difficulty in concluding that among the grandchildren the persons designated heirs were heirs *in mobilibus*, the same class of heirs as that among whom the larger part of the residue was to be divided.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court answered the first and third questions in the negative and the second question in the affirmative, and found upon the fourth question that the share falling to the grandchildren, the third and fourth parties, fell to be divided equally between them.

Counsel for First and Second Parties—Constable. Agents — Dundas & Wilson, C.S.

Counsel for Third Party—Cooper. Agents —Duncan & Black, W.S.

Counsel for Fourth Party—J. Wilson. Agents—Duncan & Black, W.S.