peculiarity in the present case, is that the testator not only provides that the issue of his sister's children dying before the period of division shall succeed to their parents' share,—a provision which, it might be argued, as it was at the debate, is nothing more than what the law would supply independently of express declaration,—but also that the issue of children dying before the date of "these presents," that is, before the date of the trust-disposition and settlement, should succeed to their parents' share. This is a peculiarity of the present case not to be found in any other, so far as I am aware; and it unmistakeably indicates, I think, so far at least as concerns the issue of children dying before the date of his deed of settlement, that the testator had not his own death in view as the period of vesting, and neither, of course, could he have proceeded on the footing of vesting taking place previous to his own death. The only intelligible explanation is, that the testator by the language he employs intended that there should be no vesting till the period of division. On any other footing the manifest object of the testator in providing that the issue of such of the children as might die before the date of his deed, or before the period of division, should come into the place of their parents, and be entitled to their parents' share, might be entirely defeated by the creditors or other assignees of such parents.

And (3) In support of the same view, there is also the peculiarity that in dividing and paying over the residue the testator declares that in the case of females, whether children or the issue of children, the provision in their favour shall be "exclusive of the *jus mariti* or right of administration of any husbands whom they may have married or may marry, and as well in that case as in that of any other of the beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaids, in such a way as they, in their sole discretion, think fit for the interest of the beneficiaries." I cannot think that an anxious provision such as this would have been made by the testator if he had intended that the residue of his estate should vest on his own death, or contemplated the possibility of its vesting prior to the period of division. It is plain, however, that supposing vesting to have taken place *a morte testatoris*, it might happen that the trustees would find when the period of division arrived that they had to pay it over and divide it, not amongst the children or the issue of the children of the testator's sisters, but to others to whom it had been transferred by them, strangers to the testator, and in regard to whom it can scarcely be supposed the anxious provision which has just been referred to was ever intended to apply.

Having regard to these considerations, I am of opinion the Lord Ordinary is right in holding that the residuary bequest in question did not vest till the death of the liferentrix and annuitants, that is, till the period of division. I am unable, in any other view, to see how what appears to me to be the manifest intention of the testator, which must in the present, as in all cases of its class, be the paramount and guiding rule of construction, could be given effect to.

In accordance with the opinion I have now expressed, I am for adhering to the Lord Ordinary's interlocutor.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming note for Mrs Margaret Finlayson or Finlay, now Sloane, and her husband, against Lord Craighill's interlocutor of 18th November 1875, Adhere to the said interlocutor, except as regards the finding for expenses; recal that finding, and allow the expenses incurred by the respondent, both in the Outer and Inner House, to be paid out of the fund *in medio;* and remit to the Auditor to tax the said expenses, and to the Lord Ordinary to proceed further with the cause, with power to decern for the expenses now found due when taxed and reported on by the Auditor, and decern."

Counsel for Reclaimers—Balfour—Jameson. Agents—Dalmahoy & Cowan, W.S.

Counsel for Respondents—Kinnear—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S., and D. J. Macbrair, S.S.C.

Counsel for Real Raiser—Asher. Agents—Dalmahoy & Cowan W.S.

Saturday, May 20.

SECOND DIVISION.

SPECIAL CASE—MACGREGOR AND OTHERS.

Succession—Property—Fee and Liferent—Heir of Provision—Sale—Constructive Conversion.

Certain house property being held in trust for Mrs A in liferent and her seven daughters in fee, the sole surviving trustee in 1782 executed a disposition, the dispositive clause of which was in these terms:—"I, by these presents, alienate and dispone to and in favour of the said" Mrs A "in liferent, and the said" seven daughters, "and their heirs and assignees whomsoever, equally in fee, and failing any of them by decease to the survivors," the said property. The procuratory of resignation was "in favour of and for new infeftment to be made and granted to the said" Mrs A "in liferent, and to the said seven daughters, and their heirs and assignees whomsoever, equally in fee, with this provision always, as it is hereby expressly provided and declared, that after the death of the said" Mrs A "the house above mentioned shall be rented by the said" seven daughters "and each of them, so long as any one of them shall remain unmarried, without paying any rent or acknowledgment for the said house to the sisters who shall happen to be married, and in the event of the marriage of the said whole sisters, or on the death of all who shall remain unmarried, then the house above mentioned shall be sold, and the price thereof be divided among the surviving married sisters and the child or children of the deceased sisters, equally, as the fee is provided in manner above written." This deed was

in the possession of one of the sisters in 1829, and was in that year recorded in the Books of Council and Session. No feudal title was ever made up in the person of Mrs A, or of any of her daughters. The last survivor of the daughters, Miss S A, who remained in possession of the house down to her death, obtained herself served in 1855 as one of two of the nearest and lawful heirs-portioners in general of three of her deceased sisters, and at the same time she expede services to the same ladies as their nearest and lawful heir in provision in general under and by virtue of the disposition of 1782. Miss S A died in 1864, at the age of 100, leaving a disposition and settlement whereby she conveyed to her great-grandniece Miss M her whole estate, and in particular, the house property in question, so far as she then had or might acquire right thereto. Miss M died intestate in 1872. In a Special Case, brought, on the one hand, by the heirs-at-law of the whole seven sisters and of Miss M (the heirs-at-law in both cases being the same persons), and on the other hand, by the other descendants of the seven sisters—*held* (1) that the deed of 1872 must be held to have been taken with consent of the beneficiaries, and intended by them to regulate the succession of the property in question; (2) that under the said deed each sister had an absolute right of fee in her own *pro indiviso* share; (3) that the surviving sister rightly made up her title as heir of provision under the deed; (4) that the deed operated conversion as at the date of the death of the last surviving sister, when the property was directed to be sold; and (5) that in these circumstances the property fell to be sold, and the whole parties to participate in the price in certain specified shares.

This was a Special Case brought to determine the right to five-seventh parts of the heritable property No. 16 South St David Street, Edinburgh, and the ground behind the same. The first parties were William D. J. O'Reilly and James Macgregor, the heirs-at-law of the whole daughters of Ann Sempill or Austin and of Josepha Macgregor; and the second parties were the other descendants of the daughters. Both the first and second parties laid claim to the whole five-seventh shares of the property.

The circumstances of the case are fully narrated in the opinion of Lord Gifford.

At advising—

Lord Gifford—The question in this Special Case is, To whom does the heritable property No. 16 South St David Street, Edinburgh, and ground behind the same, now belong? Who is in right now to make up a title thereto, and in what proportions does the property, or the price of it if sold, fall to be divided among the proprietors, if more than one? The state of the title and the history of the subject are very peculiar, and several of the resulting questions are attended with considerable nicety.

The property was originally acquired so far back as 1776 in two portions, one portion for the price of £500, and the other at the price of £160, but both portions were on the same day—27th March 1776—conveyed to certain trustees for trust purposes, afterwards specified and declared in two separate declarations of trust, dated in June 1777 and May 1780. Ever since 1776 the two subjects have been united and possessed as one undivided property.

By the two declarations of trust of 1777 and 1780, the trustees, who were feudally vested in the subjects, declared that they held the same in trust for behoof of Mrs Anne Sempill or Austin, widow of Dr Adam Austin, physician in Edinburgh, in liferent, and of Ann Austin, Mariann Austin, Katharine Austin, Rebecca Austin, Sempill Austin, Collins Austin, and Jean Gordon Austin, their seven daughters, equally in fee, "or in such other terms, proportions, and conditions, with regard to the said daughters, as should be signified by Major-General John Scott of Balcombie in his lifetime, or by the tutors for his (the said General Scott's) children after his decease." General Scott was a friend of Mrs Austin and her daughters, and he had gifted the £500, being the price of the larger portion of the subjects, for behoof of Mrs Austin and her daughters.

General Scott died very shortly after the date of the above deeds, without giving any directions as to the fee of the subjects, and the tutors for his children declined to interfere, so that in 1782, after General Scott's death, the trustees or their survivor held the property simply for Mrs Austin in liferent and for her seven daughters nominatim in fee. At that date, therefore, each daughter had absolute right to one-seventh of the fee of the subjects, and each of them had right to dispose of her respective seventh, and failing any disposition thereof the same would descend to the heirs of each daughter respectively.

In this state of matters, however, Dr Hay, the last survivor of the trustees, and in whom the title to the subjects stood vested by infeftment, executed on 5th April 1782 a disposition of the subjects in favour of Mrs Austin and her daughters, in order to denude himself of the trust, but instead of conveying the subjects simply to Mrs Austin in liferent and her seven daughters nominatim in fee, in exact terms of the declarations of trust, he conveyed the subjects in certain special terms, and under certain special conditions, without having, so far as now appears or can now be discovered, a special written authority to do so.

This disposition of 5th April 1782 narrates the original purchase of the property and the two declarations of trust. It mentions that the tutors appointed by General Scott had declined to interfere, and it then merely bears that it is "proper and necessary" that the last surviving trustee should denude himself of the subjects in manner underwritten. The deed does not expressly bear that the fiars had requested Dr Hay, the surviving trustee, to vary the terms in which the subjects were destined. Dr Hay, as sole surviving trustee, then conveys the subjects "under the provisions and declarations after mentioned, ... to and in favour of Mrs Ann Sempill *alias* Austin in liferent, and the said Ann Austin, Mary-Ann Austin, Catherine Austin, Rebecca Austin, Sempill Austin, Collins Austin, and Jean Gordon Austin, her said daughters, and their heirs and assignees whomsoever, equally in fee, and failing any of them by decease, to the survivors equally, heritably and irredeemably." The provision referred

to in the dispositive clause is said to be contained in the procuratory of resignation, but it is not quite clear that the reference may not possibly be to some other declarations which the deed contains. The provision in the procuratory, after resigning for new infeftment in favour of the mother in liferent and the daughters in fee (no mention being made in that clause of survivors), is in these terms,—"with this provision always, as it is hereby expressly provided and declared, that after the death of the said Mrs Ann Sempill the house above mentioned shall be liferented by the said Ann, Mary-Ann, Catherine, Rebecca, Sempill, Collins, and Jean Gordon Austin, and each of them, so long as any one of them shall remain unmarried, without paying any rent or acknowledgment for the said house to the sisters who shall happen to be married, and in the event of the marriage of said whole sisters, or on the death of all who shall remain unmarried, then the house above mentioned shall be sold, and the price thereof be divided among the surviving married sisters and the child or children of the deceased sisters equally, as the fee is provided in manner above written."

It does not appear when and to whom this disposition and deed of denuding by Dr Hay was delivered. Looking to its terms and purposes, I think it must be held in law to have been delivered at or shortly after its date. The granter, Dr Hay, died sometime in last century. The deed itself was recorded in the books of this Court on 14th September 1829, when it appears to have been in the possession of Miss Sempill Austin, who afterwards became the last survivor of the seven sisters, and from the date of the deed in 1782 down to the present time, not only no objection of any kind has been taken by any one to the terms of Dr Hay's deed, but no other title has been made up by any of the sisters, or by any one in their right, to the subjects in question. No infeftment followed upon Dr Hay's deed of 1782, and no feudal title has been made up to the subjects since its date.

Mrs Austin, the liferentrix, died long ago, and the whole of her seven daughters are now deceased, the last surviving daughter having been Miss Sempill Austin, who died upon 4th March 1864. Two of the daughters were married. Ann, who became Mrs Macgregor of Inverardoran, who has left descendants, and Catherine, who was Mrs General Robertson of Lawers, but who left no issue. The parties to the present case are all grandchildren of Mrs Ann Austin or Macgregor, being the children of Ann Austin or Macgregor's two daughters, Mrs O'Reilly and Mrs John Macgregor, and the questions put to the Court are limited to the fee of five shares out of the seven original shares, the other two of the shares being those of Catherine Austin (Mrs Robertson) and of Miss Collins Austin, both of which were specially conveyed, and are now said to belong to the Baroness Sempill. As to these two shares the parties to the present case are agreed, and no question is now before the Court. The Baroness Sempill is not a party to this Special Case.

In reference to the five-seventh shares now in dispute, the first two questions which arise are—*first*, Under what deeds or title were these shares held at the dates of the deaths of the five daughters, to whom the fee thereof originally belonged? and *second*, What is the legal effect of the terms of the title under which these five shares are now held?

Upon the first of these questions, viz., What is the regulating title under which this heritable subject was held at the deaths of Mrs Austin's seven daughters respectively, and upon which it is now held, I am of opinion that the regulating title, the terms of which must determine where the right of fee now is, is Dr Hay's disposition of 5th April 1782. The opposite view, contended for by the first parties to the case, that that deed was *ultra vires* of Dr Hay, and must be laid out of view, and that the regulating titles are the declarations of trust of 1777 and 1780, is, I think, altogether untenable.

It is no doubt true that failing any special directions by General Scott, or by the tutors named by him, each of Mrs Austin's seven daughters was simply and absolutely fiar of one-seventh of the property. But, then, in 1782 Mrs Austin's seven daughters, as absolute fiars, might take the title to themselves in any terms they chose. They were the absolute proprietors each of her own seventh share, and they might have required Dr Hay, who was simply trustee for them, to convey their property in such manner and with such destination as they might prescribe. If, therefore, they had subscribed Dr Hay's disposition of 1782 as consenters, or if in any other way they had recorded their desire to have the deed in its existing terms, or their approval or acceptance thereof, this would have been conclusive of the mere question of title. It would have made Dr Hay's deed the deed of the seven fiars themselves.

But I am very clearly of opinion that the want of an explicit written consent to Dr Hay's deed is sufficiently and most amply supplied by the circumstances which have occurred, and by the time which has now elapsed. The deed, as I have already stated, must be held to have been delivered at or about its date in 1782, now ninety-four years ago. It was executed for the very purpose of being delivered. It bears a clause of delivery of itself and of the whole title-deeds of the subjects. It must have been delivered before the death of Dr Hay, the trustee, and there is no trace of its having ever been in the possession of anybody else than the seven daughters, or one or more of them for behoof of them all. The deed was publicly recorded in the Books of Council and Session in 1829, which in law is equivalent to delivery, even as between third parties in an ordinary transaction, and it seems to have been acted upon in reference to a threatened encroachment. The terms of the deed were never objected to by any of the fiars, or by any one in their right, for a period of nearly a century, and all that time this deed has been held by or under the control of the fiars (for undoubtedly each of them had a right to it, and a right to challenge it or its special terms), as it formed their sole title to the property in question.

Nothing is more common than for a purchaser or disponee to take the title to the estate which he purchases in special terms or with a special destination, and although the purchaser may not sign the deed, or may not execute any written approval, yet if he accepts and holds the deed, its terms will as effectually regulate the destination of the subject as if the purchaser had executed a separate and special conveyance for this

purpose. In the present case this principle most strongly and clearly applies. It is, in my opinion, utterly out of the question, after the lapse of nearly a century to allow the grandchildren of the original fiars to challenge the terms of the conveyance which the fiars themselves took ninety-four years ago, and to which neither they nor anyone else have ever taken exception. I hold it clear, then, that the rights of parties must be determined by the terms of Dr Hay's deed of 1782 and by what has followed thereon, just as if that deed had been signed by all Mrs Austin's daughters.

Second, But there remain the further questions, —and these are not unattended with difficulty,— What are the legal effects of the terms of Dr Hay's deed of 1782 as applied to the circumstances which have occurred, and as affected by the deeds and services which have been expede by some of Mrs Austin's daughters. And here it is necessary to attend with some closeness to the terms of the deed, and to the circumstances which have occurred.

In the first place, I am of opinion that by the terms of the deed of 1782 the daughters of Mrs Austin were made ultimate and absolute proprietors each of one-seventh of the fee of the subjects. Each daughter was ultimate and absolute fiar in her respective seventh. I am laying out of view in the meantime the mother's liferent, and the successive liferents or rights of possession in favour of the unmarried daughters which may be held to have been created by the special declaration in Dr Hay's deed. Whatever be the effect of these successive liferents or quasi-liferents—for it is rather a right of occupation while unmarried than a proper liferent—I think that each daughter was absolute fiar of one-seventh share of the fee.

The terms of the dispositive clause are conclusive as to this. The subject is conveyed to the seven daughters nominatim, and to "their heirs and assignees whomsoever, equally in fee." The words are express and unambiguous, and they are repeated in the procuratory of resignation. The expression "heirs and assignees" leaves no room for doubt as to the complete vesting of the fee in each daughter—each fiar's heir is to take if she dies intestate, but she may sell, dispone, or assign to whom she pleases.

This full right of fee is not in the least affected by the further destination to the survivors of the seven sisters who are made fiars. This ulterior provision is a mere simple destination which may define and fix that the survivors will be the heirs of the predeceasers if no other disposition is made, or if the condition *si sine liberis* does not intervene, but it will not prevent each sister from disposing of her share as she pleases either *inter vivos* or *mortis causa*. There are no prohibitions against altering the order of succession, and there are no limiting or fettering clauses of any kind. It is a mere simple destination defeasible at pleasure, and if survivors take, they will take simply as heirs of provision or substitutes, their right being entirely defeasible at the pleasure of each original grantee. No doubt the deed is in some senses a mutual deed, but it gives mutual freedom, and precisely the same freedom, of disposal to each of the seven fiars.

Accordingly, this power of disposal was hardly seriously disputed at the bar, and it could not well be. It was admitted on all hands that one of the sisters, Catherine Austin or Robertson, who died without issue, had by her deed of settlement of 1826 validly conveyed her seventh of the fee to her sister Miss Collins Austin, and it was admitted that Miss Collins Austin, in her turn dying unmarried in 1852, left both her own share and Catherine's share of the fee to the Baroness Sempill under a deed of settlement and relative codicil or appointment, which took effect, and in virtue of which the Baroness Sempill is now in undisputed possession of two-seventh shares of the property. I take it therefore to be quite indisputable that each of the seven daughters had from first to last absolute right to dispose of her own seventh share of the ultimate fee.

And here, I think, I may dismiss the question of liferent or quasi-liferent, for whatever were the strict legal rights of the sisters in the liferent, they have settled these rights amicably, and the quasi-liferents have all long since expired. The clause is only of use as an aid in construing the ultimate destination.

In the next place, I am of opinion that under Dr Hay's deed there is a valid substitution or destination to survivors, which would take effect if any of the sisters predeceased without issue, and without making any disposition or settlement of their special shares. I cannot deny effect to the express destination in the deed, in the dispositive clause—"failing any of them by decease, to the survivors equally, heritably and irredeemably." No doubt this destination is not repeated *totidem verbis* in the procuratory of resignation, but the rule is quite fixed that if there is discrepancy between the dispositive clause and the procuratory the dispositive clause must rule, the procuratory in such a deed being a mere accessory clause for the purpose of completing the title. But there is really no discrepancy in the present case, for although the procuratory does not direct new infeftment to be given to the survivors, it substitutes what I hold to be an explanatory equivalent, for it directs that on the death of all the unmarried sisters "then the house above mentioned shall be sold, and the price thereof be divided among the surviving married sisters and the child or children of the deceased sisters equally, as the fee is provided in manner above written." The concluding words here used seem to me to be conclusive as to the meaning of the deed. The price is to be divided "equally" as the fee is provided in manner above written—that is, above written in the dispositive clause, for there is no other provision of the fee. I think it plain that the declaration merely provides the manner in which the subject is to be divided or the rights of parties therein made effectual when the ultimate destination comes into play. The subject being one indivisible residence instead of continuing joint possession or *pro indiviso* occupancy, it is to be sold, and the ultimate destinees are to divide the price.

Now, if I am right in this view of the destination, it follows that when Miss Sempill Austin in 1855 had become the last survivor of the seven sisters, she quite rightly and effectually, by general service as heir of provision, took up and vested in herself the three shares which had belonged to her three sisters, Jane, Rebecca, and

Mary-Ann, who had all died unmarried and intestate. She did so by expeding general service to them as their heir of provision under Dr Hay's disposition of 1782, and by virtue of these services she became vested in the three-seventh shares of the fee which had belonged to her said three sisters as completely as she was vested with her own original one-seventh share. No doubt she also expede services to the same ladies as one of two heirs-portioners to them, in order to provide for the contingency of the substitution in Dr Hay's deed proving ineffectual. But if I am right in holding Dr Hay's deed as the regulating investiture, the general services as heir-portioner may be left out of view.

I need scarcely add the reason why Miss Sempill Austin only served heir of provision to three of her sisters, although all but herself were then dead. The reason was that two of the others, Catherine and Collins, had disposed of their shares by settlement, and the remaining sister, Ann, had left issue, who, it was assumed, and I think rightly assumed, would take their mother's share.

At the death of Miss Sempill Austin, the last surviving sister, on 4th March 1864, the right to the shares stood thus—Two of the shares, namely, those of Catherine and Collins, belonged to the Baroness Sempill, in virtue of special conveyances. One was in the *hereditas jacens* of Ann (Mrs M'Gregor), and belonged to her heir or descendants, and the remaining four stood at Miss Sempill Austin's death fully vested in her person.

But Miss Sempill Austin left a disposition and settlement whereby she conveyed her whole estate, and in particular all right which she had to the St David Street property, to Miss Josepha Macgregor, and this conveyance took effect, and in virtue thereof Miss Josepha Macgregor possessed and enjoyed four-sevenths of the property from Miss Sempill Austin's death in 1864 down to her own death on 27th January 1872. I shall consider immediately to whom these four shares now belong.

The next question which requires to be decided is the effect of the provision contained in Dr Hay's disposition of 1782, that on the death of the last unmarried sister "the house above mentioned shall be sold, and the price thereof be divided among the surviving married sisters and the child or children of the deceased sisters equally." I am of opinion, although not without some hesitation, that this provision is effectual and binding on the ultimate beneficiaries, and operates as a conversion of the whole subjects as at the period fixed for the sale. It is a valid and effectual agreement and appointment by the whole seven daughters of Mrs Austin, the absolute and unlimited fiars of the property, as to what shall be done with it after their death. They absolutely direct it to be sold. It is not a mere option of sale or power of sale which is given—not a mere faculty which may or may not be exercised as one of the modes of dividing the property if no other method is agreed upon. It is the will of the testators, the absolute proprietors, as to how their succession shall be dealt with at a particular date, and as such the direction must be obeyed, unless the whole of the beneficiaries specially dispense therewith. It will have the same effect in law as in the ordinary case, where a testator expressly directs his trustees to sell his heritable estate and to divide the proceeds. It was suggested by your Lordship in the chair during the discussion that the clause was meant merely to secure the liferent or right of occupation of the unmarried daughters, and meant no more than that the property should not be sold till their death. There is great force in this view, and it has caused me much hesitation, but I have ultimately felt that the express words "the house shall be sold" are too strong to admit of a mere negative reading. They seem to be not merely a postponement of the powers of division which each fiar had at common law, but also an express contract that at a fixed period the subject shall be sold. It is this fixed and express contract or direction which fixes the intention of parties, and unless altered operates as conversion.

Still further, the direction is to divide the proceeds not among the heirs of the fiars, but among the surviving married sisters and the child or children of the deceased sisters equally. There were no married sisters to participate in the division, because both the married sisters predeceased Miss Sempill Austin, the last survivor of the whole, so that the direction, when applied to the actual facts which have occurred, is to sell the subjects upon Miss Sempill Austin's death in 1864, and to divide the price among the parties entitled thereto. Now, all the shares were disposed of by special deed, excepting the one-seventh share of Ann Austin or Macgregor, and in reference to it the question is, Whether her heir-at-law takes the price of her seventh share, or whether the same falls to be divided among all her children equally? I am of opinion that the latter construction is the true one. A direction to divide among children or bairns is quite different from a destination to heirs, although sometimes the objects may be the same. Where children are called or favoured without any mention of heirs, the general presumption is that all the children are meant, and not merely the eldest son, and especially in this case, where the thing to be divided is a sum of money, even although it be the produce of heritage. The natural meaning of the word children must receive effect, and all the children of Ann Austin or Macgregor, and not merely the eldest son or heir-at-law, are entitled to divide among them the price of their mother's proper seventh share of the property.

But who were the children of Ann Austin or Macgregor as at 4th March 1864, the date of Miss Sempill Austin's death? for that is the *punctum temporis* at which the property is to be sold and the price divided. I incline to think that the provision to children equally must be held, when applied to grandchildren, to be a provision *per stirpes*, and not *per capita*, and the result will be that the price of Ann Austin or Macgregor's seventh share will be divided, one-third to Miss Josepha Macgregor (Mrs Macgregor's granddaughter, through her son Sir Gregor Macgregor) or her representatives, one-third to the children of Mrs O'Reilly (Mrs Ann Austin or Macgregor's eldest daughter) equally among them, and one-third to James Macgregor for himself, and as representing his late brother Gregor Macgregor, the children of Ann Austin's younger daughter.

There only remains the question, To whom do the four shares which were effectually conveyed by Miss Sempill Austin's settlement to, and vested in, Miss Josepha Macgregor, now belong?

These shares are no longer under Dr Hay's deed of 1782. The destinations and provisions of that deed were effectually evacuated by Miss Sempill Austin's settlement, by which she gave them absolutely to Miss Josepha Macgregor. They now belong undoubtedly to Miss Josepha Macgregor's legal representatives, and the only question is, Were they heritable or moveable as in a question of Miss Josepha Macgregor's succession? and this question depends not upon the destination in Dr Hay's deed, but upon the effect of the direction to sell contained therein.

I have already explained my opinion that the direction to sell operated as a conversion of the subject as at 4th March 1864, the date when the direction took effect, and if Miss Josepha Macgregor had died at or shortly after that date, I think there can be no doubt that her share of the price, being four-sevenths of the whole, would have been moveable in her person, and would have descended to her executors, and not to her heirs. The difficulty is occasioned by the fact that Miss Josepha Macgregor survived for eight years without using or calling into operation the direction to sell, and it may very plausibly be contended that this implies an option to retain the heritage as heritage—and thus operates what is called a reconversion. This was the ground of the decision in *Grindlay* v. *Grindlay*, 9th November 1853, 16 D. 27, and the principle has been recognised in many other cases.—See some of them quoted in M'Laren on Succession, i. 223. In *Grindlay's* case, although the truster had expressly directed a sale, yet as the beneficiary took possession of the subjects themselves, and let them on a ten years' lease, and referred to them in a settlement as her heritable estate, this was held to operate reconversion.

In the present case, however, I do not think that reconversion can be held to have taken place. It was not in Miss Josepha Macgregor's power, by herself alone, to have dispensed with or negatived the direction to sell. It would have required the concurrence of all the beneficiaries, and the mere delay in enforcing a sale is not enough to operate as an election to take the subject *in forma specifica*. There are no circumstances disclosed in the present case sufficient to import reconversion or an intention to reconvert, and as the parties have finally agreed upon the facts, we cannot order any further inquiry as to whether there has been any election not to sell the property but to retain it as a *pro indiviso* whole. I am of opinion, therefore, that there are no *termini habiles* upon which reconversion could be rested, that Miss Josepha's four-seventh shares of the subjects must be held moveable in her succession, and now belong to her executors or heirs in moveables or next-of-kin. Her next-of-kin appear to be the whole children of Mrs O'Reilly, including Mrs Overend (who survived Miss Josepha) and the son of Mrs John Macgregor of Glengyle. These will all take *per capita*, as equally related to the late Miss Josepha Macgregor. Mrs Overend's children will take their mother's share.

The result is, that the first of the questions put in the Special Case must be answered in the negative, and the second question in the affirmative—that is to say, that the whole parties to the Special Case will divide among them the price of the five-seventh shares in the proportions above specified.

Lord Ormidale—I concur generally with Lord Gifford in the views he has expressed in regard to the various points in this case; and the only addition I desire to make relates to the question of constructive conversion arising out of the provision relating to that matter in the procuratory of resignation in the deed of 1782. I must own that the question whether and when conversion must be held to take place in this case appeared to me at one time to be attended with very considerable difficulty, and although I have latterly come to be of the same opinion on the point as Lord Gifford, I am unable to say that I am even yet entirely free from doubt on the point.

It cannot be disputed that parties may so destine property in its own nature heritable as to impress upon it the character of moveable estate *quoad* succession. The ordinary illustration of this is the case of heritable property being left in trust by a *mortis causa* disposition and settlement, with an express direction to the trustees to sell it in order that the proceeds may be divided and paid amongst certain beneficiaries. In such a case the property must, on the principle of constructive conversion, be dealt with as moveable. But here there is no trust, and no immediate direction for a sale. On the contrary, in place of it being the intention of the parties that the property should be sold when the deed of 1782 was obtained from Dr Hay, it is expressly provided by the deed that it should remain as it was, not only for the liferent use of Mrs Austin the mother, but after her death for the occupancy of her daughters, and each of them, till they were all married, or until the death of the last of the unmarried ones; and then only does a sale of the property appear to have been contemplated or directed to take place. Keeping this in view, I am disposed to concur with Lord Gifford in what I understand to be his opinion, that until the event so contemplated occurred, the house property in question could not, in any correct view that can be taken of the deed of 1782, be held on the principle of constructive conversion to be moveable estate. Any other conclusion would, I think, be inconsistent with the intention of the parties to the deed of 1782 as manifested in that deed. And, as was stated in a very marked manner by Lord Rutherfurd in *Grindlay* v. *Grindlay's Trs.* (9 Nov. 1853, 16 D. 35) in reference to a question of conversion—"It is one in regard to which the Court must go to a large extent on intention." I find also that, in conformity with the same principle, Lord Westbury remarked in *Buchanan* v. *Angus* (May 1862, 4 Macph. 379-80) when dealing with a question of constructive conversion, that till "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." Now, certainly in the present case the necessity did not arise, or the particular purposes were not answered, and the sale was not indispensable till the death of Miss Sempill Austin, when, accordingly, and not before, I concur with Lord Gifford in thinking that

the house property in question fell to be dealt with as moveable estate.

The Lord Justice-Clerk concurred.

Lord Neaves was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find—(1) that the parties of the first part are not entitled to the whole of the five-seventh shares of the property in question; and (2) that the parties of the second part are entitled to share in the value thereof; and appoint the expenses of both parties to be paid out of the said five-seventh shares, and decern; and remit to the Auditor to tax the expenses now found due, and to report."

Counsel for James Macgregor—Adam—Hon. H. J. Moncrieff. Agent—William Montgomery, W.S.

Counsel for W. D. J. O'Reilly and Miss O'Reilly—J. A. Crichton. Agent—Ebenezer Mill, S.S.C.

Counsel for Mrs Jones and Charles Overend and Children—Darling. Agent—George Burns, W.S.

Tuesday, May 23.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

WILLIAM HUTCHINSON & CO. *v.* THE ABERDEEN SEA INSURANCE CO.

Ship—Marine Insurance—Risk—Material Concealment—Change of Ship's Nationality—Merchant Shipping Act 1873 (36 *and* 37 *Vict. c.* 85).

A ship was transferred, by means of a fictitious sale, from a British to a Belgian register for the purpose of escaping the inspection provided by the Merchant Shipping Act 1873.—*Held* that failure to intimate the change of nationality when proposing for a new insurance, to a company with whom the ship had been previously insured, was material concealment, to the effect of voiding the policy, altaough, as a matter of fact, the ship was seaworthy.

In this case William Hutchinson & Co., merchants, Newcastle-on-Tyne, sued the Aberdeen Sea Insurance Co. for the sum of £701, 16s. sterling, with interest at the rate of 5 per cent. per annum from 15th December 1874 till payment, being the amount of an insurance effected by the pursuers with the defenders on 3d December 1874 against the loss of the vessel "John George" on the voyage from the Tyne to Cronstadt or Wyburg, while there, and thence back to the east coast of Great Britain.

The circumstances in which the insurance was effected, and in which the pursuers now claimed, are sufficiently set forth by the Lord Ordinary in the following interlocutor, dated 19th November 1875:—

"The Lord Ordinary, &c. . . . . finds in point of fact, *Primo*, That by policy of insurance dated 3d September 1874 the pursuers Messrs William Hutchinson & Co., who were part owners of the vessel 'John George,' in name of themselves and the other owners, effected through Messrs John and Robert Catto, shipbrokers, Aberdeen, an insurance against the loss of the said vessel at and from the Tyne to Cronstadt or Wyburg, while there, and thence back to the east coast of Great Britain, and that the said vessel was underwritten by the defenders in various sums, making up in all the sum of £725: *Secundo*, That thereafter the 'John George' proceeded to Cronstadt, and thence sailed for Leith; that during the voyage a severe gale arose, in consequence of which the 'John George' was, on the 9th of December 1874, driven ashore on the coast of Northumberland, and became a total wreck: *Tertio*, That the pursuers then claimed from the defenders, as underwriters, the sum of £701, 16s. as the amount due under said policy, but that the defenders have declined to make any payment under the policy, in respect that material facts were concealed from them by the pursuers at the time the insurance was effected: *Quarto*, That in April 1873 the pursuers, through said John and Robert Catto, had effected in Aberdeen a previous insurance on the 'John George,' and that the pursuers on that occasion, through the said Messrs Catto, informed the underwriters that the said vessel was registered at South Shields, and referred them to the French Bureau Veritas, which corresponds to the Lloyds Registry in England, in which the 'John George' was entered as an English ship, registered at South Shields as having been built at Sunderland in 1837, and as standing in April 1873 as having been classed in 1872 of the second class for two years: *Quinto*, That in the French Bureau Veritas current at the date of the policy sued on, the 'John George' still stood as a British ship, and of the same class as at the date of the former policy in April 1873; and that the defenders—nine of whom had been underwriters in the previous policy in 1873—all became underwriters on the policy sued on, in the belief that the 'John George' was a registered British ship, and that no information to the contrary was ever communicated by the pursuers to Messrs Catto, or reached any of the underwriters: *Sexto*, That prior to the 28th July 1874 the 'John George' had been transferred to a Belgian owner by a fictitious sale and mortgage, effected by James Primrose Lindsay, then the managing owner and principal part owner of said vessel, and that said vessel was on said date registered in Belgium as a Belgian vessel, and continued so registered at the date of the wreck, and that the British registry of said vessel was closed on 25th August 1874: *Septimo*, That the said transfer of ownership and change of registry were effected for the purpose of excluding the 'John George' from the operation of the Merchant Shipping Act of 1873, which empowered the Board of Trade to inspect and detain British vessels which were believed to be unseaworthy: *Octavo*, That such inspection by the officers of the Board of Trade is calculated to afford, and does afford, protection to underwriters in policies of insurance on British vessels for a single voyage, effected without any special survey on behalf of the underwriters: *Nono*, That the facts of the transfer of the ownership of the vessel and change of registry, were, or ought to have been, within the know-