But it is said the whole of this rests upon an unsound basis, because the extraordinary general meeting of the shareholders was not duly summoned, and, in particular, that the notices calling the meeting did not specify that this business was to be taken up by the meeting. Now, that is no doubt in violation of one of the regulations of the company, and one of the regulations which forms an article of association, and which is published to the world. But although third parties know that an extraordinary general meeting of the company must be summoned in that particular way, the question remains whether they are bound to inquire and to satisfy themselves whether a particular general meeting, and the resolution under which the directors are acting, was so summoned. I hold it to be perfectly clear law that they are not bound so to inquire, but, on the contrary, that they are entitled to presume that everything has been regularly done in the summoning of the meeting of the company at which such resolution is passed. I think any other conclusion upon such a question as that would be attended with the most monstrous and inexpedient results. Therefore I am very clearly of opinion that the defence founded upon the want of due summoning of the extraordinary general meeting is entirely without foundation.

Upon the other question, whether there was a concluded contract made by the parties so empowered to contract, I entirely agree with all your Lordships. I think, in the first place, that the correspondence and the minutes do not in themselves make a concluded written contract of sale, because some of the conditions subject to which that sale was to be made were not finally agreed to on both sides. I think, in the second place, with Lord Deas, and I understand with all your Lordships, that the mere attempt to adjust a draft-disposition which was never finally approved of by both could not have any such effect. I think, in the third place, that no possession of the ground was ever given by the company, and that even such kind of possession as the pursuer took without the assent of the company, or anybody authorised by the company, was of far too equivocal a character to get the better of the imperfection of the written contract, even if it had been given by the company to the pursuer.

I am therefore for adhering to the interlocutor of the Lord Ordinary, but I think it right to suggest that there is one finding in the interlocutor, viz. the first, which is quite unnecessary for the judgment, and with regard to which I confess I entertain some little doubt—in which his Lordship finds that the statements of the pursuer are not relevant. There may be a doubt about that, but it is not in the least degree necessary for the judgment. I think, therefore, we had better recal that part of the finding and assoilzie.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Lord Advocate (Watson)—Guthrie Smith—Asher. Agent—A. Morison, S.S.C.

Counsel for Defenders (Respondents)—Fraser—Balfour—Strachan. Agents—Watt & Anderson, S.S.C.

Thursday, June 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

HOGG *v.* HAMILTON AND OTHERS.

Heritable or Moveable—Conversion—Power of Sale.

A truster left heritable and moveable property to trustees, giving them a power of sale, and directing them to "divide" the whole free residue among his unmarried sisters. *Held (dub.* Lord Shand) that the direction to divide did not necessarily operate conversion of the heritage.

Opinion (*per* Lord Shand) that in a question whether conversion has taken place or not, arising sometime after the trust-deed has come into operation, it is necessary to look at—(1) the intention of the truster as expressed in his deed; (2) the actings of the parties taking benefit by it, which may stamp the trust property with one character or the other.

Actings of parties *held* (*per* Lord Mure and Lord Shand) sufficient to stamp an heritable estate, which trustees were empowered to sell and were directed to divide among them, with the character of heritage.

William Jamieson, who died in 1858, left a trust-disposition and settlement conveying to his sister Margaret, in the event of her surviving him and remaining unmarried, and failing her to his other unmarried sisters in succession, and William Neilson and John Webster as trustees, all his property, moveable and heritable, to be divided, after payment of his debts and a small legacy, among his unmarried sisters equally. He gave his trustees a power to sell his heritable property (consisting of a villa and garden and a small tenement of workmen's houses, under £2000 value in all) by public roup, private bargain, or on a valuation, to the eldest of his sisters that might desire it. The clauses of the deed are quoted at length in the Lord President's opinion.

The truster was survived by four unmarried sisters; Margaret alone of the trustees accepted. The moveable estate was divided among the sisters, and they continued to live together, dividing the rents of the property, which were drawn by Margaret. In 1860 Jane was married, and her sisters having obtained a valuation of the heritable property, paid her £500 as her share thereof, and took an assignation of her right to it by a deed dated 25th and 27th August of that year.

Of the three remaining sisters, one, Jessie, died in 1861, another, Margaret, in 1866, and the third Maria, in 1873. The pursuer in this case was the husband of Maria, and claimed as the heir in heritage of his wife's sister Jessie, her (Jessie's) share of the property in question. The defenders were Jessie's next-of-kin. The question between the parties therefore was, Whether the estate in question was heritable or moveable?

The pursuer, *inter alia*, pleaded—"The defences are untenable in law, and should be repelled, in respect that (1) on a sound construction of the trust settlement of the said William Jamieson, Jessie Jamieson's interest in the heritable subjects therein disponed was heritable, and on her death

passed to her heir-at-law; and (2) *esto*, that the said interest was originally moveable, it became heritable by reconversion, and was so *quoad* the said Jessie Jamieson's succession on her death, in consequence of her having elected to allow her share of the said heritable subjects to remain and be dealt with as heritage throughout her lifetime."

The defender pleaded that Jessie Jamieson's interest in the trust-estate was moveable.

The Lord Ordinary found the estate heritable, adding the following note:—

"*Note.*—. . . . Two questions have arisen —(1) Whether the heritable estate left by the truster is by force of the terms of his settlement to be treated as moveable *quoad* his succession? and (2) whether, assuming this to be so, his residuary legatees, of whom Jessie Jamieson was one, so dealt with the property left to them as, nevertheless, to make it heritable *quoad* their succession? . . . . . .

"It will be observed that Jessie's share consisted of her own original one-fourth share under her brother's settlement, and of one-third part of her sister Jane's share, to which she had acquired right under the deed of August 1860.

"Had the case rested on the construction of the trust-disposition and settlement above, the Lord Ordinary is inclined to think that its terms would have operated as a conversion of the truster's heritable estate into moveable *quoad* his succession. There is no direction to sell, but the trustees are directed to "divide" the residue of his means and estate equally among his four sisters. Having regard to the amount and condition of the means and estate which fell to be divided, the division could not have been made except by the conversion of the heritable estate into money. A conveyance of the heritable property to be held by the residuary legatees *pro indiviso*, would not appear to be a sufficient compliance with the truster's direction "to divide" the residue—*Fotheringham's Trustees* v. *Paterson*, July 2, 1873, 11 Macph. 848; and the truster therefore must be held to have intended a sale of the subjects—*Buchanan* v. *Angus*, May 15, 1862, 4 Macqueen 374.

"But it appears to the Lord Ordinary that the residuary legatees, who were the only parties interested, elected that the heritable estate should not be sold and divided among them. When Jane was married in 1860, and required payment of her share, the necessity then arose of dealing with the heritable estate, and of selling it and dividing the proceeds. The estate, however, was not sold; but in order to avoid a sale the other three residuary legatees bought up Jane's interest in it. It appears therefore to the Lord Ordinary that the estate was not sold, because the three remaining residuary legatees resolved, as they had a right to do, being the only persons interested, that it should remain invested as it was. In a question therefore as to their succession, the Lord Ordinary thinks that it must be regulated according to the nature of the subject, and, being heritable, that Jessie's right to a share went to her heir in heritage, whom the pursuer represents—*Williamson* v. *Paul*, Dec. 15, 1849, 12 D. 372; *Grindlay* v. *Grindlay's Trustees*, Nov. 8, 1853, 16 D. 27."

The defender reclaimed, and argued—The first question here is—What was the character of the trust under William's deed? The answer to that is to be found in the answer to this question, viz. Could the trust purposes have been carried out without a sale? We say they could not. That is illustrated by the cases of *Fotheringham* and *Buchanan*, quoted by the Lord Ordinary; if sale be "indispensable for the execution of the trust," then the trust estate is moveable. Lord Fullerton's opinion in *Advocate-General* v. *Blackburn's Trustees*, November 27, 1847, 10 D. 166. Also opinions of Lord Justice-Clerk Patton and Lord Cowan in *Mackenzie* v. *Mackenzie*, February 14, 1868, 6 Macph. 375. In the case of *Boag* v. *Walkinshaw*, June 27, 1872, 10 Macph. 872, provisions very similar to the provisions here were held to have operated conversion. The second question is—Was that character affected by the transactions of his beneficiaries? If it was not originally heritable, it did not become more so by Jane's marriage or Jessie's death, for it must still have been sold before a division could take place—*Williamson* v. *Paul*, December 15, 1849, 12 D. 372.

Argued for the pursuer—Is there constructive conversion here? No; for the trust purposes might have been satisfied without a sale, *e.g.*, by a conveyance *pro indiviso* as was suggested in *Auld* v. *Mabon*, December, 8, 1876, 14 Scot. Law Rep 144, 4 Rettie 211. There is no conversion where a sale is not necessary—*per* Lord Justice-Clerk in *Smith* v. *Wigton's Trustees*, Jan. 9, 1874, 1 Rettie 358. Further, all concerned have treated this as heritable; indeed their actings were the best possible answer to the contention on the other side that a sale was inevitable to satisfy the trust purposes. These actings were a very important consideration—Lewin on Trusts, 788; *Davidson* v. *Kyde*, Dec. 20, 1779, M. 5597; *Macgregor and Others*, May 20, 1876, 13 Scot. Law Rep. 450.

At advising—

Lord President—The late Mr William Jamieson, who appears to have been a surgeon residing at Bellshill, left two small heritable properties in that neighbourhood, and also moveable estate to the amount of £1200. This estate, heritable as well as moveable, he disposed of by a deed dated 8th August 1854, about four years before his death. His object plainly was to provide for his unmarried sisters, and he declares his will to be that if any of his sisters who are still unmarried are married during his lifetime they shall not have the benefit of any of the provisions contained in this deed. That being his object, he carries it into execution by appointing a body of trustees, one of whom was to be his eldest unmarried sister at the time, who was to be a trustee *sine quo non*. The two gentlemen who were appointed trustees with her did not accept, and Miss Margaret Jamieson became sole trustee The instructions of the truster in his deed were —first, to pay his debts; second, to pay a legacy of £10 to an old servant; and then comes that purpose of the deed with which we are specially concerned. He says—"I desire, instruct, and enjoin my said trustees, and the survivors, survivor, acceptors or acceptor of them, to divide, and they shall divide, the whole free residue of my means and estate equally amongst the said Margaret Jamieson, Jane Jamieson, Maria Jamie-

son, and Jessie Jamieson, my unmarried sisters, share and share alike, excluding all others from any benefit or interest under this deed or in my succession:. Declaring that should any of my said sisters predecease me, or be married at the time of my death, then the share or shares of such deceasor or deceasors, or of such as may be married at the time of my death, shall be devisible equally amongst the survivors who shall be unmarried at the time of my death; or if only one shall survive me and be unmarried, then she shall be entitled to the whole of the free residue of my whole means and estate: Further, declaring that my said trustees shall have power to sell and dispose of my heritable property, either by public roup or private bargain, or they may have it valued by a competent person, and either of my said unmarried sisters, and who shall be unmarried at the time of my death, having priority of choice according to seniority, shall have a right to purchase the same at such valuation."

Now, there are some things perfectly clear on the face of these provisions. In the first place, the sisters were to have equal shares, and the trustees had power to sell the heritable estate, but there is no direction to sell. The imperative direction is to divide the residue equally among his unmarried sisters. That is the only part that requires construction. Now, t is to be taken in connection with the power of sale. That need not be exercised at all, and if it is, it may be done in various ways, either by private bargain or by public auction, or handed over at a valuation to the eldest sister that may desire to have it. It has been contended that an imperative direction to divide an estate, consisting, as this did, partly of heritage and partly of moveables, necessarily implies a direction to sell the heritage. I do not feel disposed to put any such limited construction on the term "divide." I would apply to it the same construction as has been applied to the term "pay," which is often read as meaning to convey or transfer, and in such a case as this it may mean to dispone an heritable estate. In the same way, I think the term "divide" means to pay or transfer to a plurality of beneficiaries, and that may be done by giving each a share of equal value with the others in some other way than by selling the estate and dividing the price. In short, the term "divide" advances one a very short way in determining whether the testator had an intention of converting the estate from heritable to moveable.

Now, that being so, the only thing left is the power of sale; and the existence of that power will not operate conversion. To operate conversion there must be a direction to sell, or a necessity of doing so, in order to carry out the purposes of the trust. As there is no direction to sell here, we have to consider merely whether it was necessary for the purposes of the trust that the heritable estate should be sold. In dealing with that point we gain considerable light on the question by seeing what was actually done by the beneficiaries and the trustee. They divided their brother's moveable estate, and then all lived together, the eldest sister, as I have said, being trustee, simply keeping the heritable estate and living on the rents, which were collected by the eldest sister Margaret, and divided by her. Then when one of them came to be married they entered into an arrangement by which any necessity for a sale was avoided. They took a hint from their brother's deed, and ascertained the worth of the estate by a valuation, and then paid their sister Jane her share of the estate, getting from her a conveyance of her right and interest therein. Then from that time the three sisters who are left go on to possess the heritable estate, and it becomes their heritable estate in every substantial sense of the words. It mattered very little that one of the three was trustee as well as beneficiary. She might very easily have granted a conveyance divesting herself of the character of trustee. Nor was there anything inconsistent with the wishes and intention of the truster in their conduct. Therefore I do not think the Lord Ordinary is right in dividing the question into two parts. It is all one. This property was not directed to be converted, nor was it necessary to convert it for the execution of the trust purposes, which is practically shown by what has happened. In point of law, then, as well as in fact, the heritable estate was heritage in the persons of these sisters after the assignation granted by Jane, and accordingly the succession of Jessie, with which we are dealing here, has not been altered in character since the death of the truster, and is still, as it then was, heritable.

Lord Deas—There is no doubt that the words used by the testator in reference to his whole estate—"I desire, instruct, and enjoin my said trustees, and the survivors, survivor, acceptors or acceptor of them, to divide, and they shall divide, the whole free residue of my means and estate"—are a direction to divide, and not a mere power of division; but, as your Lordship says, a direction to divide does not necessarily imply a direction to sell or to convert the estate. The word "divide" is susceptible of another construction, and is to be construed with reference to the subject with which the testator is dealing. In the case of *Buchanan* v. *Angus* the direction was to pay, and that is a much stronger word in favour of a conversion than the word "divide." You must therefore look at the nature of the estate at the date of the deed and at the death of the truster before you can say what his intention was as to its conversion. Where it is heritable, the words "pay" or "divide" will be construed into meaning that you are to keep it heritable; that is the import of the case of *Buchanan*. This word "divide" may be satisfied in many ways. If there is no other way, a conveyance to the beneficiaries *pro indiviso* will satisfy it, although I do not say that it necessarily implies such a conveyance.

The provision made by the truster here as to the marriage of any of his sisters before his death plainly shows that he meant his unmarried sisters to go on living together, and points to this, that nothing could suit his purpose better than a *pro indiviso* conveyance to them.

There is but one question here, as your Lordship has pointed out, and the solution of it you will find in the deed. What these parties have done was to follow up the intention of the maker of the deed, and that has had no effect in altering the character of the succession.

Lord Mure—The Lord Ordinary has dealt in his note with two separate points—First, What is the effect of the clause of the deed that your Lordship has quoted? Second, What is the position of his estate after the way in which parties have dealt with it? If it had been necessary to separate these questions, I should have had considerable difficulty in concurring with his Lordship in his solution of the first of these questions, viz., that the estate was by this clause rendered moveable. I think it was heritable, because there was no direction to sell, and no necessity for the administration of the trust that there should be a sale. The best evidence of that is that parties have up to this time managed to avoid a sale, and yet have carried out the wishes of the truster. I find therefore it is not necessary, and being of the opinion which—I find from the short report in the Law Reporter—I expressed in the case of *Auld* v. *Mabon*, "that unless such conversion is indispensable, we cannot hold that the character of the succession is moveable," I must hold that the estate remained heritable. I see no difficulty about conveying to two or more beneficiaries a *pro indiviso* right where trustees have such powers as they had in that case, or as they have here. Therefore, if it had been necessary to look at the character of the estate at the date of the truster's death, I should have held it to be heritable. I concur with his Lordship, however, in thinking that the interests of the beneficiaries have become stamped with an heritable character from the actings of parties since they took over their sister's rights.

Lord Shand—The result of my opinion is in concurrence with that of your Lordships, but I cannot agree with some of the views expressed by your Lordships. My opinion is in accordance with that of the Lord Ordinary as to the double nature of the case. In every case where a deed dealing with heritage followed by actings of parties comes before the Court, two questions necessarily arise—one, whether the intention of the granter of the deed produces conversion? and, in the next place, assuming that to be so, whether the actings of parties have shown a determination to stamp the estate as heritable? That there must be two questions is obvious from this consideration, that the intention of the granter of the deed has to be interpreted as at the date of his death, and that intention cannot be affected by the actings of parties. Now, I am rather of opinion—although after what has fallen from your Lordships I do not wish to express it confidently—that the truster's deed did operate a conversion, as the Lord Ordinary thinks. A division could not have been made except by sale unless the beneficiaries gave their consent to a different course. I quite agree with your Lordship in thinking that the word "divide" does not necessarily imply conversion; but I think that the *prima facie* meaning of that word in the case of a mixed estate of this kind, when you are dealing with the destination of the residue, is that there shall be a sale. I have heard no suggestion from the bar as to how this subject could have been divided otherwise. That part of the clause about his sister being entitled to get the property upon a valuation, rather bears out the view that the truster thought that in order to divide the estate it was necessary there should be a sale.

But I find a very clear and sound ground of judgment in the Lord Ordinary's note, which has been substantially concurred in by your Lordships. The actings of parties have established the character of the estate as heritable. They divided the moveable estate at once, but retained the heritable estate, buying out the interest of one of their sisters, and leaving the heritable estate among the others.

Lord Deas—With the permission of your Lordship and of my brother Lord Shand, I wish to add a word of explanation for the sake of the law. It would be most misleading to the profession if it were thought that the question of conversion must be decided as at the date of the truster's death. That is not so.

The Court adhered.

Counsel for Pursuer—Asher—Moncrieff. Agent—Alex. Morison, S.S.C.

Counsel for Defenders — Trayner — Rhind. Agent—J. Young Guthrie, S.S.C.

Friday, June 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DUKE OF HAMILTON *v.* BUCHANAN.

(*Ante*, p. 253.)

Landlord and Tenant—Lease—Constitution of Lease—Offer.

Two offers were made for a lease of a farm, neither of which was accepted or rejected in writing. Possession by the offerer followed, which the landlord understood had reference to the second offer, the terms of which in an action he called upon the tenant to implement. The tenant said the possession had followed on both offers. After a proof—*Held* (1), on the evidence, that there had been a misunderstanding, the landlord ascribing the possession to the second offer, the tenant to both; and (2) that, in the circumstances, the legal inference was that there was no completed contract, and that decree fell to be given in terms of a conclusion of the summons to that effect.

This case (the nature of which has been explained *ante*, p. 253) now came to be discussed upon the proof which had been led in terms of the interlocutor of 26th January.

In addition to the conclusion for declarator that a valid lease had been constituted between the parties, and that the defender was bound to implement it, the pursuer obtained leave to conclude further that "in the event of decree in terms of the foresaid conclusions or any of them not being pronounced, it ought and should be found and declared . . . that no valid contract of lease . . . had been constituted, and that the defender has no right or title to possess the said lands;" and there followed conclusion for a declarator of removing against him. There was a plea in law to the same effect.