Reid Cotton, now wife of the said Admiral Sir James Hope, for preservation as well as for publication, in the register of the county of Linlithgow." Now, the defender maintains that the effect of that was to infeft Sir James Hope of new in the estate of Carriden, and that his title thereafter depended on that infeftment; that there was a reservation in that marriage-contract for him to execute a conveyance of this estate failing children of the marriage, and that he has actually made such a settlement of the estate, and that Miss Hope acquired a right to the estate by virtue of that settlement and conveyance from the trustees there appointed.

Now, I entirely concur with the Lord Ordinary in the view he takes of this, namely that the effect of that infeftment was not to destroy or invalidate or affect in any way the previous infeftment of Sir James Hope in the fee of this estate, and that down to the day of his death this estate depended upon his infeftment taken in 1829. The effect of the registration of the contract was merely to secure the liferent interest of Lady Hope, and that was its only effect. As to the circumstance that this estate may have been conveyed by the trust-disposition and settlement of Sir James Hope, and that Miss Hope may have a personal title under and in virtue of that trust-disposition and settlement, that is no affair of the superior's; it is a matter into which I think he is not entitled to inquire at all. These are personal titles which he has no right to see. What is presented to him is a good service of this lady as heir of her deceased brother, who was vassal last entered, and in my opinion the superior is bound to be contented with a casualty of relief.

Lord Deas—I am very clearly of the same opinion.

Lord Mure—The basis of this claim is rested upon this title said to have been made up by Sir James Hope on his marriage. I concur in the view the Lord Ordinary has taken of this matter, that by anything done at that time there was no superseding of the title made up by Sir James Hope at a much earlier period in 1829, and that he stood invested under that title at the day of his death. In these circumstances I think we must adhere to the Lord Ordinary's interlocutor.

Lord Shand—I am of the same opinion. The case upon the defence, as it was originally stated, of the Duke of Hamilton was contained in the first plea-in-law—[*reads*]. That was the full defence pleaded; and it was maintained entirely on the ground that Sir James Hope had exercised the power reserved to him in the marriage-contract, and left the trust-disposition and settlement of 1878 by which he conveyed the lands to certain trustees, and that the pursuer had acquired the lands by a conveyance from these trustees. The Lord Ordinary has disposed of that point in the second branch of his judgment, and there was no argument maintained against it—the point was abandoned at the bar. The argument thereafter was maintained only upon a plea-in-law which was added in the course of the discussion, to this effect—[*reads*]. Now, without going into the grounds upon which your Lordships have proceeded, I think there is a complete and obvious answer to that plea, and it is this—that whatever may be the destination in that marriage-contract, this lady who proposes now to take up the property, and has taken it up, is the heir of line of the last vassal Sir James Hope; and it is quite settled by a series of cases that if the heir of line is presented to the superior or demands entry from the superior, that is at once an answer to any claim for composition. I refer in support of that to the elaborate opinion of Lord Wood in the case of *The Marquis of Hastings*, which was referred to in the course of the discussion, reported in 21 Dunlop, 871; and to the old case of *Mackenzie* which was very fully discussed in that opinion. These two cases settle the law beyond question, and upon that ground, and that ground alone, I desire to base my opinion on this part of the case. I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Pearson. Agent—John Hope, W.S.

Counsel for Duke of Hamilton—Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 6.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

AITKEN AND OTHERS *v.* MUNRO AND OTHERS.

Heritable and Moveable—Conversion—Discretionary Trust for Sale.

A testator by his trust-disposition and settlement conferred upon his trustees, with the view of enabling them to execute the purposes of the trust, "the most ample powers which any proprietor whatever can possess and enjoy, or which if in life I could exercise in the sale and disposal of my lands, heritages, and moveable means and effects, with power to them . . . . to convert the whole of my estate, heritable and moveable, into money." He also gave them power, if they should see fit, to continue to hold and retain the heritable subjects. The trustees, in the administration of the trust, retained a portion of the heritage unsold for many years in order that the truster's widow might enjoy a liferent bequeathed to her of part of it, and to provide for an annuity also bequeathed to her. In a question between the heirs and the next-of-kin of certain of the beneficiaries after the widow's death, relating to the heritage retained to meet the annuity, *held* (*aff.* judgment of Lord M'Laren—*dub.* Lord Deas) that as the exercise of the power to sell was entirely in the discretion of the trustees, the heritage, so long as not actually converted by them into money, was not constructively converted by the will.

By deed of settlement dated 18th June 1827, and duly recorded, Robert Aitken, builder in Glasgow, who died in August 1827, disponed in favour of certain trustees named therein, for the purposes

of the deed, his whole estates, heritable and moveable, excepting his household furniture, which he made over absolutely to his wife.

By the second purpose of the trust-deed the trustees were instructed to set apart the trustee's house in Gallowgate Street, Glasgow, as a residence for his wife in the event of her surviving him, and they were also directed to pay to her an annual sum of £250 so long as she should continue his widow, and it was left to their discretion to set apart a portion of the heritable subjects in security of this annuity.

By the last purpose of his trust-deed the truster appointed the whole residue of his estate, heritable and moveable, including the fee of the heritable property or stock set apart for the annuity, and also the house left to his widow in liferent, "or the price thereof" "to be divided" by the trustees among his children equally, share and share alike, to be payable to those of full age at the date of his death at the first term of Whitsunday or Martinmas after his death, and to those in minority at his death on their respectively attaining majority, or if daughters being married, declaring that notwithstanding what was before written the fee or the capital sum of the property set apart to meet the annuity, and the house appointed for her residence, should be retained by the trustees "aye and until the same shall be relieved and disencumbered of the rights of the said Jean Shanks or Aitken therein, either partially by her second marriage or by her decease. Thereafter he made this provision—"And with the view of enabling my trustees or trustee to execute the purposes of the trust hereby confided to them, I do hereby confer upon my said trustees or trustee the most ample powers which any proprietor whatever can possess or enjoy, or which if in life I could exercise in the sale and disposal of my lands, heritages, and moveable means and effects, with power to them, as soon after my death as they may think expedient for the benefit of the trust, to convert the whole of my estate, heritable and moveable, into money, but with the exception always of the house or lodging presently possessed by me, to be appropriated as before provided for the residence of the said Jean Shanks, my wife, and which house or lodging shall not be sold until after the death of the said Jean Shanks, and with power also to my said trustees or trustee, notwithstanding anything hereinbefore written, if they shall think fit, to continue to hold and retain the heritable subjects belonging to me, or any part or parts thereof, and to suspend the actual appointment and division of the same among my children as before provided until the death of the said Jean Shanks."

The testator was twice married. He had six children by his first wife, and five by his second, Jean Shanks or Aitken. He died in August 1827 survived by his wife, who lived until May 1881.

The trust-estate consisted for the most part of heritable property in Glasgow and elsewhere. The trustees from time to time realised the whole of the moveable estate and a part of the heritable estate, and divided the proceeds thereof among the beneficiaries entitled thereto. The only assets retained by the trustees and not divided before the date of this multiplepoinding consisted of certain tenements and shops in Glasgow, the rental of which amounted to more than £700 per annum, and which property was retained by them in security of the widow's annuity. As the rental of these tenements was in excess of the annuity, the surplus rents were divided amongst the parties entitled thereto, except the shares falling to the representatives of Mrs Margaret Aitken or Munro, afterwards Leitch, and Mrs Agnes Aitken or Walker, both daughters of the truster, whose shares were consigned in respect of conflicting claims by their representatives in heritage and *in mobilibus*. Mrs Leitch was twice married, and with regard to her share, which amounts to about £738, several questions arose—First, as to whether it was to be regarded as heritable or moveable in regard to her succession; and second, whether it was liable to be attached by the creditors of her second husband, who died insolvent, and whose estates were realised by her as executrix under the supervision and management of a committee of his creditors.

Mrs Walker's interest in the surplus rents amount to about £174. The whole amount was claimed by her only son Robert Walker, in respect that it was heritable, while a portion of the sum was claimed by his sister in respect that it was moveable. The amount was accordingly consigned by the trustees, who on July 19, 1882, raised an action of multiplepoinding, calling as defenders all the residuary legatees or their representatives.

The unsold heritable property and the consigned sums of surplus rents formed the fund *in medio*, and the main question between the parties was—Whether the estate was to be treated as heritable or moveable in relation to the succession of the residuary legatees?

The competition lay between the heirs and the next-of-kin of the issue of Mrs Leitch and Mrs Walker. The heirs of each of these ladies contended that the share falling to each respectively was on a just construction of Mr Aitken's settlement heritable in their succession. Their next-of-kin contended that the share of each respectively was moveable. Archibald Munro, as a grandson and heir-at-law of Mrs Leitch, and Robert Walker, son of Mrs Walker, claimed the fund *in medio* so far as falling to these ladies respectively, on the ground that it was heritable.

On the other hand, Patrick Walker Leitch and others, the children of Mrs Margaret Munro or Leitch by her second marriage, maintained that upon a sound construction of the trust-settlement the share of residue bequeathed to their mother was moveable, that it fell to their father *jure mariti*, and that they were entitled to participate in her share of the fund *in medio* to the extent of two-thirds as representing their father, and of the remaining one-third as having fallen to their mother *jus relictæ* on his death, and so passed to them.

A claim was also put in by the trustees of Mr Robert Walker of Lethanhill, husband of Mrs Walker. They maintained that the residue should be treated as moveable, and further that as the bequest of residue under the truster's disposition was not declared to be exclusive of the *jus mariti* of any husband his daughter might marry, Mrs Walker's share therefore fell *jure mariti* to her husband Robert Walker, and his trustees were thus in right thereof.

On 14th November 1882 the Lord Ordinary pronounced an interlocutor ranking and pre-

ferring certain claimants on the footing that the heritage which had not been sold by the trustees was to be treated as heritable in the succession of the residuary legatees of the truster.

"*Opinion.*—In this action of multiplepoinding the fund *in medio* consists of heritable property still unsold, part of the trust-estate of Robert Aitken, who died in 1827, and of a share of the proceeds of other estate sold in 1864. The main question is, whether the estate is to be treated as heritable or moveable in relation to the succession of the residuary legatees? Two of the truster's children, Mrs Leitch and Mrs Walker, died leaving issue, and their respective heirs and next-of-kin are competing for the undistributed part of the residue accruing to their families. On the part of the next-of-kin of the ladies it is contended that the heritable property is constructively converted under a direction to sell which is said to be contained in Mr Aitken's settlement. I was referred to various clauses of the settlement, but the only one which I regard as material is the clause commencing—'And with the view of enabling my said trustee or trustees to execute the purposes of the trust hereby confided to them, I do hereby confer upon my said trustees or trustee the most ample powers which any proprietor whatever can possess or enjoy, or which if in life I could exercise in the sale and disposal of my lands and heritages and moveable means and effects.' It appears to me that the clause commencing with these words is not an absolute and unqualified trust, but is in the clearest and plainest language a discretionary trust or power to be exercised according to the opinion of the trustees and exigencies of the trust as time and circumstances may determine. I am not sure that the case of a discretionary trust for sale has arisen for decision in any of the recent cases, but it is considered by Lord Westbury in *Buchanan* v. *Angus*, 4 Macq. 379, in a passage which has not received so much attention as some of the other observations of that eminent judge in his review of this branch of the law. I refer to those expressions in which his Lordship intimated an opinion that in the case of a qualified trust contingent upon necessity or the exercise of a discretion, then 'until the discretion is exercised or the necessity arises and is acted on, . . . there is no change in the quality of the property, and the heritable estate must continue to be held and transmitted as heritable.' It is, I think, implied in the passage quoted, that when the discretionary power is exercised in a due course of administration, or when in a due administration a necessity has arisen for an immediate sale, conversion will take place in accordance with the testator's will, and the estate will descend as moveable estate, although the estate or its price may be undistributed in the hands of the trustees when the succession opens. I think this is a sound view of the law applicable to such a case as the present; it is simply an extension of the established doctrine of constructive conversion to the case of contingent and discretionary powers, with the necessary qualification,—an important one in my view,—that the effect of the power in altering the succession is suspended until the occurrence of the event or the exercise of the discretion which brings the power into operation. The sale in order to have such an effect must also be in a proper course of administration. An unnecessary or capricious sale would not be a valid exercise of the power, and it would obviously be improper to attribute any effect as regards succession to a sale not in terms of the power.

"In the present case no question arises as to the validity or propriety of the acts of the trustees. The trust-estate seems to have consisted chiefly of heritage, and sales were made from time to time, apparently with the approval of, certainly without objection on the part of, the beneficiaries. I am informed by counsel that sales were made soon after the truster's death, at least before the year 1829. Several sales of property in Glasgow and Greenock were effected in the year 1864, as shown by the minutes printed with the record. Of the proceeds of these sales, a sum amounting with interest to £738, 1s. 8d., being Mrs Leitch's proportional share, was deposited in bank, and is part of the fund *in medio*. That this is moveable succession I do not doubt, because the property which it represents was not only constructively but actually converted in Mrs Leitch's lifetime with a view to immediate distribution, although the money was not paid to that lady.

"In connection with this sum a subsidiary question arises. Mrs Leitch was previously married to a gentleman of the name of Munro, and there are issue of both marriages. The children of the first marriage claim that the fund should be divided equally amongst Mrs Leitch's children. The children of the second marriage claim the whole fund through their father, to whom they say it passed by the legal assignation of marriage. If my opinion is well founded, that there was no conversion under Mr Aitken's will until the trustees had sold or resolved on a sale, then Mrs Leitch's interest at the commencement of the trust was a heritable interest, and did not pass to her husband by marriage. It follows, on the principle of *Cuthill* v. *Burns*, and other cases, that a subsequent conversion of that interest from heritable to moveable would not bring it within the dominion of the husband. On the contrary, the money, unless given to the husband as a donation, would remain the property of the wife, might be reinvested by her in heritable securities, and, even if not restored to its heritable condition, would descend to her representatives as her succession. On this question, accordingly, I find for the representatives of Mrs Leitch, being the children of both marriages.

"With regard to the unsold heritable property, which is the chief part of the fund *in medio*, my opinion is that the interest of Mrs Walker and Mrs Leitch in this part of the residuary estate was heritable in their respective lifetimes, and that their heirs-at-law are entitled to be preferred. The trustees had an absolute discretion to sell or not to sell. It does not appear that they were called upon by any of the beneficiaries to sell off the remaining trust property, and that there was a certain convenience in retaining this property, because it formed a security for the annuity payable to Mrs Aitken, though doubtless larger than was necessary for that purpose. I cannot say that in retaining this property, with the tacit approval of all concerned, the trustees are to be held to have exceeded their discretion. If they were within their discretion, it follows from the principles on which my judgment is based,

that whether the trustees have sold or have refrained from selling, the quality of the succession is determined by the event.

"The remaining entry in the account of the fund *in medio* consists of the rents of the unsold heritable property. These, in each, so far as accruing in the lifetime of the truster's daughter, will descend as personalty. The rents which have accrued after her death belong to the heir-at-law as fruits of his heritable estate."

The claimants Patrick Walker Leitch and others reclaimed, and argued — The language used in the residuary and other clauses of the deed bearing on the question was more appropriate for the conveyance of moveables than of heritage. Though no absolute direction was given to sell the heritage, there was an intention in the testator to make this fund moveable, from which a direction might be implied. It was intended that when the widow died the property was to be sold for division. The words in the deed, "or the price thereof," following the direction that the residue should be divided among the truster's children, favoured the reclaimer's contention. There were three elements favouring conversion—a residuary bequest, a mixed estate, and a number of beneficiaries.

Authorities—*Davie*, M. 4624; *Patrick* v. *Nichol*, December 7, 1838, 1 D. 207; *Baird* v. *Watson*, December 8, 1880, 8 R. 233; *Lord Advocate* v. *Blackburn's Trustees*, November 27, 1847, 10 D. 166; *Smith* v. *Advocate-General*, 14 D. 585; *Buchanan* v. *Angus*, May 15, 1862, 24 D. (H. of L.) 5, 4 Macq. 374; *Somerville* v. *Gillespie*, July, 6, 1859, 21 D. 1148; *Boog* v. *Walkinshaw*, June 27, 1872, 10 Macph. 872; *Fotheringham's Trustees*, July 2, 1873, 11 Macph. 848; *Nairn's Trustees* v. *Melville*, November 10, 1877, 5 R. 128; *Duncan* v. *Thomas*, March 16, 1882, 9 R. 731; *Hogg* v. *Hamilton*, June 7, 1877, 4 R. 845; *Auld* v. *Mabon*, December 8, 1876, 4 R. 211; *Williamson*, March 16, 1843, 2 Bell's App. 89.

Argued for Archibald Munro and Robert Walker—The presumption was that this estate should remain in the same quality as at the testator's death. It was argued on the other side that the direction that the residue should be "divided" among the truster's children was equivalent to an instruction to convert prior to division, but if the discretion of the trustees had not been exercised prior to division, it was not to be exercised for the purpose of division. As a sale was not in the circumstances indispensable, it could not be held as directed by the truster, who admittedly had not expressly ordered it. No conversion had taken place; more definite instructions would be required to warrant it.

At advising—

Lord President—The object of this multiplepoinding is to distribute the residue of the trust estate of Mr Robert Aitken, builder in Glasgow, who died in 1827 leaving a settlement dated 18th June of the same year. The question to be determined is, whether the estate which is now to be distributed is to be treated as heritable or moveable in relation to the succession of his family, or at least of two of his family, whose estates we are now concerned with, and who died in 1869 and 1875 respectively, while the trust was still in operation and the residue could not be divided, at least for a considerable time.

The deed under which this question arises specially conveys to trustees certain heritable subjects—there are six different house properties in Glasgow, and one property in Greenock specially conveyed to the trustees; and the testator having provided his widow with the dwelling-house in which he himself lived, gave her also an annuity of £250 a-year, and in order to secure that annuity he authorised his trustees either to realise from his estate a certain sum of money and to place it out on good heritable security for the purpose of securing this annuity; and he declared also "that if my said trustees or trustee shall deem it more advisable for the benefit of the trust, they shall be entitled, and I do hereby authorise and empower them, to set aside and appropriate and retain such part or parts of the heritable subjects which shall belong to me at the time of my death, as they may think fit for securing the aforesaid annuity hereby provided in favour of the said Jean Shanks or Aitken." Then the residue clause is in these terms—the testator appoints "the whole residue of my estate and effects, heritable and moveable, real and personal, above conveyed, including the fee, reversion, or remainder of the capital sum or sums or stock which may be held or invested, or the heritable property which may be set apart and retained, for answering and securing the annuity provided to the said Jean Shanks or Aitken, my wife, and the said house or dwelling hereby directed to be appropriated for her residence, or the price thereof, to be divided by my said trustees or trustee among Robert Aitken, William Aitken, Margaret Aitken or Leitch, wife of John Leitch, shipmaster in Greenock," and so forth, being the children of the marriage. Then further on there is a declaration "that notwithstanding what is before written, in so far as the said residue consists of the fee, reversion, or remainder of the said capital sum or sums or stock held or invested, or of the heritable subjects set apart and retained for answering the said annuity provided to the said Jean Shanks or Aitken, my wife, or of the lodging appropriated for her residence, the same shall be held and retained by my said trustees aye and until the same shall be relieved and disencumbered of the rights of the said Jean Shanks or Aitken therein, either partially by her second marriage or by her decease." Then there is a further provision in which the testator confers upon the trustees "the most ample powers which any proprietor whatever can possess and enjoy, or which if in life I could exercise in the sale and disposal of my lands and heritages and moveable means and effects, with power to them, as soon after my death as they may think expedient for the benefit of the trust, to convert the whole of my estate, heritable and moveable, into money, but with the exception always of the house or lodging presently possessed by me, to be appropriated as before provided for the residence of the said Jean Shanks, my wife, during her life, in case of my death survived by her, and which house or lodging shall not be sold until after the death of the said Jean Shanks; and with power also to my said trustees or trustee, notwithstanding anything hereinbefore written, if they shall think fit, to continue to hold and retain the heritable subjects belonging to me, or any part or parts thereof, and to suspend the actual

apportionment or division of the same among my children as before provided until the death of the said Jean Shanks." Now, these seem to me to be the two clauses of this deed that are of importance for the decision of the present question. The trust has been in existence for a very long period indeed—from 1827 till the death of the widow in 1881—and it is not alleged or suggested that the administration of the trust by the trustees has not been quite in accordance with the provisions of the trust-deed. No mal-administration of any kind is imputed to them. I think it is impossible to resist this conclusion upon the interpretation of the deed, that the trustees were invested with ample discretion to retain the heritable estate or to sell it, whichever they may think most expedient, or whichever they might find to be necessary in the execution of the purposes of the trust. We are dealing, therefore, with a case of trustees invested with a discretion to sell or to retain, and not with a case in which there is either a direction to convert into money or something in the deed equivalent to such a direction. Now, it is necessary in the next place to see what has happened in the administration of this trust. We have a very distinct account of the matter I think in the condescendence of the fund *in medio*, the sixth article of which states that "the trust estate consisted for the most part of heritable properties in Glasgow and elsewhere. The trustees from time to time realised the whole of the moveable estate, and part of the heritable estate, and divided the proceeds thereof among the beneficiaries entitled thereto. The only asset of the estate retained by the trustees, and not realised and divided by them, consists of—(1) tenement of shops and dwelling-houses at the corner of Gallowgate and Great Dovehill, Glasgow, being Nos. 181 and 183 Gallowgate, and No. 3 Dovehill; (2) two front tenements and one back tenement of shops and dwelling-houses at the corner of Gallowgate and East Campbell Street, Glasgow, and being Nos. 215 to 229 Gallowgate, the rental of which for the current year amounts to £773, 9s. 11d. subject to the ground-annual of £40. These properties were held in terms of the testator's settlement to meet the annuity payable to his widow." And there is also, I understand, the dwelling-house which was occupied by the widow, which is still unsold. The fund *in medio* is stated in the ninth article of the condescendence to consist of Mrs Leitch's share of (1st) the surplus rents of the properties from Whitsunday 1855 to Martinmas 1881, now represented by deposit-receipts in name of the trustees; and (2) a sum deposited in the Bank of Scotland, being her share of the heritable property that was sold by the trustees prior to the year 1865; and (3) a share of the heritable properties before mentioned. And in like manner, in regard to Mr Walker's share, it consists of her share of these surplus rents, her share of the price of the properties deposited in the Bank of Scotland when these properties were realised, and her share of the heritable property still retained. Now, as I think I have mentioned before, Mrs Walker died in December 1869, and Mrs Leitch on the 24th of August 1875, and the question comes to be, whether the properties now in the hands of the trustees are to be dealt with as heritable or moveable in the succession of Mrs Leitch and Mrs Walker. Now, it is a remarkable circumstance in connection with this that these heritable subjects have remained unconverted in the hands of the trustees for more than half a century, and that fact strikes one as somewhat remarkable when one comes to inquire, as one must do, whether it was necessary in the due administration of this trust to convert the heritage into moveable property, it not being stated that there was anything done unduly in the administration of the trust, or that these heritable properties were retained instead of being sold for any unlawful or illegitimate purpose, and it certainly appears pretty conclusive of this question that no necessity has ever arisen for the conversion of the heritable property into money. In these circumstances it appears to me that this case must be disposed of in conformity with the rule which was laid down by Lord Fullerton in the case of *Blackburn's Trustees*, and adopted by the House of Lords in the case of *Buchanan* v. *Angus*. In the latter case the Lord Chancellor, in whose opinion Lord Cranworth agreed, expressed himself thus—"The principle or doctrine of conversion appears to be the same both in England and in Scotland. Conversion is a question of intention, and depends on the nature and effect of the direction given in any settlement or will;" and then he takes the case, in the first place, that there is a direction to sell, the effect of which undoubtedly is to operate conversion. "But," he continues, "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 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." He says then "these principles are clearly deducible in Scotch law from the cases of *Durie*, *Patrick*, *Blackburn*, *Williamson*, and *Pearson*, which have been cited at the bar." Now, after that very authoritative decision, it appears to me to be impossible to contend that this heritage is in any sense converted, the power of the trustees being entirely discretionary. It depends entirely whether they duly exercised the power upon the occurrence of the event or necessity which required its exercise, whether the heritage is to be held as converted or not, but so far from any such event or necessity arising for the sale of this heritable property, those trustees have retained it and have it now in their hands at this moment, when the residue of the estate falls to be distributed. I am therefore of opinion with the Lord Ordinary that the succession of Mrs Leitch and Mrs Walker, in so far as concerns their interest in Mr Aitken's trust, is heritable and not moveable.

Lord Deas—I have never had any doubt or difficulty about the meaning of the case of *Buchanan* v. *Angus*, but I have had some doubt about whether it applies to this case. I have felt some doubt about whether according to the import of this deed these houses are not sufficiently

diverted by implication by the testator to be sold at his widow's death. A question of this kind is admittedly a question of intention. It was so laid down in the House of Lords in *Buchanan* v. *Angus*. That must mean, I think, the intention of the testator. Now, there is a great deal to be said to the effect that this deed sufficiently indicates the intention of the testator that these houses should be sold at the death of his widow. There is certainly a peculiarity in this case which did not occur in the case of *Buchanan* v. *Angus*, and that is, that it must be kept in view that this man was a builder to trade, and it was in that way that he came to erect these houses, and certainly intended them to be sold from the first. And I rather think there is a great deal to be said for this, that though they had not been sold by the trustees, he intended them to be sold as soon as the great purpose which he had in view, viz., the accommodation of his wife during her life, was served and fulfilled by her death. The clauses of the trust-deed which require to be taken into view, as your Lordship has stated, are very few in number. The first is that which relates to the house that was destined to be occupied by his wife, where, in the second place, he directs "My said trustees or trustee shall hold, set apart, and preserve the building or dwelling occupied by me in Gallowgate Street of Glasgow, during the lifetime of the said Jean Shanks, and shall appropriate the same as a dwelling-house for the said Mrs Jean Shanks or Aitken, in case she shall survive me, and which house or dwelling I direct and appoint that she shall possess and enjoy during all the days and years of her life after my death; and my said trustees or trustee shall realise from my estate and make payments to the said Mrs Jean Shanks or Aitken, in the event of her surviving me, of the sum of fifty pounds sterling to defray the expense of her mournings," &c. And along with that he gives her "the whole household furniture and plenishing belonging to me that may be in and about my dwelling-house at the time of my decease, including heirship moveables, books, linen, plate, china, liquors, and others, which my said trustees or trustee shall deliver over to her accordingly." Then there comes her annuity of £250 as his widow in case she shall survive him so long as she shall not enter into a second marriage, and if she does marry a second time it was to be restricted to the sum of £100 a-year. Then we have the residuary clause, which is this—"And in the last place, I appoint the whole residue of my estate and effects, heritable and moveable, real and personal, above conveyed, including the fee, reversion, or remainder of the capital sum or sums or stock which may be held or invested, or the heritable property which may be set apart and retained for answering and securing the annuity provided to the said Jean Shanks or Aitken, my wife, and the said house or dwelling hereby directed to be appropriated for her residence, or the price thereof, to be divided by my said trustees or trustee among his ten children therein named," and "any other lawful child or children born or to be born to me, equally between or among them, share and share alike." Then he confers upon his "trustees or trustee the most ample powers which any proprietor whatever can possess and enjoy, or which if in life I could exercise in the sale and disposal of my lands and heritages and moveable means and effects, with power to them, as soon after my death as they may think expedient for the benefit of the trust, to convert the whole of my estate, heritable and moveable, into money, but with the exception always of the house or lodging presently possessed by me, to be appropriated as before provided for the residence of the said Jean Shanks, my wife, during her life in case of my death survived by her, and which house or lodging shall not be sold until after the death of the said Jean Shanks; and with power also to my said trustees or trustee, notwithstanding anything hereinbefore written, if they shall think fit, to continue to hold and retain the heritable subjects belonging to me, or any part or parts thereof, and to suspend the actual apportionment and division of the same among my children as before provided until the death of the said Jean Shanks." Now that looks to me very like a suspension during the lifetime of his widow of the sale which he contemplated when he built the houses, and which apparently he contemplates is to take place on the death of his wife. He does not say certainly that they are to be converted into money, but he suspends the actual apportionment and division of the same, including the house which is mentioned before, till his wife's death, and I am inclined to think that he intended when his widow died that the house which she occupied was to be sold and the price divided, and that he intended or supposed that that would apply to the whole of these houses. When he built these houses he built them for the purpose of being sold, and he intended them to be sold on a certain event. He certainly shews his intention that when the time came they should be sold and the prices divided.

Now, that leaves only a question that is somewhat novel, and I think not altogether affected by the case of *Buchanan* v. *Angus*—the question whether the mere indication of intention by the truster that when the time shall come, that is, when the suspension of the division among the children has ceased—when that event takes place—it shall mean a power or a duty upon the part of the trustees to sell the houses and divide the money. I think that raises a different question not expressly decided by the case of *Buchanan* v. *Angus*—the question whether the clear expression of an intention by the testator that after a certain time his house property shall be sold and the price divided, that is not enough by way of direction to sell. I am very much disposed to put that construction upon this deed, and if I had had any expression of opinion to that effect from the rest of your Lordships I should not have much hesitation in doing so. But I do not place so much confidence in my own single opinion as to say that I can clearly hold this intention manifested by this deed to be sufficient to amount to a direction to sell. I have some doubts whether this case may not be sufficiently distinguished from that of *Buchanan* v. *Angus* as to let in the construction contended for here by the reclaimers, that there is enough here to amount to a direction to sell and divide, and not merely to a discretionary power to do so; but, as I have said, I do not feel confident enough in my own impression of the matter to take a different view from your Lordships on the question, which I understand to be a unanimous opinion that the case of *Buchanan* v. *Angus*

applies, although I think there are indications in that case and in this that might tend to lead one to a contrary opinion. It is therefore with some reluctance, and not a little doubt, that I come to the conclusion with your Lordships that the claims of the parties before us resolve into claims, not for sums of money, but for shares of these heritable properties as they now stand vested in the persons of these trustees. I may say, however, that it is not very easy to reconcile a case of this kind with that of *Buchanan*. Here the man was a builder merely, not building for his own possession, or for other people's, but for the purpose of sale at some time or other, and that being so, what I desire to provide against is the inconvenience that will arise if the hard and fast rule laid down in *Buchanan's* case be applied to all cases of implied discretion to sell or to retain, and even in cases where there is some indication of an intention to the contrary.

Lord Mure—The question which appears to me to be raised here for our disposal is, whether the estate in the hands of these trustees, and which has been in their hands for a very considerable period of time for the purpose of administration, is to be dealt with as heritable or moveable estate in regard to the successors of certain beneficiaries under the deed now before us for construction? and the conclusion I have come to is that expressed by your Lordship in the chair.

The Lord Ordinary in the latter part of his note states the principles or rules upon which this question is to be decided. After a careful consideration of the cases to which we were referred in the course of the discussion, and particularly of the cases of *Buchanan* v. *Angus* in the House of Lords, I think that it may now be safely laid down as ruled that (1) where there is a direction to sell, that direction will operate as an immediate conversion of heritable property into moveable, whether the heritable property is sold or not; (2) but if, on the other hand, there is a mere power or discretion to the trustees to sell, or, in other words, if the sale or power of sale is to be in their option, there is no conversion unless the sale is absolutely essential, or, in Lord Fullerton's words in the case of *Blackburn*, "necessary and indispensable to the execution of the trust;" (3) if a sale be not necessary and indispensable, the right remains heritable so long as the discretion is not exercised by the trustees.

In the present case the discretion has not been exercised during the period of forty years which this trust has lasted, and therefore the application of the rule appears to me to be that this estate remains heritable, and that the succession must be held to be to an heritable right in the persons of these beneficiaries. It is quite plain that in cases of this sort it may be more convenient where there are so many beneficiaries that the estate should be sold and divided rather than that the estate should be made over to them piecemeal *pro indiviso*. But, then, if the estate does remain in its heritable form in the hands of the trustees till the period of division has arrived—no indispensable necessity for its sale having in the meantime arisen—the estate does not become moveable but remains heritable, and may be divided without any sale. Now, the clause by which the division of this estate is appointed to be made is the residue clause. It is in these words:—"I appoint the whole residue of my estate and effects, heritable and moveable, real and personal, above conveyed, including the fee, reversion, or capital sum or sums or stock which may be held or invested, or the heritable property which may be set apart and retained, for answering and securing the annuity provided to the said Jean Shanks or Aitken, my wife, and the said house or dwelling-house hereby directed to be appropriated for her residence, or the price thereof, to be divided by my said trustees or trustee among" his children there named. The "price thereof" is to be divided no doubt, but there is a further direction by the testator in relation to his estate in the passage which your Lordship read, where he gives his trustees "the most ample powers which any proprietor whatever can possess and enjoy, or which if in life I could exercise in the sale and disposal of my lands and heritages, and moveable means and effects, with power to them, as soon after my death as they may think expedient for the benefit of the trust, to convert the whole of my estate, heritable and moveable, into money, but with the exception always of the house or lodging presently possessed by me, to be appropriated, as before provided, for the residence of the said Jean Shanks, my wife, during her life, in case of my death survived by her, and which house or lodging shall not be sold until after the death of the said Jean Shanks, and with power also to my said trustees or trustee, notwithstanding anything hereinbefore written, if they shall think fit, to continue to hold and retain the heritable subjects belonging to me, or any part or parts thereof, and to suspend the actual apportionment and division of the same among my children, as before provided, until the death of the said Jean Shanks." Now, it appears to me that these words are substantially identical with those that were under consideration in the House of Lords in the case of *Buchanan* v. *Angus*, which was a case of a direction by the testator to his trustees to pay over the residue of his estate to his beneficiaries or the produce thereof; and upon this point Lord Westbury explained his view of the duty of the trustees to be that they were to transfer the heritable estate, if they thought that right, or if it were sold, to pay over the prices, just showing that the power these trustees held was a continuous power that they were to continue to do what they thought fit in their own discretion. And in this case I think the words of the testator which I have quoted just lead me to the same conclusion, that it was left to the trustees by the testator to say how they should make over the trust-estate to the beneficiaries, but that they should manage it so long as it was in their hands, and that so long as it remained in their hands it was of the nature of heritage.

Lord Shand—I agree with my brother Lord Deas in what has been said by him as to the inconvenience that I fear is being produced by the application to all cases that have occurred in recent times of the doctrine of the case of *Buchanan* v. *Angus*.

In the present case there are, I think, eleven beneficiaries, and there are three or four heritable properties situated in different parts of Glasgow

and in Greenock; and although no doubt it is practicable to convey those heritable subjects to that number of beneficiaries, it certainly is most expedient that that should be done, and it is impossible to shut one's eyes to the fact that when a division of these subjects takes place the properties should be sold and the prices distributed. But then a more striking instance of the same thing occurred in the case of *Duncan's Trustees*, which was cited to us in the course of the argument, reported in 9 R. 730—a case which came before the other Division of the Court—where I find that certain heritable subjects had to be disposed of among fifty-two beneficiaries, and where it was also held that the properties were heritable, although some of the Judges in their opinions thought that the only practical way out of this distribution was to sell the properties and distribute the prices, rather than by conveyances to the beneficiaries. But I do not see my way, looking to the authorities, to differ from the opinions which have been expressed by the majority of their Lordships; and it may be that the matter is one in which, if there is to be a remedy, must be found in legislation rather than in different decisions. In the case before the Court the testator left his property (it was practically heritable estate that he left) to his trustees, and in order to the reclaimers succeeding in the argument they must show that there is a conversion of that heritable estate into moveable; and so it appears to me that in order to show that they must make out either one or other of two things. They must show that within the provisions of this deed there is a direction to sell the properties with a view to the distribution of the estate among the beneficiaries—a direction which no doubt may be found there by strong implication as well as by express words; or they must show, if they cannot point to any express or clearly implied direction to sell, that at all events, in the circumstances of the trust, a sale is indispensable in order to the execution of the trust. Unless one or other of these things can be shown, the estate is heritable, and must be dealt with as heritable.

Now, I do not mean to go into the provisions of the deed as your Lordships have done, but I may just say that I agree in thinking that there is no direction to sell here either expressed or implied. It is true that there is a discretion vested in the trustees to retain the heritage, and that the property has been held under that discretion for, as your Lordship has pointed out, upwards of half a century. That circumstance does not weigh much with me, because the argument in the case is not that the trustees were not entitled to keep the property unsold for fifty years or so long as the liferenter lived—for it is admitted that the administration of the trustees was quite proper; but the argument is that the property having been kept for such a length of time—that depending upon the life of the liferenter—whether at her death there is either an implied direction to sell or a necessity to sell. The element that the property has all along been held as heritage does not affect the question. The question is whether at the time when the distribution occurs—and it was quite proper to keep it up to that time—there is a direction to sell or a necessity to sell. As I have said, I do not think there is such a direction; and therefore the only thing that can be pointed to as of the nature of necessity for a sale is that the property requires to be sold in order to be divided among the beneficiaries, and that owing to their number it would be less difficult to divide the prices than convey the properties to them. And here I am met with the case of *Duncan*, where the other Division, reversing the decision of Lord Adam, held that it was a case where there was no actual necessity for a sale. If I were to hold that the large number of beneficiaries among whom that estate fell to be divided, constituted an expediency for realising it and dividing the proceeds, I could not hold that in such circumstances there was an actual indispensable necessity for a sale of the trust property. Here we have seven subjects and eleven beneficiaries, and I may just say that if the earlier case of *Duncan* had not been decided before the present, and if your Lordships had been disposed to hold the present case as one disclosing an expediency for a sale, I should have been disposed to agree; but as I do not find that to be the state of your Lordships' opinions, and although I do not agree with the decision in that case of *Duncan*, I refrain from stating an opinion on the point. There is enough for my opinion in the fact that there is here no direction to sell, express or implied; and that being so, I do not think we should be justified in interfering with the discretion conferred by this truster on his trustees, and which they have exercised for so long without objection. I therefore agree with your Lordships in thinking that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

Counsel for Reclaimers—J. P. B. Robertson—Patten. Agents—J. & J. Patten, W.S.

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HOUSE OF LORDS.

Friday, July 6.

(Before Lords Blackburn, Watson, Bramwell, and Fitzgerald.)

CAMPBELL *v.* WARDLAW AND OTHERS (CAMPBELL'S TRUSTEES).

Succession—Fee and Liferent—Liferent of Whole Amount Produced—Mineral Field opened after Testator's Death.

A testator who had opened up and wrought part of the minerals in his lands during his life, directed his trustees in the event (which happened) of his wife surviving him, to pay over to her "the whole annual produce and rents of the residue and remainder of my estate, heritable and moveable, during all the days and years of her life." After the testator's death his trustees opened a new