

conceive that the testator intended anything but this. The trustees sold the estate, and therefore the result is what the truster intended, that the whole proceeds should be equally divided among his children, and that there was conversion. There was a power of sale that there might be a distribution for the benefit of his children. I know of no case countenancing the idea of distribution of heritage to some of the children and moveable to others. No doubt Lord Neaves and Lord Benholme in the case of *Mackenzie v. Mackenzie* made it a ground of judgment that conversion only took place at the actual time of sale, but as yet there has been no decision countenancing such a result as I have just indicated, and I must therefore hold that there was conversion.

LORD RUTHERFURD CLARK—I agree with Lord Young. I think the first question to be determined is when vesting took place. I am of opinion that the shares vested on the death of the widow. There is a plausible argument that vesting was postponed till the date of the distribution of the estate. But that is a date of vesting which is assigned only in exceptional circumstances, and I think we have here nothing to postpone vesting.

Then comes the question, What kind of share vested in each of the children? Was it a heritable or was it a moveable *jus crediti*. We must consider whether the trust-deed by itself operated conversion. After the decision in the case of *Sheppard's Trustees v. Sheppard*, which was decided to prevent questions of this kind arising in the future, I cannot doubt but that the trust-deed containing a mere power to sell did not operate conversion. But conversion might be effected by a sale, and then I think conversion will occur at the date of the sale. I concur in the views stated by Lord Neaves and Lord Benholme in the case of *Mackenzie v. Mackenzie*. I do not see how the term of conversion can be drawn back to an earlier date than the sale. I am of opinion that when Jane and Margaret died, they died vested in a heritable *jus crediti*, which transmitted to their heirs in heritage.

LORD JUSTICE-CLERK—I am constrained to agree with Lord Young, for I see no other extrication of this difficult question. As a general rule it has always seemed to me that conversion is not to be presumed in the sale of property like this. It could hardly happen that where the truster clearly intended his children should share equally in his fortune, that he should intend that his heir in heritage, *i.e.*, his eldest son, should succeed to his parent's share to the exclusion of the others. I do not know any case in which it is not obvious that the intention of the testator was exactly the reverse, and that he did not make it quite clear that his view and expectation was that there was to be an equal division. But the law has said that where a mixed succession is left to the trustees with a power of sale, that unless that sale be indispensable to the execution of the trust, the heritable estate will remain heritable and not be converted. Therefore if in the ordinary case there is a provision that in the event of one of the beneficiaries dying his children shall succeed, the children so succeeding succeed to heritable property, and therefore the eldest son,

who is heir in heritage, excludes all the rest. That has been the course of decision. As I have said in the discussion, there were several judgments in this Division in which we held that the notion of the division *in forma specifica* of tenements in a town could not have entered into the head of the testator, nor could be assumed to have been his intention. But decision has run on the other groove, and now *Sheppard's Trustees* has decided that where the exercise of a discretionary power of sale conferred on the trustees is not indispensable to the execution of the trust, and has not been executed, there is no conversion. This is a very special case. The trustees had power to hold the estate *in forma specifica*, and only sold it when the children did not by a majority request a conveyance of it, as contemplated by the truster. The truster did undoubtedly contemplate the possibility of its being sold. The question is, was there conversion and when? I am of opinion that there was no conversion before the estate was sold, and I agree, as I have said, with the result at which Lord Young has arrived.

The Court found "(1) with reference to the first of the questions, that no right to a share of the heritable estate of the testator vested in any of his children till the death of his widow, and that the share that would have fallen to his son John if he had survived her, passed to his children equally in terms of the fourth purpose of the testator's settlement; (2) with reference to the second question, they are of opinion that the share of said succession effeiring to Jane Seton and Mrs Sim vested in them as having survived their mother; and (3) that their shares of said succession fell to their heirs-at-law respectively."

Counsel for Second Parties—M'Lennan. Agents—Philip, Laing, & Trail, S.S.C.

Counsel for Third and Fourth Parties—Shaw. Agent—R. C. Gray, S.S.C.

Saturday, July 3.

FIRST DIVISION.

STEWART v. STEWART.

Husband and Wife—Aliment—Restriction of Aliment—Remit to Accountant to Inquire into Petitioner's Circumstances.

In an application by a husband to restrict the amount of aliment found due to his wife under a decree of separation *a mensa et thoro* and for aliment, the Court, on the petitioner's averment that he had become unable to pay the sum decerned for, *remitted* to an accountant to inquire into the petitioner's circumstances.

On 8th January 1884 Mrs Jane M'Cubbin or Stewart raised an action against her husband, Thomas Stewart, hatter in Glasgow, concluding for decree of separation *a mensa et thoro*, and for payment of a yearly aliment of £300.

Decree of separation *a mensa et thoro* was subsequently pronounced by the Lord Ordinary, whose judgment was affirmed by the Second Division, the amount of aliment being by

arrangement fixed at £250 per annum. There were two children of the marriage, both girls, who when the decree was pronounced were aged fifteen and twelve respectively.

This was a petition by Thomas Stewart to restrict the sum of aliment payable to his wife.

The petitioner set forth the sources of his income, and averred that when the sum of £250 was arranged he was anxious to deal liberally with his wife, but that he now found that owing to losses in business, and to other causes for which he was not responsible, his income, now derived wholly from private investments, was £184 per annum, and he was unable to pay the aliment agreed on. He was also proprietor of a house valued at £45 rental, in which he lived.

He offered £52 per annum, and asked to be allowed a proof of his averments, and thereafter that the aliment should be restricted. He stated his desire that the children of the marriage should now live with him.

Mrs Stewart lodged answers.

She alleged that her husband's income was not less than £820 per annum. She denied all knowledge of the losses stated by the petitioner to have been incurred by him, and averred that the sum offered was totally inadequate for her support. She objected to the proposed removal of her daughters to live with the petitioner.

The Court pronounced the following interlocutor:—

“Remit to Mr A. Moore, C.A., Glasgow, to inquire into the circumstances of the parties, and to report: Grant diligence for the recovery of writings, and commission to the said accountant to examine havers and to receive their exhibits.”

Counsel for Petitioner—W. G. Miller. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent—Ure. Agents—J. P. Bannerman, W.S.

Tuesday, July 6.

SECOND DIVISION.

FINLAY'S TRUSTEES v. FINLAY.

Succession—Legacy—Vesting—Postponement of Payment.

A truster directed his trustees to make over his business to his son John, subject to payment of his debts and to payment of a “legacy or debt” to be paid by him to the truster's other son James at the first term of Whitsunday twenty years after the truster's death, it being declared that payment was postponed for such a length of time in order that John might not be unduly burdened in carrying on the business. Provision was also made that the trustees should protect the interests of James by satisfying themselves that the business was being carried on to profit, and if it was not, that they should wind it up and realise it, and invest the proceeds, subject to the “legacy or debt” to James, for behoof of John, and on his death for his lawful children. John

died without leaving issue, within the twenty years, and the business was given up. *Held* (1) that the business was his, and the assets of it fell to be administered by his executor, subject to provision for the legacy to James; (2) that the legacy vested in James *a morte testatoris*, but was not payable for twenty years after the truster's death; and (3) that James was entitled to discharge it on arranging with the trustees as to its value as a legacy not payable or bearing interest till that period expired.

William Finlay, cabinetmaker in Edinburgh, died on 10th February 1876, survived by two sons, James Finlay, a farmer in New Zealand, and John Finlay, cabinetmaker in Edinburgh, and leaving a trust-disposition and settlement and codicils dated 3d, 4th, and 8th February 1876. By this settlement he appointed certain persons to be his trustees. He left to his elder son James Finlay various specific legacies, including the rent of some buildings used as workshops, which were to be let by trustees to the younger son John Finlay at a rent of £100 per annum. By the last clause of his settlement, in respect that his son John had for many years assisted him in the active management of his business, he directed his trustees to make over to him (John) the business in Princes Street carried on by him (testator), with the leases of the business premises, stock-in-trade, book and bill debts, &c., and generally the whole of the estate not specially destined—the conveyance to be burdened with his debts due at the time of his death, “and also with a legacy or debt of £2000 sterling in favour of my said eldest son James, to be paid to him by his brother John at the first term of Whitsunday twenty years after my decease (payment of the above legacy or bequest being postponed by me for such a length of time in order that my son John may not be unduly burdened in conducting the said business); and in the event of my son James dying before the said legacy becomes payable to him, then I direct my trustees to pay and divide the same equally among his lawful children.” The testator also provided that in order to protect the interests of his son James Finlay the trustees were to have power, and were directed to take means, to satisfy themselves that the said business was being properly and profitably carried on, and in the event of it appearing that the business was not being carried on to a profit, they were directed to wind up the same, realise the trust estate, and invest the proceeds, “subject always to the foregoing legacy or debt of £2000 to my son James,” for behoof of John, and upon his death to divide the estate among his lawful children, making such provision for his widow, if he left one, as they might think proper.

James Finlay was married, and had several children.

The business continued to be carried on by John Finlay, and from time to time he submitted to his father's trustees statements showing the position of the business, and also exhibited to them the books used for conducting the business, the whole business assets being treated as falling under the settlement and forming part of the testator's personal estate.

John Finlay died intestate on 5th December 1885, leaving a widow but no children. His widow was appointed executrix-dative qua