

these payments. These defenders justify these payments on two grounds—(1) as cash payments; (2) as secured to the extent of £1000, in virtue of the deed of agreement, 33 of process, constituting a trust in Walter and Andrew Haddon. These are relevant defences, and may be sufficient if they are established, but I am unable to say whether they are well founded in fact, and on these points there must, I think, be inquiry.”

The pursuer reclaimed, and argued—The averments of the pursuer were sufficient, if proved, to infer reduction of the sale to Richardson. They were in effect that Messrs Raeburn had fraudulently put forward Richardson, who was a man of straw, to purchase the subjects for an inadequate price in order that they might get payment of Wilson's debt to them. Any transaction, however indirect, designed to give one creditor an illegal preference, was struck at by the Act 1696, c. 5. In any view, the Lord Ordinary was wrong in assailing Richardson without inquiry—Goudy on Bankruptcy, p. 85; *Millar v. Duncan & Low*, December 11, 1822, 2 S. 71, 2 W. & S. 579; *Nicol v. M'Intyre*, July 13, 1882, 9 R. 1097, per Lord Young.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I think the judgment of the Lord Ordinary is right.

If there had been averments relevant to show that there had been a conspiracy by which Richardson, not entering into a *bona fide* transaction for himself, was acting solely as a means of getting payment of Messrs Raeburn's debt, such averments would have presented a case for inquiry.

The pursuer has acted very frankly in not overstating his case, but on such averments as he makes in support of his conclusion for reduction and his conclusion against Richardson, I cannot hold that they entitle him to inquiry.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, Q.C.—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders and Respondents W. & J. Raeburn and Haddon & Turnbull—Wilson Q.C.—Steedman. Agents—Steedman & Ramage, W.S.

Counsel for the Defender and Respondent Richardson—Chree. Agents—MacKenzie & Fortune, S.S.C.

Thursday, January 24.

SECOND DIVISION.

M'CALL'S TRUSTEES v. MURRAY.

Succession—Vesting—Discretion of Trustees—Direction to Divide so soon after Death of Liferentrix as Deemed Proper.

A testator directed his trustees to pay the liferent of the residue of his estate, heritable and moveable, to his daughter, and in the event of her death without issue, “then, so soon thereafter as deemed proper,” to divide the residue of his estate into equal shares, according to the number of his sisters in life “at the period of such division, and such of them as may have died leaving lawful issue;” and having thus divided the residue, to pay it over to his sisters in certain proportions, whom failing to their issue, it being declared that if any of his sisters should have predeceased “the said term of payment and division amongst them” leaving issue or descendants, such issue or descendants should take the share which would have been their parent's, and that in case any of them should predecease without leaving issue or descendants the share should be held to have lapsed. The liferentrix died unmarried in October 1899. One of the truster's sisters survived the liferentrix, but died unmarried in January 1900, before the estate had been divided by the trustees. *Held* that her share vested in her on the death of the liferentrix.

Succession—Heritable and Moveable—Conversion—Intention of Testator.

A testator directed his trustees on the death of his daughter without issue, to “divide” the residue and to “pay” it in certain proportions to his five sisters or their issue or descendants. He declared that the provisions to females should be exclusive of the *jus mariti* and right of administration of their husbands, and empowered the trustees if they thought proper, “in order that the provisions herein conceived in favour of females may be rendered more secure,” to lay out these provisions on the security and in the purchase of heritable property. The testator also conferred on his trustees power of sale. The testator died in 1869, and was survived by his daughter and five sisters, three of whom were married and had issue. He left estate partly heritable and partly moveable. The heritage consisted of house property in Glasgow. The testator's daughter died without issue, and at the date of her death the trustees had not exercised their power of sale. Thereafter, in a question as to the persons entitled to succeed to one of the residuary legatees in whom a share of the residue had vested, *held* that her share was wholly moveable and fell to her heirs *in mobilibus*.

Thomas M'Call, architect in Glasgow, died on 18th August 1869, leaving a trust-disposition and settlement by which he conveyed his whole means and estate, heritable and moveable, to the trustees and for the purposes therein mentioned.

The purposes of the trust were (1) payment of debts; (2) (3) and (4) payment of certain legacies and annuities to certain persons, and among others to his five sisters—Mrs Jean M'Call or Gracie, Isabella M'Call or White, Agnes M'Call, Jessie M'Call, and Alice or Elshie M'Call or Kirkwood; (5) payment of the liferent of the residue of the estate, heritable and moveable, to the truster's daughter Mary M'Call, and of the fee to her lawful issue; and (6) division of the residue of the estate in the event of Mary M'Call dying without leaving lawful issue.

The sixth purpose was in the following terms:—"In the event of the death of the said Mary M'Call without leaving lawful issue . . . then, so soon thereafter as deemed proper, my trustees, after providing for fulfilment of the purposes of the trust above mentioned, shall divide the residue and remainder of my estate and effects . . . into equal shares according to the number of my said sisters who may be in life at the period of such division and such of them as may have died leaving lawful issue, that is, a share for each sister then in life and one for each sister who may have died leaving lawful issue, and my said trustees having thus divided the said residue and shares as aforesaid shall pay over two-thirds of one share to the said Mrs Alice or Elshie M'Call or Kirkwood, whom failing, to her issue as after mentioned, and the remaining shares and part of a share equally to and among the said Mrs Jean M'Call or Gracie, Isabella M'Call or White, Agnes M'Call, and Jessie M'Call, whom failing, to their issue as after mentioned, my said sisters and their issue in the events aforesaid being hereby constituted my residuary legatees, declaring always that should any of my said sisters Jean M'Call or Gracie, Isabella M'Call or White, Agnes M'Call, Jessie M'Call, or Alice or Elshie M'Call or Kirkwood, have predeceased the said term of payment and division amongst them leaving lawful issue or their descendants, such issue or their descendants shall take equally among them, if more than one *per stirpes*, the share which would have fallen to the deceasing parent had she survived the said term, the issue of predeceasing children in every case coming in their parent's room and place, but in case any of my said sisters shall predecease the said term without leaving lawful issue or their descendants at the aforesaid period of division, then the share provided to such sister and her issue shall be held as lapsed and divided accordingly."

The truster further provided:—"The whole provisions herein contained conceived in favor of my said daughter and sisters and all others being females shall be exclusive of the *jus mariti* and right of administration of any husbands whom

they have already or may hereafter marry and payable on their own receipts alone without the receipts of such husbands and in order that the provisions herein conceived in favor of females may be rendered more secure I authorise and empower my said trustees if they shall think proper so to do notwithstanding the foresaid destination and provisions in place of paying over their provisions to the said females to lay out the same on the security or in the purchase of such heritable or other property as they may think fit either in name of the said females exclusive of the *jus mariti* courtesy or other legal right on the part of their husbands or of themselves the said trustees or others as trustees for behoof of such females in liferent for their liferent use allenerly and of their children whom failing of my said trustees for the ends uses and purposes before mentioned in fee in which last case the fee before conceived in favor of such females is hereby restricted and limited to a liferent right accordingly but with power nevertheless in that event to them respectively in the event of any one or more of them dying without issue to test by will or other *mortis causa* deed upon the fee of their respective shares."

The truster gave his trustees power to complete titles to his heritable estate and also "powers of sale by public or private bargain, and power to borrow money upon the security of the trust estate."

The truster was survived by his daughter Mary M'Call and by his five sisters. He left heritable property, consisting of house property in Duke Street, Glasgow, which was ultimately sold by the trustees in February 1900 at the price of £3740, and moveable property of the value of £5069.

Mary M'Call, the liferentrix, died unmarried on 23rd October 1899. Four of the truster's sisters, viz., Agnes M'Call, Mrs Kirkwood, Mrs Gracie, and Mrs White, predeceased her. Mrs Kirkwood, Mrs Gracie, and Mrs White all left issue. Jessie M'Call survived the liferentrix Mary M'Call. Upon the death of Mary M'Call, Jessie M'Call was the only annuitant surviving on the estate of the said deceased Thomas M'Call. The trustees held a meeting on 7th December 1899, when their law-agent reported that owing to the death of the liferentrix Miss Mary M'Call the only matter which prevented the trust from being wound up was that the annuitant Miss Jessie M'Call was still in life, and that Miss Jessie M'Call was disposed to accept the value of her annuity in cash. The trustees then resolved that the value of the annuity should be ascertained by the law-agent with the view of paying the amount over to Miss Jessie M'Call, and further, that the heritable property should be sold by public roup. No steps to carry out this arrangement had been made when the said Jessie M'Call died, unmarried, on 3rd January 1900.

Jessie M'Call left a general disposition and settlement dated 14th June 1899, in which she appointed Mary M'Call before mentioned to be her executor and universal

legatee under burden of payment of debts and certain legacies. In consequence of Mary M'Call having predeceased Jessie M'Call, Thomas Henry White and Jessie Thomson Kirkwood or Knight were appointed her executors-dative conform to decree-dative dated 2nd February 1900.

Thereafter questions arose as to whether the share of Thomas M'Call's estate provided to Jessie M'Call had vested in her, and whether such share, if it had vested, was wholly moveable, or partly heritable and partly moveable. For the decision of these questions a special case was presented for the opinion and judgment of the Court. The parties to the special case were (1) Thomas M'Call's trustees; (2) Mrs Kirkwood's descendants other than her heir in heritage; (3) the descendants of Mrs Gracie and Mrs White excluding their respective heirs in heritage, and including the two executors dative of Jessie M'Call; and (4) the heirs in heritage of Mrs Gracie, Mrs White, and Mrs Kirkwood respectively, who were also the heirs-at-law in heritage of both Jessie M'Call and Thomas M'Call. The second, third, and fourth parties were the heirs *in mobilibus ab intestato* of Jessie M'Call, and also the heirs *in mobilibus ab intestato* and the residuary legatees of Thomas M'Call.

It was stated in the special case that apart from the estate now in question Jessie M'Call left sufficient estate to pay her debts and legacies.

The questions of law were as follows:—(1) Did the share of the residue of the said Thomas M'Call in favour of Jessie M'Call vest in her? (2) In the event of query 1 being answered in the affirmative, does such share of residue fall to be paid to the representatives of Jessie M'Call *ab intestato*? (3) In the event of query 2 being answered in the affirmative, does such share of said residue fall to be paid over (1) to the heirs *in mobilibus* of the said Jessie M'Call, or (2) so far as represented by the share of the heritable property to her heirs in heritage, and the remainder of her said share to her executors? (4) In the event of query 1 being answered in the negative, (1) does such share of said residue belong to the second, third, and fourth parties as residuary legatees of the said Thomas M'Call, or (2) does such share fall into intestacy, and (a) belong to the second, third, and fourth parties *per stirpes* as his heirs *in mobilibus*, or (b) so far as represented by the share of heritable property belong to his heirs in heritage, and the remainder of said share to his heirs *in mobilibus*."

Argued for the second parties—(1) The share of the estate of Thomas M'Call provided to Jessie M'Call vested in her at the date of the death of Mary M'Call. The words "so soon thereafter," &c., had not the effect of suspending vesting. Vesting took place at the earliest period at which the trustees might in the exercise of their discretionary powers fix the period of division—*Scott v. Scott's Executor*, January 27, 1877, 4 R. 384; *Wood v. Neill's Trustees*, November 6, 1896, 24 R. 105. (2)

If the estate had vested in Jessie M'Call it formed part of her moveable succession. It was plainly the intention of the testator that her share should be moveable. The right that had vested was a claim to a share of residue; the trustees were directed to *pay over* that share; the number of beneficiaries was large, so that a division of heritage was difficult; the heritage was not a family estate, but a house held as an investment; and there was a clause in the deed directing that the provisions to females were to be exclusive of the *jus mariti* and right of administration of any husbands they might have married or might marry, and that the trustee instead of paying over their provisions to females might lay out the same on the security or in the purchase of heritable or other property. All these indications showed that it was the intention of the testator that the provisions should be moveable—*Advocate-General v. Blackburn's Trustees*, November 27, 1847, 10 D. 166; *Baird v. Watson*, December 8, 1880, 8 R. 233; *Brown's Trustees v. Brown*, December 4, 1890, 18 R. 185; *Playfair's Trustees v. Playfair*, June 1, 1894, 21 R. 836; *Galloway's Trustees v. Galloway*, October 27, 1897, 25 R. 28.

Argued for the third parties—The share had not vested in Jessie M'Call—*Howat's Trustees v. Howat*, December 17, 1869, 8 Macph. 337. It therefore belonged to them and the second and fourth parties as residuary legatees of Thomas M'Call, and fell to be divided among these parties in terms of his settlement, or alternatively the share was moveable and fell into intestacy and belonged to them and the second and fourth parties *per stirpes* as the representatives of his heirs *in mobilibus*.

Argued for the fourth parties—The part of the share in question which was invested in heritage was heritable and fell to them either as heirs in heritage of Jessie M'Call, or alternatively of Thomas M'Call. If the estate had vested in Jessie M'Call, her share was a mixed estate, partly heritable and partly moveable, and the heritable part of her share having remained unsold at her death, they as her heirs were entitled thereto. The mere use of the words "divide" and "pay" settled nothing as to the testator's intention in the matter of conversion—*Hogg v. Hamilton*, June 7, 1877, 4 R. 845, opinion of Lord President Inglis, p. 848. In all cases of this kind the more convenient course would have been to give each of the beneficiaries a sum down, but the mere fact that it was easier to divide up money than to divide heritage had no bearing on the question. The real criterion was—Could Jessie M'Call have refused during her life to take from the trustees a *pro indiviso* share of the heritage as part of her share of the testator's estate? If she could not, then there had been no conversion, and the portion of the estate which vested in Jessie M'Call, and which consisted of heritage, passed to the fourth parties as her heirs in heritage—*Sheppard's Trustee v. Sheppard*, July 2, 1885, 12 R. 1193; *Seton's Trustee v. Seton*,

July 2, 1886, 13 R. 1047; *Anderson's Executrix v. Anderson's Trustees*, June 18, 1895, 22 R. 254. The clause in the present deed directing that the provisions to daughters should be exclusive of the *jus mariti* of their husbands did not affect the result. A similar clause occurred in *Sheppard's Trustee, supra*. If the estate had not vested in Jessie M'Call, it fell into intestacy, and the fourth parties were entitled to the heritable part of it as heirs in heritage of the heirs of Thomas M'Call.

At advising—

LORD JUSTICE-CLERK—The first question is, whether the residue of the estate of Thomas M'Call vested in Janet or Jessie M'Call. Thomas appointed the liferent of the residue to go to his daughter Mary M'Call, and on her death without issue then alive it was to be divided into equal shares according to the number of his sisters, the issue of any predeceasing sisters being entitled to a share with surviving sisters. When the liferent lapsed Janet or Jessie M'Call was the only annuitant surviving, and she died in 1900. Three of the sisters died leaving issue.

The clause of the deed upon which the question of vesting depends is the sixth clause, by which the trustees are directed, in the event which occurred, "then, so soon thereafter as deemed proper, my trustees . . . shall divide the residue . . . and having thus divided the residue shall pay" in a certain manner directed. I am of opinion that Janet or Jessie M'Call having lived to the time to which this direction applied, there was vesting in her. There is no direction to hold up the estate, the only direction given being to enable the trustees to have reasonable time to carry out the testator's directions in detail, but the rights and interests of beneficiaries coming into operation upon the event occurring which caused the right to emerge.

The second question is, whether the whole share which vested in Janet or Jessie is to be held to have been moveable, or was partly heritable and partly moveable, the rights of parties to this case depending upon the answer to be given to that question. It is not unattended with difficulty, there being nothing direct in the trust-deed to aid in interpreting it. But I think that when the deed is examined to ascertain the intention of the granter, the fair result is that he desired his estate to be divided as a moveable estate. I do not proceed upon the power given to the trustees to sell, for that might be a power which it was wise to give, although the testator had no direct intention that his estate should be dealt with as moveable in its entirety when the time for division came. Nor do I attach any weight to the use of the word "pay" used in regard to the shares, for if the deed was otherwise clear, the use of such an expression would not be sufficient to compel a reading which would imply that the whole was moveable. But when it is found that the testator's instructions seem to relate to a division into shares, and again into fractions of shares, and further that

when the testator desires to provide protection for provisions to females he specially gives the trustees power, if they see fit, to lay out the amount of their shares "on the security or in the purchase of such heritable or other property as they may think fit, either in name of the said females exclusive of the *jus mariti*, courtesy, or other legal right on the part of their husbands;" it seems to me that that indicates that the estate the trustees had to deal with was a moveable estate, part of which they might apply for special reasons in the purchase of heritage. It is to be noted that in the general conditions only the *jus mariti* and right of administration of husbands are excluded, and that where the testator deals with heritage he inserts the word "courtesy." It seems thus to be a fair inference from the deed that the succession was moveable.

My opinion is that the first and second questions should be answered in the affirmative, and the first alternative of the third question in the affirmative. The fourth question it is unnecessary to answer.

LORD YOUNG—I am also of opinion that the share of the estate of Thomas M'Call provided to Jessie M'Call vested in her. I am further of opinion, from expressions used in the deed, that it was the intention of the testator that she should take her whole share in money, and not part of it in land, and that the estate must therefore be dealt with as moveable, and go to her heirs *in mobilibus*.

LORD TRAYNER—I entertain no doubt that the rights which the late Jessie M'Call took under the settlement of her brother Thomas M'Call vested in her on the death of Mary M'Call, who liferented the whole trust estate. The only doubt which has been suggested as to the period of vesting arises from the terms of the direction to the trustees to divide the residue of the truster's estate on the death of the liferentrix without issue, or "so soon thereafter" as the trustees deemed proper, with the further provision that if any of the residuary legatees should predecease "the said term of payment and division among them," the share of such predeceaser should descend to her issue, and failing issue should be treated as a lapsed legacy. In view of these provisions it was maintained that there was no vesting in the residuary legatees until actual payment or division had been made. I cannot assent to that view. It appears to me that the period of division and payment to and among the residuary legatees contemplated by the truster was the death of the liferentrix, and although it is added "or so soon thereafter" as the trustees should deem proper, these words appear to me only to provide for a reasonable time being allowed the trustees to realise and distribute the estate. In a word, that the latitude given to the trustees as to the time of division had only reference to the fair administration of the trust and realisation of the estate according to what they deemed best, but did not postpone vesting, or enable the

trustees by their actings to delay or alter the period of vesting.

The question whether the share of residue which fell to and vested in Jessie M'Call was all moveable or was partly heritage is attended with some difficulty. Part of the residue was undoubtedly heritable at the date of the death both of the truster and of the liferentrix. The trustees had a power of sale, but did not exercise it. There was therefore no conversion through the action of the trustees. But there are three considerations which lead me to the conclusion that the share of Jessie M'Call must be treated as all moveable succession. *First*, the direction of the truster to his trustees is to divide the residue and to pay it in certain proportions to the residuary legatees. This in itself is not much, because I recognise that the words "pay," "convey," "transfer," &c., have been regarded in previous cases as practically synonymous. Still it is a direction to pay, which applies more directly to a division of realised estate than to estate which is to be transferred to a legatee *in forma specifica*. *Second*, The fractional division of the residue among the legatees would have been more difficult to accomplish in the way of *pro indiviso* conveyance of heritage than in the payment of money, and I see nothing to suggest that the truster intended to put any such difficulty on the shoulders of his trustees. *Third*, The truster directed his trustees, if they think proper, "in order that the provisions herein conceived in favour of females may be rendered more secure," to invest the shares falling to females in the purchase of heritable property or in heritable securities, so as to exclude the legal rights of any husbands they might marry. Now, I think that direction fairly presupposes that the heritage left by the truster had been or was to be realised before the division of the residue, as otherwise the truster would have directed his trustees to convey the existing heritage to the legatees, so as to exclude their husbands' legal rights, and to invest the balance in such a way as to produce the same effect. This last consideration seems to me to be enough to turn the scale on a balancing of considerations in favour of the view that there was conversion—conversion by reason of the intention of the truster—who intended, as I conclude, from his whole deed, that on the death of the liferentrix his estate should be realised, and in that form paid over to the residuary legatees in the proportions mentioned by him.

LORD MONCREIFF—On the question of vesting I do not entertain any doubt. The "term of payment and division" in the case of the liferentrix Mary M'Call dying without leaving lawful issue was the date of her death. No doubt the deed contains the provision that the trustees are to divide "so soon thereafter as deemed proper," but that is after the term of payment and division in the sense of the deed has arrived, and the direction is only inserted in order that the trustees may take such reasonable

time as they may think fit for ingathering and realising the estate.

The question of conversion is perhaps more difficult. The argument *ab inconvenienti* does not carry us very far, because those who are entitled to take may chance to be many or few at the date of division. But in the present case there are sufficient indications in the deed that what the truster anticipated and intended in disposing of his mixed estate was that it should all be converted into cash and then divided. The provisions which have already been referred to with regard to the provisions in favour of females sufficiently indicate this.

I therefore agree that the first and second questions and the first alternative of the third question should be answered in the affirmative.

The Court answered the first and second questions and the first alternative of the third question in the affirmative, and found it unnecessary to answer the fourth question.

Counsel for the First and Second Parties—Jameson, K.C.—Graham Stewart. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for the Third Parties—W. Campbell, K.C.—Cullen. Agent—Henry Robertson, S.S.C.

Counsel for the Fourth Parties—Cook—Spens. Agents—W. & J. Cook, W.S.

Friday, January 25.

FIRST DIVISION.

[Dean of Guild Court, Edinburgh.

SOMERVILLE v. MACDONALD'S TRUSTEE.

Burgh—Dean of Guild—Order for Taking Down of Ruinous Buildings—Notice—Refusal to Allow Proof—Order Made on Expert Knowledge of Court—Appeal—Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxvii.), sec. 166—Edinburgh Improvement, &c. (Amendment) Act 1893 (56 and 57 Vict. cap. cliv.), sec. 34 (3).

Section 166 of the Edinburgh Municipal and Police Act 1879, as amended by sec. 34 (3) of the Edinburgh Improvement, &c. (Amendment) Act 1893, provides that if any building "be deemed by the burgh engineer to be in a ruinous or insecure state" he shall cause notice to be given to the owner requiring him to take down such building, and if he does not begin to do so within three days after such notice, the Dean of Guild Court, on the complaint of the Procurator-Fiscal, shall, "if they find it necessary after hearing parties," order the owner of the building to take it down, and failing his doing so cause it to be taken down.

A, the proprietor of the ground floor of a tenement, received a notice from the burgh engineer in the following