

annually a surplus of income of between £120 and £150.

The testator's widow died in 1904, leaving a holograph will in which she expressly disposed of the sum of £20,000 invested by the trustees to provide her annuity.

A special case was after her death presented to the Court containing, *inter alia*, the following question:—"Did the power of bequest conferred by the testator on Mrs Chivas extend to the whole sum of £20,000 set aside by the first parties (the testator's trustees) to meet her annuity?"

The second parties to the case contended that Mrs Chivas' power of bequest did not apply to the whole sum which the trustees might in their discretion and for their own protection set aside to meet the annuity, but only to such sum as was sufficient to provide such part of the annuity as was not provided by the rents of Thornhill. They maintained that while the trustees might be entitled to set aside such a sum as would insure that there should not in any contingency be a deficiency, the sum so set aside by the trustees was not the measure of the widow's right of bequest.

The third parties contended that the power of bequest conferred by the testator on Mrs Chivas extended to the whole amount set apart by the first parties out of the residue of the testator's estate to meet her annuity.

The following cases were referred to—*Forsyth v. Kilgour*, December 15, 1854, 17 D. 207; *Munro's Trustees v. Munro*, June 21, 1899, 1 F. 980, 36 S.L.R. 761; *Hicks v. Ross*, [1891] 3 Ch. 499.

The judgment of the Court was delivered by

LORD LOW—. . . By the third purpose of his settlement Mr Chivas directed his trustees to pay to his wife an annuity of £500, "with power to my said spouse to bequeath the amount of said annuity to any one or more of our children as she may think fit." It appears very clearly from the context that what the truster meant by the expression "the amount of said annuity" was the capital sum retained by his trustees to provide for the annuity. . . .

The third question relates to the sum (£20,000) retained by the trustees to secure Mrs Chivas' annuity. The second parties contend that that sum was excessive seeing that a considerable part of the annuity was met by the rents of Thornhill, and that accordingly Mrs Chivas' right to bequeath the sum retained to secure the annuity should be held to be limited to such an amount as would have been reasonably sufficient for that purpose after taking into account the average free rents of Thornhill. Now, I think that the sum retained by the trustees was very full, but it is not suggested that they acted otherwise than in good faith, and I am not prepared to say that the amount was so extravagant that they cannot be regarded as having exercised their discretion reasonably. I am therefore of opinion that the third question falls to be answered in the affirmative. . . .

The Court answered the question in the affirmative.

Counsel for the Second Parties—Wilson, K.C.—D. Anderson. Agents—Davidson & Macnaughton, S.S.C.

Counsel for the Third Parties—Cullen, K.C.—Blackburn, K.C.—Chree. Agent—F. J. Martin, W.S.

Tuesday, November 6.

FIRST DIVISION.

HENDERSON'S TRUSTEES *v.* HENDERSON AND OTHERS.

Succession—Heritable and Moveable—Conversion—Intention.

A testator directed his trustees to hold the residue and remainder of his estate and effects, "or of the prices and produce thereof," in trust for the use of his children, and on the youngest child attaining twenty-five years, at which time vesting took place, to pay, assign, and dispose whatever should remain (subject to the retention of sufficient to provide an annuity to the widow) to the children and grandchildren equally *per stirpes*; "declaring always . . . that it shall not be imperative upon my trustees for the purposes of this division to convert the residue of my means and estate into cash, but they shall be entitled . . . should they deem it more beneficial for any of my children or grandchildren to have parts or portions of my estate allocated to them, to have such parts or portions of my estate, whether heritable or moveable, as they shall resolve so to allocate, valued . . . and to assign and dispose the parts or portions so valued to the child or children, or the issue of such of my children to whom my trustees shall have allocated the same respectively, . . . but declaring that the exercise of this power and of the power of allocation before given by my trustees shall be purely at their own discretion, and shall be in no way compulsory upon them." The trustees divided at the period of payment the trust estate save the heritage, which formed the largest portion, and which, with the beneficiaries' consent, they continued to hold, paying the revenue in part as the widow's annuity, and as to the remainder to the beneficiaries. On the widow's death this heritable property, of an urban character, having been sold, held that the interest of a son who had died between the date of vesting and the death of the widow was moveable as to his succession.

James Henderson, civil engineer in Glasgow, died on February 8, 1870, leaving a trust disposition and settlement dated 11th July 1861, which was recorded in the Court Books of the Commissariat of Lanark 1st July 1870, and in the Books of Council and Session 15th June 1874.

The trust disposition, *inter alia*, provided—“Fourthly, that my trustees shall hold the residue and remainder of my estate and effects hereby conveyed, or of the prices and produce thereof, in trust for the use and behoof of my children and such other children as may hereafter be procreated of my body, and shall pay and apply the annual interest or produce thereof as they may consider necessary in the maintenance, education, and upbringing of said children in a manner suitable to their circumstances and prospects in life, with power also to my trustees to use and apply as much of the principal of my means and estate for these purposes as they shall consider prudent and advisable: Declaring that my trustees shall be the sole and exclusive judges of the amount, whether of principal or interest, so to be applied, and the time and manner of its application: And on the youngest of my children born or to be born attaining the age of twenty-five years complete, I direct my trustees to pay, assign, and dispoise whatever shall then remain of my means and estate (subject to the reservation after mentioned for securing the provisions to my spouse) to and among my children equally, share and share alike: Declaring always, as it is hereby specially provided and declared, that it shall not be imperative upon my trustees for the purposes of this division to convert the residue of my means and estate into cash, but they shall be entitled, and I hereby specially authorise and empower them, should they deem it to be more beneficial for any of my children or grandchildren to have parts or portions of my estate allocated to them, to have such parts or portions of my estate, whether heritable or moveable, as they shall resolve so to allocate, valued by one or more competent neutral persons to be specially chosen and appointed by my trustees for that purpose, and to assign and dispoise the parts and portions so valued to the child or children or the issue of such of my children to whom my trustees shall have allocated the same respectively, *pro tanto* of the share or shares falling to them respectively of my estate, the parts or portions so allocated being reckoned in the division of my estate as of the value or values placed upon them by the party or parties appointed by my trustees to value the same, with power to my trustees to advance to any of my children such part of their provision as to my trustees shall seem proper for fitting them out in life: But declaring that the exercise of this power and of the power of allocation before given by my trustees shall be purely at their own discretion, and shall be in no way compulsory upon them: And declaring further that the foresaid provisions to my children (except to the extent paid to them under the powers to that effect hereinbefore given) shall not become vested interests in them until the term of payment thereof; but in the event of the death of any of them before such term of payment, leaving lawful issue, the provision to any of them so dying leaving lawful issue shall be divided equally among his or her issue,

and failing such issue, shall belong to my surviving children or their issue equally among them *per stirpes*: . . . And I hereby farther direct and appoint that in the event of my spouse, the said Juliana Mary Gale, surviving to the foresaid period of division, my trustees shall retain and invest in their own names as much of the residue of my means and estate as will in their opinion be sufficient to secure the provisions payable to her out of my estate, and on said provisions being fully satisfied, my trustees shall pay the sums so retained to the parties then in right thereof.”

The testator was survived by his widow, who died on 17th January 1905, and by six children; the youngest, Mary Henderson, attained the age of twenty-five years on 3rd May 1887, at which date, in terms of the above-quoted provision of the trust-disposition, the children's shares vested in them, and, subject to reservation for payment of the widow's annuities, fell to be paid, assigned, and disposed to them. The trust estate at the truster's death consisted of heritable property in Union Street, Glasgow, valued subject to bonds at £5500, and moveables valued at £353, 19s. 2d., and the trustees, while paying over to the beneficiaries in 1887 the estate so far as ingathered by them, continued, with the beneficiaries' consent, to hold the heritable property and to pay the widow's annuities out of the revenue therefrom and the balance of the revenue to the beneficiaries in their proper shares. No proposal was ever made to allocate the trust estate. After the death of the widow the trustees resolved on 13th September 1905 to sell the heritable property, and in January 1906 it was sold for £17,000, from which fell to be deducted bonds for £3150.

One of the testator's sons, John Julian Henderson, who had been of weak mind and under curatory, had died unmarried and intestate on 25th January 1902, and a question arose whether his interest in the trust funds was heritable or moveable. A special case was therefore presented by (1) Thomas Adam, property agent, Glasgow, and another, the trustees of the testator James Henderson; (2) Robert Gale Henderson, the immediate elder brother and heir in heritage of the said John Julian Henderson; and (3) (a) the other surviving children of the truster, viz., James Allan Henderson, Laurence Henderson, and Caroline Mary Henderson or Roberts (one son William having died in 1898 without issue), and (b) the said James Allan Henderson as executor of John Julian Henderson and also of the truster's widow.

The special case stated—“The second party maintains that said deceased John Julian Henderson's share of the said James Henderson's estate, in so far as the same consisted on 25th January 1902 (the date of the death of the said John Julian Henderson) of heritable property, namely, one-sixth part of the said heritable property and produce thereof after deduction of the proportion of the heritable debt affecting the same, is heritable as regards succession to the said John Julian Hender-

son, and that the second party is entitled thereto as the heir-at-law in heritage of the said John Julian Henderson, and that neither the said sale of the property nor anything they, the first parties, have done, or may hereafter do, can deprive him of his right of succession to the share of the said John Julian Henderson in said heritage, or the money value thereof. . . . The third parties maintain that the said John Julian Henderson's interest in the said trust estate is moveable, and his share thereof falls to be divided in terms of the law regulating intestate moveable succession in Scotland."

The questions for the opinion and judgment of the Court were—“(1) Is the interest of the said deceased John Julian Henderson in the heritable property left by his father and the produce thereof heritable, and does such interest or the value thereof in money fall to be conveyed or made over to the second party? or (2) Is his interest in said heritable property and produce thereof moveable, and does said interest or its value in money fall as such to be divided according to the law of intestate moveable succession in Scotland?”

Argued for the third parties—The share of the deceased son John Julian had the character of moveable impressed on it by the arrival in 1887 of the period of distribution. The arrival of that period made it necessary that the trustees should exercise the discretionary power of sale which lay in them; that had the effect of changing the discretion into a direction to sell, and inferred conversion—*Buchanan v. Angus*, May 15, 1862, 4 Macq. 374, per Lord Chancellor (Westbury) 379. It did not matter that the trust property *de facto* continued in heritage—Special Case *Macgregor and Others*, May 20, 1876, 13 S.L.R. 450. It had only so remained in heritage by consent of the beneficiaries—*inter alios*, of John Julian's curator, who was powerless to alter the character of his ward's succession—*Moncrieff v. Miln*, July 16, 1856, 18 D. 1286. It was practically impossible, or at all events very inconvenient, to allocate this urban heritage among so many beneficiaries, and that was the only alternative to realising. Realising inferred conversion, and hence a step which implied conversion was indispensable to the trust purposes being carried out—*Watson's Trustees v. Watson*, May 17, 1902, 4 F. 798, per Lord M'Laren, 804, 39 S.L.R. 628; *Fotheringham's Trustees v. Fotheringham*, July 2, 1873, 11 Macph. 848, 10 S.L.R. 540; *Sheppard's Trustee v. Sheppard*, July 2, 1885, 12 R. 1193, 22 S.L.R. 801; *Brown's Trustees v. Brown*, December 4, 1890, 18 R. 185, 28 S.L.R. 138; *Playfair's Trustees v. Playfair*, June 1, 1894, 21 R. 836, 31 S.L.R. 671; *M'Call's Trustees v. Murray*, January 24, 1901, 3 F. 380, 38 S.L.R. 292. *Auld v. Anderson*, December 8, 1876, 4 R. 211, 14 S.L.R. 144, was in many points to be distinguished, as, for example, in that the trustees in that case had power to borrow and so equalise the shares allocated. This contention that John Julian's succession was moveable was borne out by the terms of the settlement where the testator clearly

contemplated realisation of the heritage by such expressions as “prices and produce thereof,” “pay, assign, and dispoise,” and “it shall not be imperative upon my trustees . . . to convert the residue of my means and estate into cash.” Clearly the succession of John Julian from his father's estate was moveable.

Argued for the second party—John Julian's succession was heritable *quoad* his interest in the heritage of his father's estate. The power given the trustees to allocate was not inconsistent with a general power of sale, and there was nothing in the settlement to show that the power of sale was to be exercised, nor was it indispensable to the execution of the trust. Thus *Anderson's Executrix v. Anderson's Trustees*, January 18, 1895, 22 R. 254, 32 S.L.R. 209, applied. A mere direction to pay did not infer conversion. Moreover, the act of election by John Julian's curator could not be resiled from.

At advising—

LORD M'LAREN—(Read by Lord Kinnear)—In consequence of the death of John Julian Henderson, one of the testator's children, intestate, on 25th January 1902, and while the trust estate was still undivided, it becomes necessary to determine whether the interest which he took under his father's will is heritable or moveable in relation to his succession.

The property is in fact heritable, but it is maintained by Mr John Julian Henderson's executors that his interest in it was moveable, because the testator his father had directed it to be sold, or, which is the same thing, had given his trustees a power of sale, the exercise of which is indispensable to the due execution of the trust.

Some cases and points in the application of the principle of constructive conversion are now settled by decisions, so far as a question of testamentary intention can be governed by the law laid down in other cases. For example, the two Divisions of the Court came independently to the conclusion that where children were to be paid their shares successively as each child attained majority the presumption was irresistibly strong that the testator intended a payment in money, because the Court would not, unless on the clearest evidence, attribute to a testator such an inconvenient and impracticable arrangement as that the children were to be made owners *pro indiviso* in conjunction with his trustees.

Again, it has often been affirmed that the mere fact that the body of beneficiaries is numerically large is not decisive in favour of conversion, because if the distribution of the estate is to be made at one time it is possible to carry it out by a conveyance to the beneficiaries *pro indiviso* in the proportions to which they are respectively entitled.

The present case does not fall under either of the categories to which I have adverted, and I think the question we have to consider is whether the testator, in the events which have happened and in the

existing condition of his estate, is not to be taken as having directed a sale and conversion of his heritable estate.

There can be no doubt that Mr Henderson contemplated a sale of his heritable estate as a thing that might be necessary in certain circumstances, because the direction regarding the disposal of the residue begins with words to the effect that his trustees shall hold the residue of his estate, "or of the prices and produce thereof," in trust as there directed. Again, in the clause of special powers we have the words "with powers of sale by public or private bargain."

I think we may even go further and say that, except in the case which he distinctly specifies, Mr Henderson intended that his power of sale should be exercised, because the special direction begins with words declaring "that it shall not be imperative upon my trustees for the purposes of this division to convert the residue of my means and estate into cash." Then the will proceeds to empower the trustees, should they deem it more beneficial, to allocate parts of his estate to his children and grandchildren. This is to be carried out by means of a valuation to be made by neutral persons, and then the trustees are "to assign and dispose the parts and portions so valued to the child or children, or the issue of such of my children to whom my trustees shall have allocated the same respectively," and so on.

Now, the residue of Mr Henderson's estate is divisible amongst four surviving children and the representatives of a deceased son; that is, in one view of the case, amongst five objects of the trust, and in the other view amongst more than five. But we learn from the special case that the residue consisted of one heritable property in Glasgow, and that this property has been sold (under reservation of all legal rights) for the sum of £17,000.

I am not surprised that the trustees should have thought it proper to exercise their powers of sale, because with one heritable subject and five beneficiaries allocation was materially impossible, and as I read the will allocation is the only alternative to a sale and division of the price. The direction is that it shall not be imperative on the trustees to sell, but that if they consider it expedient they may allocate; and this, in my opinion, implies that if allocation is impracticable, it is imperative on the trustees to sell, and to pay the shares of the beneficiaries in money. I am therefore of opinion that the trust's heritable estate was constructively converted, and that the questions should be answered in favour of the third party; that is, that we should negative the first question, and answer the second question in the affirmative.

LORD PEARSON—On the death of the testator in 1870, one of his children John Julian Henderson was under curatory, and so remained until his death in 1902. The question for decision is whether at John Julian Henderson's death his interest in his father's heritage was heritable or moveable in his person.

The children's interest under James Henderson's will vested in 1887, when the youngest of them attained the age of twenty-five. At that date there was a partial distribution of the moveable estate so far as ingathered, but the rest of the estate remained undistributed, partly because of the existence of an annuity payable to the widow, and partly because it was considered imprudent to realise the heritage at that particular time. On the death of the widow in 1905 the trustees resolved to sell the heritage by public roup, and it was sold in January 1906 at the price of £17,000. John Julian Henderson, whose share is here in question, had died in January 1902, at which time the trustees had neither sold nor resolved to sell any of the heritage. The estate therefore remained vested in the trustees *in forma specifica* as heritage at the date of his death, and if John Julian Henderson's beneficial interest in the estate was itself heritable in quality at that date, its nature would not be changed by the subsequent exercise of a merely discretionary power of sale on the part of the trustees. On the other hand the question whether his beneficial interest was heritable is not solved in the affirmative by the mere circumstance that the heritable estate remained unsold at his death. It is necessary to take a wider view of the settlement and to consider its provisions in the light of what we know as to the nature and quality of the trust estate. The question really is whether these trust properties could at any time have been distributed in the form of heritable estate by the trustees, acting according to the provisions of the will. Now the problem before the trustees was, how to equalise the shares in the distribution of the estate in accordance with the terms of the will itself. Both at the testator's death in 1870 and at the period of vesting in 1887 the beneficiaries were six in number, among whom there was to be an equal division. The heritable estate did not in fact admit of being so divided *in specie*, consisting as it did of parts of a tenement in Union Street, Glasgow. The two alternatives usually open to trustees in such circumstances are either to sell the properties and divide the proceeds, or to convey them to the beneficiaries *pro indiviso*. Now if both these alternatives had been really open to the trustees under this will, the claim of the heir-at-law might have been well founded. For in that case a sale would not have been indispensable to the execution of the trust purposes, and the right of each beneficiary from and after the date of vesting might be accurately described as a right to a *pro indiviso* share of the heritage, irrespective of whether the trustees ultimately exercised their power of sale before division. The question therefore comes to be this, whether the second alternative, namely, a *pro indiviso* conveyance, was open to the trustees here, and in my opinion it was not. As I read this will, it does not contemplate a conveyance of the estate in *pro indiviso* shares, and, indeed, it impliedly excludes that alternative. The leading assumption

of the will is that the estate shall be realised and divided in cash. And, in the alternative, it is "specially provided and declared that it shall not be imperative upon my trustees for the purposes of this division to convert the residue of my means and estate into cash, but they shall be entitled, and I hereby specially authorise and empower them, should they deem it to be more beneficial for any of my children or grandchildren to have parts or portions of my estate allocated to them, to have such parts or portions of my estate, whether heritable or moveable, as they shall resolve so to allocate, valued by one or more competent neutral persons . . . and to assign and dispose the parts and portions so valued to the child or children, or the issue of such of my children, to whom my trustees shall have allocated the same respectively, *pro tanto* of the share or shares falling to them respectively of my estate." This alternative of "allocation" is the only alternative contemplated by the testator, and, as the facts turned out, it proved to be an impossible alternative. Thus a sale and division of the price was at the date of vesting, and has ever since been, the only possible course open to the trustees, and was indispensable to the execution of the trust.

This view of the case is not affected by varying the date at which the distribution is supposed to take place. I think the true date to be regarded is the date of vesting. The question would have been the same if the testator's widow had predeceased that date. The sale was in fact postponed, with the result that at the date when John Julian Henderson died the subjects remained heritable in the persons of the trustees. But the postponement of the sale, whether by agreement or for convenience, or in the hope of a more favourable realisation, is an incident which cannot affect the decision of the question before us.

I am for answering the second question of law in the affirmative.

LORD KINNEAR concurred, and stated that he was authorised to say that the Lord President concurred in this judgment.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First Parties—Irvine—Wark. Agents—J. & J. Gellatly, S.S.C.

Counsel for the Second Party—Craigie, K.C.—Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for the Third Parties—Hunter, K.C.—J. G. Jameson. Agents—A. P. Purves & Aitken, W.S.

JULY SITTINGS, 1906.

FIRST DIVISION.

(Before the Lord President and a Jury.)

MOFFAT v. COATS.

Reparation—Slander—Privilege—Malice—Statement by One Relative to Another as to Matter of Family Interest—Statement by Uncle to Mother of Nephew regarding Pursuer, who was One of Nephew's Companions.

In an action of damages for slander the defender admitted in the witness-box that he had said to his nephew's mother that he had had it from a friend that the pursuer "would not be permitted to go on any racecourse in the country," and that he had made the statement because he thought the pursuer was not a good companion for his nephew.

Direction per the Lord President that the statement complained of was privileged, and that proof of malice was necessary.

On 4th November 1905, John Moffat, residing at Barshaw, Paisley, raised an action against George Coats, Belleisle, Ayr, in which he sued for £5000 in name of damages for slander. Two issues were adjusted for the trial of the cause, of which the following was the first, viz.—“(1) Whether on or about 2nd July 1905, on board the steam yacht 'Hebe,' and at or near Hunter's Quay, and in the presence and hearing of Sir Thomas Glen Coats and Lady Glen Coats, or of one or other of them, the defender falsely and calumniously stated that the pursuer when racing his horses did not run them straight, and that he would not be permitted to go on any racecourse in the country, or used words of a similar import, meaning thereby that the pursuer was a dishonourable man, who, while he apparently intended to win a race or races, deliberately attempted to lose the said race or races in order to enrich himself, to the loss, injury and damage of the pursuer.”

The pursuer and defender were related, the pursuer being a first cousin once removed of the defender. The defender was a brother of Sir Thomas Glen Coats, and was the guest of Sir Thomas and Lady Glen Coats on board their steam yacht the "Hebe" cruising off Hunter's Quay on the date in question. The Mr T. G. Arthur, Carrick House, Ayr, from whom the defender at the trial stated that he had his information, was an uncle of the pursuer.

The Lord Ordinary (SALVESEN) refused the insertion in the issue of the word "maliciously," leaving it open to the defender to raise that question at the trial, on the ground that a privileged occasion was not disclosed by the pursuer's averments. To this judgment the First Division on a reclaiming note adhered after hearing counsel for the defender (reclaimer), who referred to the following cases—*Bry-*