

witnesses—George John Pitt Taylor, late Captain of the 78th Highlanders, residing at Bandrum, near Dunfermline; and James Thom, butler to the said Sir James Horn Burnett, at Crathes Castle aforesaid; by the said Harriet Georgina Alice Cochrane or Richardson, and James Thomas Stewart Richardson, at Altamont, Blairgowrie, the 7th day of December and year last mentioned, before these witnesses—Elizabeth Jarvis, nurse at Altamont aforesaid, and Mary Stewart, maid to the said Miss Caroline Ella Cochrane, residing there; and by the said Hugh James Rollo, at Edinburgh, the 10th day of March 1875 years, before these witnesses—William Robertson, apprentice, and John Alexander James, clerk, both to the said Hugh James Rollo, being the witnesses by whom the said disposition and conveyance bears to be attested: Further, grant warrant to the Keeper of the General Register of Sasines to record in said register the declaration now granted.”

Counsel for Petitioner—Sym. Agents—
Coventry & Robertson, W.S.

Wednesday, July 15.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

BANK OF SCOTLAND v. LANG AND
OTHERS (WHITE'S TRUSTEES).

*Succession—Heritable and Moveable—Con-
structive Conversion—Arrestments.*

A testator died survived by eight children, and leaving moveable property of considerable value, and seven different heritable properties. By his trust-disposition and settlement he directed his trustees to divide the residue of his estate into equal portions, one for each of his lawful children and their respective lawful issue *per stirpes*, and declared that the whole of the provisions to sons should vest at majority, that two-thirds of the provisions of daughters should vest at majority or marriage, and that the remaining one-third should be held for them in liferent and their issue in fee. It was further declared that all property or funds, heritable or moveable, falling to females should belong to them exclusive of the *jus mariti* and right of administration and right of courtesy, and any other right of their husbands. Power was conferred on the trustees to sell all or any part of the trust-estate, but the deed contained no express direction to the trustees to sell the heritable estate. Upon the death of the testator his trustees realised the moveable estate, and after they had paid the testator's son David

his share thereof, certain creditors of David used arrestments in their hands, and thereafter brought an action of furthcoming against the trustees and David. It appeared that unless it were held that there had been conversion of the heritable estate, the pursuers' arrestments had attached nothing.

Held—aff. Lord Wellwood—(following *Sheppard's Trustees*, 12 R. 1193) that as a sale of the heritage was not indispensable to a proper execution of the trust, there was no conversion, and that the arrestments had attached nothing.

Succession—Heritable and Moveable—Conversion.

A beneficiary under a will disposing of both heritable and moveable estate, consented to part of the moveable estate in which he had an interest being applied to buildings on the heritable estate.

Held that his consent operated conversion of his interest *pro tanto*.

Opinion (by Lord Wellwood) that where a testator left a mixed estate of moveable and heritable property, and, *inter alia*, certain buildings in course of erection, the funds required for their completion were heritable *destinatione*.

Mr David White died in 1888, survived by eight children, some of whom were in minority, and leaving moveable property, including thirteen wine and spirit businesses to the value of about £20,000, and seven separate heritable properties in Glasgow and elsewhere, the value of which was about £40,000.

By trust-disposition and settlement dated 29th August 1887 he directed his trustees therein named to pay certain legacies and an annuity to his widow, and to make provision for the education for any of his children who might be under seventeen years of age at his death. By the sixth purpose of the settlement he directed the trustees to give two of his sons the option of purchasing all or any of the wine and spirit businesses belonging to him, and in the event of any of those sons not exercising the option, to sell the same, “in terms of the general powers of sale hereinafter mentioned,” unless some of his other sons should wish to purchase them. In the last place, with respect to the residue of his estate, the testator directed his trustees to hold and apply the said residue for the persons and in manner following—“That is to say, I direct and appoint them to divide the said residue into equal portions, one for each of my whole lawful children now alive, or hereafter to be born, or their respective issue, *per stirpes*, as after mentioned; and (first) as regards the whole portion of each of my sons and two-third parts of the portion of each of my daughters, it is hereby declared that the portions of such of my sons as have attained majority previous to my death shall vest at my death, and the portions of my sons then in minority shall vest on their attaining majority, and that two-third parts of the

respective portions of such of my daughters as have attained majority or been married during my life shall vest at my death; and as regards any of them in minority and unmarried, the same shall vest on their attaining majority or being married, whichever of these events shall first happen." It was declared that if any of his children should die before the period of vesting leaving issue, such issue should be entitled equally *per stirpes* to the share which would have belonged to their parents had they survived, and if any of the children should die before the period of vesting without issue, the share which would have belonged to them if in life should accresce to the survivors and to the issue *per stirpes* of predeceasers, it being declared in the case of daughters that the trustees should hold and apply one-third of such accreting shares and one-third of their original shares for their liferent alimentary use only, and for the heirs of their body *per stirpes* in fee. It was further declared "that all property and funds, heritable and moveable, whether consisting of capital or income, falling in virtue of these presents to females, shall belong to them exclusive of the *jus mariti* and right of administration and right of courtesy, and every other right of any husband whom they may have, and shall not be affectable by nor liable for the deeds or debts of such husband." The testator conferred the following powers upon his trustees—"To sell the trust-estate, or any part thereof, by public or private sale, and with or without previous advertisement, which power of sale shall be held to include power to feu or to convey in consideration of and under burden of a ground annual, . . . to lend upon the security of the trust-estate, . . . to grant leases and remove tenants, . . . to invest the trust funds in the purchase of lands or other heritable property in Scotland, England, or elsewhere." . . . The deed contained no express direction to the trustees to sell the trust-estate.

After Mr White's death the trustees realised the moveable estate, and after deducting a sum of £3782, 9s. 3d., which was necessary for the completion of certain buildings the erection of which had been begun by the testator, they paid over the share of the moveable estate belonging to the children of the testator who were of age, and, *inter alios*, to his son David the sum of £1750.

Some months after the above payment had been made to David, the Bank of Scotland, upon the dependence of an action against David, arrested the sum of £450 in the hands of the trustees, and thereafter the bank brought an action against the trustees and David White junior for payment of £385, 11s. 10d., for which, with £22, 17s. of expenses and dues of extract, they had obtained decree against David White junior.

The pursuers founded, *inter alia*, upon the fact that the trustees had expended the sum of £3782, 9s. 3d. of personalty, as already mentioned, in buildings upon the heritable estate.

The defenders denied that at the date of the pursuers' arrestments there was in the hands of the trustees any moveable estate belonging to David White junior except such as had already been attached by an arrestment which it was not disputed had been used at the instance of other creditors of David White junior prior to the arrestment by the pursuers.

Proof was allowed, from which it appeared that at the date of the pursuers' arrestment the only moveable fund in the hands of the trustees belonging to David White junior was a sum of £89, which was insufficient to meet the prior arrestment, and that the said sum of £3782, 9s. 3d. of personalty which had been expended by the trustees on buildings, had been so expended with the consent and approval of David White junior.

On 21st May 1891 the Lord Ordinary (WELLWOOD) found that it was not proved that any funds due to the principal debtor David White junior had been attached in the hands of the trustees of David White senior by the pursuers' arrestment; therefore sustained the defences and assolizied the defenders.

"*Opinion.*—In this action the pursuers, the Bank of Scotland, seek to recover present payment from the defenders, trustees of the late David White senior, of a sum of £385, 11s. 10d., for which, with £22, 17s. expenses of process and dues of extract, they obtained decree against the defender David White junior on 18th January 1890. The action is founded upon an arrestment dated 28th October 1889, by which the pursuers, upon the dependence of an action against D. White junior, arrested in the hands of the defenders, White's trustees, the sum of £450, less or more, due and addebted to them by David White junior.

"The defence is that at the date of the arrestment the only moveable fund in the hands of the trustees belonging to the principal debtor David White junior was a sum of £27, 15s. 8d., and that his remaining interest in the estate of his late father consisted of his share of heritable estate. It was further pleaded in defence, and it is admitted, that on 26th October 1889, being three days before the date of the pursuers' arrestment, an arrestment which is admitted to be effectual and preferable to that of the pursuers, was used in the hands of the trustees to the extent of £150 by other creditors of David White junior. Taking Mr More's figures as correct, that the sum due to David White junior in the trustees' hands is £89, not £27, that sum is insufficient to meet the prior arrestment.

"The principal question argued was whether David White junior's interest in his father's estate was wholly moveable, or partly heritable and partly moveable.

"The pursuers' counsel broadly contended that David White junior's interest or *jus crediti* in his father's succession was wholly moveable. The question is one of intention to be gathered from the terms of the settlement, read in the light of the circumstances at the death of the truster. The truster David White senior died in 1888, possessed of heritable and moveable property to a

considerable amount, the heritable being, roughly speaking, worth about £40,000, and the moveable, including certain wine and spirit businesses, being worth about £20,000.

"He was survived by eight children, some of whom were in minority.

"In the trust-deed there is no express direction to sell the heritable estate. The trustees are directed to divide the residue of the whole estate into equal portions—one for each of the truster's lawful children or their respective lawful issue *per stirpes*. The trustees are given, amongst other powers, power to sell the trust-estate or any part thereof 'by public or private sale, and with or without previous advertisement, which power of sale shall be held to include power to feu or convey in consideration of and under burden of a ground annual.'

"They are also given power to grant leases 'of such duration and on such conditions and terms as they shall think proper . . . With power also to borrow money on the security of the trust-estate.'

There being no express direction to sell the heritable property, the pursuers in order to establish constructive conversion must show that a sale of the heritable property is indispensable to the proper execution of the trust. The most recent case on the subject is *Sheppard's Trustees*, 12 R. 1193, which was a decision of a Court of seven Judges on account of a difference or supposed difference in the views and decisions of the two Divisions of the Court in regard to the application of the doctrine of constructive conversion. The recent decisions pronounced by the First Division were *Auld v. Anderson*, 4 R. 211; *Hogg v. Hamilton*, 4 R. 845; *Duncan's Trustees v. Thomas*, 9 R. 731; *Aitken v. Munro*, 10 R. 1097; and those pronounced by the Second Division were *Boag v. Walkingshaw*, 10 Macph. 872; *Fotheringham's Trustees*, 11 Macph. 848; *Baird v. Watson*, 8 R. 233.

"I think it will be found on comparing those cases and reading the opinions delivered in *Sheppard's Trustees*, that the two Divisions did not differ as to principle, but that the First Division construed the word 'indispensable' with greater strictness than the Second Division, holding that in order to infer constructive conversion it was not sufficient that it should be inconvenient to abstain from selling the heritable property, and that a conveyance to beneficiaries *pro indiviso* would in the absence of other considerations satisfy a direction to divide a mixed residue among a number of beneficiaries. The result of the case of *Sheppard's Trustees* was that the Court by a majority of five to two sustained the First Division's views on the subject of constructive conversion. I must accordingly consider the present case in the light of that judgment.

"Now, I do not find in the trust-deed sufficient grounds for holding that in order to the due execution of the trust as regards division of the residue there is an indispensable necessity for a sale of the heritable estate. On the contrary, I find indications that a sale for that purpose was not

contemplated as necessary by the truster. In particular, there is a provision that all property and funds, heritable and moveable, falling to females, shall belong to them exclusive of the *jus mariti* and right of administration and right of courtesy of their husbands.

"The pursuers point to the inconvenience of conveying the heritable properties to such a number of beneficiaries *pro indiviso*, especially having regard to the fact that their respective interests are declared to vest at different times. I can only say that this consideration was held insufficient in the authorities to which I have referred; and further, that the difficulty might, if necessary, be got over in any particular case by the trustee exercising their borrowing powers.

"The pursuers also rely on the sixth purpose of the trust as indicating a direction, or at least an intention to convert. Now, the spirit business directed to be sold, which was carried on in shops for the most part held on lease, was moveable property; and the direction to sell referred, I think, to the business. None of the shops belonging to the trust were sold, the trustees granting leases of them to the purchasers of the business.

"The next question is, whether it is proved that the trustees expended part of the moveable estate upon or in connection with heritage; and if so, whether the sums so expended must be held still to retain their moveable character in the present question, and thus to be attachable by the arrestment used by the pursuers? The pursuers particularly pointed to a sum of £3782, 9s. 3½d., which was expended by the trustees upon the completion of certain buildings which were in the course of erection at the death of the truster. They maintained that even if the principal debtor's *jus crediti* in the trust-estate, in so far as it consisted of heritage at the death of the truster, was heritable, the trustees could not alter the character of his interest in the moveable estate by applying part of it to the improvement of the heritable estate. The trustees answered in the first place that the buildings being in course of erection at the death of the truster under contracts entered into by him, the funds required for their completion were heritable *destinatione*, and founded on the case of *Malloch*, 5 Macph. 335; and in the second place, that David White junior expressly consented to the money being so applied. Both answers, I think, are sound; but the second answer is sufficient, because the principal debtor's consent to part of the moveable estate in which he had an interest being so applied operated reconversion of his interest *pro tanto*—*Grindlay*, 16 D. 27, and *Hogg*, 4 R. 845.

"It is further said that the trustees have not kept the accounts of the heritable and moveable estates separate; and that it appears from the accounts that the trustees at their own hands applied part of the moveable funds in payment of expenses and charges connected with heritage. It certainly appears from the account of

charge and discharge that separate accounts were not kept, and that the proceeds of the moveable estate and the rents of the heritage were used indiscriminately for trust purposes. But I do not think that the pursuers have succeeded in showing that moveable funds have been applied in connection with the heritable estate to such an extent as on a restatement of the accounts to leave any balance to be imputed to David White junior's share of moveables, especially after satisfying the prior arrestment. So far as I can see, the rents of the heritage were more than sufficient to meet all charges on heritage. For instance, from the income account it appears that sums amounting to £1246, 0s. 5d. were expended prior to 29th October 1889, and a sum of £481, 16s. 0½d. between that date and 28th January 1890, in payment of repairs on the heritable properties, and insurance, rates, taxes, and assessments, &c., connected therewith. But, on the other hand, it appears, under the head of receipts, that rents were received prior to 29th October 1889 to the amount of £3632, 3s. 3d., and after that date to £1088, 1s. 1½d., in all £4720, 4s. 4½d. It thus appears that the rents, out of which properly the expenses connected with the heritage fell to be paid, amounted to more than double the amount of the aforesaid payments in connection with heritage, the remainder, which would have more than covered the share of expenses of administration referable to heritage, being apparently applied in payment of moveable debts.

"Therefore, on the whole matter, I think that, even if sums so expended could be traced and regarded as still moveable, the pursuers have not succeeded in showing that there would remain any balance of moveable funds expended on or in connection with heritage to be attached by the pursuers' arrestment. I therefore hold that there were not at the date of the pursuers' arrestment in the hands of David White senior's trustees any moveable funds due by them to David White junior, to be attached by the pursuers' arrestment. The defenders must therefore be assoltized from the action as laid, whatever may be the effect of the pursuers' arrestment in regard to sums in which David White junior has a contingent or reversionary interest.

The pursuers reclaimed, and argued—The interest of David White junior was moveable and attachable by arrestment. The question of conversion was one of intention to be gathered from the terms of the settlement and the circumstances at the death of the testator. Owing to the nature of the trust-estate, which consisted of seven heritable properties and thirteen wine businesses, a partial sale was inevitable. There could not be a *pro indiviso* conveyance to the beneficiaries some of whom were under age. The testator only intended the trust to continue as long as was necessary, and the estate was to vest in the beneficiaries at his death if they had then attained majority. But it was impossible to give

effect to the trust and make this division without conversion. It was this point which separated the case from *Sheppard's Trustees*, upon which the Lord Ordinary had proceeded. The provision in the trust expressly directing to sell the businesses did not differentiate them from the heritage in order to contrast the methods of dealing with them, but was merely intended to give the trustees leave to sell to themselves. The trustees had hitherto made no distinction, but had treated the whole estate as one fund, expending money out of the moveable funds on buildings, &c., and paying the beneficiaries by conversion. Even though estate was heritable, the beneficiaries' interest in it was moveable—*Bell's Prin. secs. 1492, 1996; Sheppard's Trustees*, July 2, 1885, 12 R. 1193, and remaining authorities in the Lord Ordinary's note. In any case, the question should be kept open, and the arrestment allowed to hold good for any contingent sums which might come into the arrestee's hands—*Learnmont v. Shearer*, March 3, 1866, 4 Macph. 540.

The defenders argued—This case was merely a conflict of diligences. If the pursuers gained their case they would be able to interfere with the management of the trustees. The pursuers must make out that there was an express direction, or indispensable necessity to sell, and neither of these existed here. The deed was against it; the clause as to the daughter's share being exclusive of *jus mariti*, &c., was applicable only to heritage. The trustees might quite well divide the heritage, retaining the management of the minors' portion. There was no obligation on them to sell.

At advising, the Court adopted the Lord Ordinary's opinion and adhered to his interlocutor.

Counsel for the Pursuers and Reclaimers—Dickson—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders and Respondents—Asher, Q.C.—Aitken. Agents—Carmichael & Miller, W.S.

HIGH COURT OF JUSTICIARY.

Friday, July 17.

(Before Lord Young, Lord Rutherford Clark, and Lord Trayner.)

WHYTE v. ROBERTSON.

Justiciary Cases—Summary Prosecutions—Relevancy—Section of Statute Contravened not Specified.

A complaint charging a contravention of a statute which does not specify the section contravened is irrelevant. A conviction under such a complaint will be *suspended*, although the relevancy has not been challenged before trial.