subject of entail certain things which he could not. To see what the different articles were we must look to the deed. I agree with my Lord President that the exception is not from the conveyance but from the prohibition. I also agree that in order to see what "corporeal moveables" are in the deed the sense in which the truster used these words elsewhere in the deed must be looked to. His other expressions form a sort of glossary.

Lord Mure—I concur. The phraseology is a little peculiar in a deed framed with reference to the law of Scotland.

Lord Shand—I only add that this reading and construction is confirmed by the direction to his trustees to settle his landed property by deed of entail "as soon as practicable after my death." The truster had thus no idea of management by these trustees for any length of time.

The Lords answered the first and second questions in the affirmative.

Counsel for the First Party — Robertson — Pearson. Agents—Melville & Lindesay, W.S.

Counsel for the Second Parties—Mackintosh—Gillespie. Agents—Gillespie & Paterson, W.S.

Thursday, March 16.

SECOND DIVISION.

[Lord Adam, Ordinary.

DUNCAN OR THOMAS *v.* LITTLEJOHN AND OTHERS.

Succession—Vesting.

Terms of deed under which *held* (*rev.* Lord Adam) that vesting had taken effect *a morte testatoris*, and was not deferred until the period of division.

Heritable and Moveable—Conversion.

Terms of deed in respect of which *held* (*rev.* Lord Adam) that notwithstanding the large number of persons who were to participate in an heritable estate which trustees had power to sell, conversion from heritable to moveable was not operated.

Henry Duncan died on 4th July 1830 survived by a widow, one son, and seven daughters. He left a trust-disposition and settlement dated 12th February 1823, and three codicils dated 20th April 1824, 30th April 1825, and 30th October 1828. His estate consisted chiefly of house property in Edinburgh. By the trust-disposition and settlement he conveyed to Henry Duncan, his son, and certain other persons, as trustees for behoof of his said son Henry Duncan, and of the seven daughters of the truster, "equally among him and them in liferent, for his and their liferent uses allenarly, and to the lawful child or children procreated and who may be procreated of his and their bodies equally among them in fee (that is to say, the whole children of my said son and daughters shall have right equally among them *per capita* and not *per stirpes* to the fee of the whole subjects immediately hereinafter disponed for behoof of my said son and seven daughters in liferent)," certain heritable property in Edinburgh. By another provision of the deed he conveyed certain other subjects in Edinburgh (under burden of an annuity to his widow) to the same trustees for behoof of his son and his five daughters Rachel, Eliza, Robina, Isabella, and Ann. These subjects were conveyed for behoof of those persons in terms precisely similar to those just above quoted. To his son the testator also conveyed a long lease of a dwelling-house called Comely Gardens. He further conveyed to the trustees for behoof of his son and the five daughters above named in liferent allenarly, and their children equally among them *per capita* in fee, the whole residue of his heritable and moveable estate. The deed went on to provide—that "with respect to my heritable estate generally, above conveyed (exclusive of what is specially conveyed), now belonging or which belongs to me at the time of my decease, I hereby authorise my said trustees, in the order foresaid, either to hold the same undisposed of in their own names for behoof of my said son and of the said Rachel, Eliza, Robina, Isabella, and Ann Duncan in liferent, for his and their liferent uses allenarly, and of his and their children equally among them *per capita* in fee, as aforesaid, or, with consent of my said five daughters last above named, or the children of any of them who may be dead before me, to sell and dispose thereof, and to grant the necessary dispositions or other conveyances to the purchasers, who shall be nowise concerned with the application of the price or prices, and either to purchase other heritable property with the prices thereof, or to lend out the proceeds on good heritable securities, one or more, and to take the rights and securities thereof to my said trustees, in the order foresaid, for behoof of the said Henry Duncan himself and of my said five daughters last named equally among them in liferent, for their liferent uses allenarly, and to his and their children equally among them *per capita* in fee, as aforesaid: And further, I hereby direct and appoint my said trustees, in their order, to convert the whole of my moveable estate before conveyed into cash as soon as conveniently may be after my decease, and to lay out the same either in the purchase of heritable property or properties, or to lend it out upon good heritable securities, one or more, and to take the rights, titles, and securities thereof to the said trustees themselves in their order, also for behoof of the said Henry Duncan and my said five daughters last above named equally among them in liferent, for his and their liferent uses allenarly, and to his and their children equally among them *per capita* in fee, as aforesaid." It was then provided that the trust "shall as to all the property, heritable and moveable, hereby conveyed, remain and subsist during the lifetimes of my said son and of the whole of my said seven daughters, and the survivor of them; and upon the death of the survivor of them and my said son my said trustees shall be bound to denude in favour of the persons who shall then have right to the different subjects hereby conveyed in terms of this deed, the said trustees being always entitled to be reimbursed and relieved of all necessary expenses and obligations which they may have incurred in the management and execution of this trust: And it is hereby specially

provided and declared that upon the death of any one or more of my said son and seven daughters leaving lawful issue, the liferent right to which such deceaser or deceasers were entitled respectively shall thereafter, during the subsistence of this present trust, fall and belong to the children of such deceaser or deceasers respectively —that is to say, my said trustees shall during the subsistence of the trust make payment to the children of such deceaser or deceasers *per stirpes* of the same annual sums to which their respective parents would have been entitled to had they been alive; and in case of the decease of the whole children of any of my said son and daughters after the decease of their parents, and during the subsistence of this trust, the share to which such children would have had right shall belong to and be divided by my trustees among the whole of my other grandchildren surviving at the time, but always in such a manner that the children of my said two daughters Janet and Agnes Duncan shall not receive nor be entitled to any benefit or share from any part of my said estate, heritable or moveable, except to the extent of a proportion arising solely from what has been provided to their said parents in terms of this deed: And it is hereby further declared that in case of the decease of my said son or any of my said daughters above mentioned without leaving lawful issue, the liferent right of such deceaser or deceasers shall after their deaths fall and belong, not to the survivors of my said son and daughters, but to their children equally among them (the children of any of my said son and daughters who may be deceased being entitled to their parent's share), and my said trustees shall make payment to them accordingly, but always under the declaration in regard to the proportions of the children of the said Janet and Agnes Duncan before specified; and in case of the decease of any of my grandchildren during the subsistence of this trust leaving lawful issue, such issue shall be entitled to the same share which their parents would have been entitled to had they been in life."

By the first codicil, dated 20th April 1825, the testator gave to Henry Duncan, his grandson, son of his son Henry, a share, along with his father and aunts, of his estate, heritable and moveable (except Comely Gardens), equal to his father's share; "and upon my said grandson attaining to the age of twenty-one years he shall have right to receive from my said trustees acting for the time the rents, profits, and dividends of his said share of my said estate, until the final division thereof as within mentioned, when he shall be entitled to the share itself in the terms within specified; but it is hereby declared that in respect of the share hereby provided to my said grandson, he shall not be entitled to any part, along with his brothers or sisters, of the share provided to my said son himself in liferent, and his children in fee, in the final division thereof, in the event of his having a brother or sister alive at the time, or of any of them having left lawful issue." By the same codicil he left to his son, "free of any right of fee in favour of his children," the house known as Comely Gardens. On the 30th of the same month the testator executed a second codicil by which he revoked both these provisions in the first codicil and authorised the sale of Comely Gardens, the proceeds to be laid out on good heritable security or in the purchase of heritable property, and the rights to be taken to his son and five daughters above named in liferent and their children in fee, in every respect in the same manner as the other subjects were provided to them.

The third codicil was of no importance to the questions in this case, except that it appointed the trust to subsist during the lifetime of the truster's widow Elizabeth Duncan. She died on 16th February 1880, thus surviving the last of the truster's children, who died on 19th December 1878. In April 1881 Mr Duncan's trustees brought this action of multiplepoinding for their exoneration and for distribution of the estate. Claims were lodged for a number of grandchildren of the testator, and also for the representatives of grandchildren who had died. Mrs Thomas, the only remaining daughter of the testator's son Henry Duncan, claimed two-ninth parts of the estate first conveyed in the settlement, and two-seventh parts of the remaining property of the testator, contending that under the second codicil the additional share of the estate created in favour of her brother Henry Duncan had been transferred to her father whom she now represented.

The two chief questions necessarily involved in the ascertainment of the rights of various claimants were, Whether vesting of the estate took place *a morte testatoris*? and Whether the heritable estate of the testator was under his settlement to be treated as moveable *quoad* succession?

The Lord Ordinary (ADAM) found that vesting was postponed till the death of the widow, and that the heritable estate was to be treated as moveable *quoad* succession.

He added this note:—"The truster Henry Duncan died on 4th July 1830. He was survived by his widow and by one son and seven daughters. The last surviving child, Mrs Ann Duncan or Brown, died on the 19th December 1878. The widow, who survived all her children, died on the 16th February 1880.

"The truster left a trust-disposition and settlement dated 12th February 1824, and three codicils dated respectively 20th and 30th April 1825 and 30th October 1828.

"Two questions were argued to me—(1) Whether on a sound construction of the truster's settlements a right to a share of the fee of the trust estate vested in the beneficiaries *a morte testatoris*, or whether such vesting was postponed until the period of division—that is, either the death of the last surviving child or of the widow? and (2) Whether the heritable estate left by the truster was to be treated as moveable *quoad* his succession?

[*After narrating the deeds quoted and referred to in the narrative, his Lordship proceeded*]—

"It would thus appear that the whole estate left by the truster fell to be divided into two portions, one of which was destined to his son and seven daughters and their children in liferent and fee, and the other portion to his son and five daughters and their children in liferent and fee, under the burden of an annuity to his widow and the liferent of a house. The first of these portions is estimated to be of the value of £3155, and the second of £9600.

"The estate appears to have consisted chiefly of house property situated in various parts of Edinburgh.

"With reference to the question whether the fee of the estate vested *a morte testatoris*, or only at the period of division—had the only direction in the trust-disposition been that the trustees should hold the estate for the truster's children in liferent and their children *per capita* in fee, probably the grandchildren, as a class, would have taken a fee *a morte testatoris*, each grandchild on coming into existence becoming entitled to a share; but there are other clauses in the deeds which require to be considered in order to ascertain the truster's intention, which, of course, is the guiding principle in the case.

"It will be observed, accordingly, that the truster directs that the trust shall, as to all the property thereby conveyed, remain and subsist during the lifetime of his son and the whole of his seven daughters and the survivor of them; and upon the death of the survivor he directs his trustees to denude in favour of the persons who shall then have right to the different subjects conveyed. Having thus defined the period during which the trust is to subsist, the truster proceeds to deal with the liferent of the estate during the subsistence of the trust. He provides that upon the death of any one or more of his son and daughters leaving lawful issue, the liferent right to which such deceaser or deceasers were entitled respectively should thereafter, during the subsistence of the trust, belong to the children of such deceaser or deceasers respectively *per stirpes*. This shows that the object of the truster in postponing the period of division until all his children were dead was not merely to secure the liferent of the estate to them, because much the larger share of the estate was liferented by his son and five favoured daughters, and no one after their deaths but their children had any interest in the fee of the properties which they liferented, yet these children were not entitled to have the properties conveyed to them so long as either of the other two daughters Agnes and Janet, or his widow, might be in life—a contingency which actually happened in this case. If a right to the fee of the properties vested in the children *a morte testatoris*, it is not easy to see why the conveyance of them to the children should have been postponed until the death of other persons who, or whose children, in that view, had no interest whatever in the fee of the subjects. The same observation also occurs with reference to the Comely Gardens property, which was originally left (though that was afterwards altered) to the son Henry Duncan and his children in fee and liferent respectively. No one else had an interest in the fee of these subjects if they vested *a morte testatoris*, yet they were not to be conveyed to them until the termination of the trust by the death of the last survivor of the truster's children and widow.

"It is also clear that the children of a deceasing parent do not ultimately take the fee of the same share of the estate, of which such parent was to have the liferent. At the termination of the trust the whole estate is to be divided among the grandchildren *per capita*, so that a grandchild, being, for example, the only child of a deceasing child, might enjoy the liferent of a seventh or ninth share of the estate, as the case might be, while at the ultimate division he might, and in this case would, only get the fee of less than a twentieth part of it.

"The truster next provides that in case of the decease of the whole children of any of his son and daughters, after the decease of their parents and during the subsistence of the trust, the share to which such children would have had right should belong to and be divided among the whole of his other grandchildren surviving at the time.

"A question was raised whether 'the share' here referred to meant the intermediate liferent only which such grandchildren had been enjoying, or whether it meant the share of the estate which such grandchildren would have taken had they survived the period of division. If the latter be the meaning, it would be conclusive against vesting *a morte testatoris*, because it would be a clear case of a gift over to survivors. I think, however, that by 'the share' here is meant only the liferent right which the children had on the decease of their parents been enjoying, which on their death is directed to be paid to the other grandchildren then surviving. But if this be so, the remark occurs, why should the representatives of these children, who (on the assumption that the estate had vested in such children *a morte testatoris*) would ultimately get a share of the fee, be in the meantime deprived of any share of the liferent corresponding to such fee?

"But if it was intended that no fee should vest in such predeceasing children, and that the estate should ultimately be divided only among such of the grandchildren as survived the period of division, then it is easy to understand why only the grandchildren, who were ultimately to take the fee, should get the intermediate liferent.

"The truster next declares that in the event of the decease of his son or any of his daughters without leaving lawful issue the liferent right of such deceaser should not accresce to the survivors of his son and daughters, but should be paid to the children equally among them.

"The truster, finally declares that in case of the decease of any of his grandchildren during the subsistence of the trust, leaving lawful issue, such issue should be entitled to the same share which their parents would have been entitled to had they been in life.

"The first question which occurs is, Whether 'the share' here mentioned refers only to the share of the liferent which such deceasing grandchildren were then entitled to, or whether it refers to the whole share, both of liferent and fee, to which such grandchildren would have been entitled had they been in life at the termination of the trust? Now, I see no reason for limiting this share to the liferent merely. It is not so expressed in the deed. The issue are to take the same share as the deceased parent would have taken if in life. But such parent, if in life at the termination of the trust, would have taken a share of the fee of the estate, and I think the intention was that his issue should come in his place and take a share. If this be so, it is a gift of the fee to such issue which is inconsistent with a right to such fee having vested in the parent *a morte testatoris*.

"There are some provisions in the first codicil which seem to throw some further light on the truster's intentions. By this codicil the truster gives to Henry Duncan, his grandson, a share equal to that provided to his father. No doubt this has been recalled, but it is legitimate to look at the codicil to gather what the truster's inten-

tions were with regard to his estate. Henry Duncan is to have right to the rents and profits of this share until the final division of the estate, when it is declared he shall be entitled to the share itself in the terms specified in the trust-disposition and settlement—that is, then, at the final division, and not sooner, to be entitled to the share itself. There is no reason to suppose that it was the truster's intention that this share should vest at any different time from that given to his father, to which it was to be equal, or to his aunts' shares, which were in the same position as the father's.

"Again, it was provided that in respect that Henry Duncan had got this share, he was not to be entitled to any part, along with his brothers and sisters, of the share provided to the son himself in liferent and his children in fee in the final division thereof, 'in the event of his having a brother and sister alive at the time, or any of them having left lawful issue.' It was only, then, in the event of a brother and sister of their issue surviving the termination of the trust, that Henry Duncan was not to get a part of the share provided to his father and his children. This was obviously because it was only in that event that, in the view of the testator, the brothers and sisters would be prejudiced by a share having been given to their brother in his own right. But if a right to a share vested in the brothers and sisters *a morte testatoris*, then the share given to their brother would have been to their prejudice whether they survived or not.

"On the whole matter, therefore, I am of opinion that it was not the intention of the truster that a right to a share of the fee of the estate should vest in his grandchildren alive at his death. I think the various provisions to which I have referred are inconsistent with that view, and indicate an intention on his part that everything should be kept in suspense during the subsistence of the trust. It appears to me that his intention was that the estate should be equally divided among his grandchildren, or their issue, alive at the termination of the trust, subject always of course to the truster's directions as to the exclusion of the children of two of his daughters from any share of certain of the trust properties, and as to his son Henry Duncan's children taking a double portion.

"I was referred on this part of the case to the cases of *Laing* v. *Barclay*, 20th July 1865, 3 Macph. 1143; *Snell's Trustees* v. *Morrison and Others*, 20th March 1877, 4 R. 709; *Young* v. *Robertson*, 4 Macph. Ap. Ca. 314; *Fergus and Others*, 13th July 1872, 10 Macph. 968; *Miller* v. *Finlay's Trustees*, 25th Feb. 1875, 2 R. (H. of L.) 1; *Carleton* v. *Thomson*, 30th July 1867, 5 Macph. (H. of L.) 151; *Taylor* v. *Gilbert's Trustees*, 12th July 1878, 5 R. 217.

"I understand that if the estate is to be held as vesting only at the period of division, no question arises practically as to whether the trust estate is to be treated as heritable or moveable *quoad* succession, but as the matter has been argued to me it may be as well that I should express my opinion on the subject.

"With regard to the trust estate, the larger part of it consists of heritable subjects which were specially conveyed to the trustees to be held by them for behoof of his children and grandchildren on the terms stated above. No power was given to the trustees to sell any of these subjects except one, as after mentioned.

"With respect to the heritable estate generally, other than that specially conveyed, power was given to the trustees either to hold the same undisposed of in their names, or, with consent of his five favoured daughters, or the children of such of them as might predecease him, to sell the same, and either to purchase other heritable property with the price thereof, or to lend out the proceeds on good heritable securities, and to take the rights and titles thereof in their names for behoof of his children and their children as aforesaid.

"The truster further directed his trustees to convert the whole moveable estate into cash, and to lay out the same either in the purchase of heritable property or on heritable securities, taking the titles as aforesaid; and in the event of their lifting any of the sums so laid out, they were directed of new to invest the same in purchasing heritable property or on heritable securities as aforesaid.

"By the second codicil the trustees are authorised, if they shall see fit, to sell Comely Gardens, and they are directed, on the price being recovered, to invest the same in the purchase of houses or other heritable property, or on heritable security, taking the titles in their own names for behoof of his son and five favoured daughters as aforesaid.

"So far, therefore, from there being any direction on the part of the truster to convert his heritable into moveable estate, it is clear that his intention was that when the period of division came his whole estate should be in heritable form. It is said, however, that this was merely for the preservation of the estate during the existence of the trust. The trustees are not directed at the termination of the trust to divide the estate, but to denude in favour of the persons who shall then have right to the different subjects conveyed. There is no power of sale given to the trustees other than the limited power above mentioned. But no doubt, if it is necessary for the execution of the trust—if it is clear that the intentions of the truster cannot be carried out otherwise than by a sale of the subjects—then not only a power but a direction to sell may be implied. The one material fact which is relied on as showing that the truster must have intended that the estate should be sold and divided in money is, that if it shall be held that the estate vested *a morte testatoris* the beneficiaries amount to fifty-two in number, and if at the period of division, to twenty-three. It is said that it is impossible to suppose that the truster could have intended that the subjects should be conveyed to such a number of persons to be held by them as *pro indiviso* proprietors; and it is difficult to suppose that he could have so intended. But if the estate is not to be conveyed to the beneficiaries, to be held by them as *pro indiviso* proprietors, then I do not see how it can be divided equally among them otherwise than by a sale of the subjects.

"I am therefore of opinion that the heritable estate must be held to be moveable *quoad* succession. I was at the hearing of a different opinion; but having regard to the weight which is given in the cases of *Fotheringham's Trustees, &c.*, 2d July 1873, 11 Macph. 848; *Boag* v. *Wallace*, June 27, 1872, 10 R. 1872; *Nairne's Trustees* v. *Melville*, Nov. 10, 1877, 5 R. 128; *Baird, &c.* v. *Watson*, Dec. 8, 1880, 8 R. 233, to the element of difficulty, if not impossibility, of dividing a trust-estate consisting of heritable subjects equally

among many persons otherwise than by converting the same into money, I have come to be of the opinion above expressed.

"I was, in addition to the cases above mentioned, referred to the cases of *Weir* v. *The Lord Advocate*, June 22, 1865, 3 Macph. 1007; *Auld* v. *Anderson*, 8th Dec. 1876, 4 R. 211."

His Lordship thereafter pronounced an interlocutor by which the findings above expressed were made operative, and found Mrs Thomas entitled to two shares *per capita* of the whole estate.

Mrs Thomas reclaimed.

The claimants interested in maintaining that there was vesting *a morte testatoris* in the grandchildren of the testator, and that therefore the representatives of grandchildren who did not survive the widow were entitled to participate in the estate, then argued that on a sound construction of the deed and codicils the rights under it vested *a morte testatoris*.

On the question of conversion—No doubt the number of beneficiaries (52 if vesting was *a morte testatoris*) was an important element in such cases, but here it stood alone. The plain inference from the deed was against conversion.

The Lords made avizandum.

At advising—

Lord Craighill—The present action has been raised for the distribution of the estate of the late Henry Duncan under judicial authority, those interested differing in opinion as to the import and effect of the settlement by which that distribution must be regulated.

Mr Duncan died so long ago as 1830. All his children, seven in number, were interested in the liferent, and after the lapse of the liferent rights of predeceasors the survivors were interested in the income of the estate. There was an annuity provided to his widow, which was a burden upon the succession. The last of his children died in 1878, and his widow survived until February 1880, and this is the explanation of the delay which has occurred in the division of the fee of the property. Two questions have been raised for decision, and have been determined by the Lord Ordinary. The first, Whether on a sound construction of the truster's settlement a right to a share of the trust-estate vested in the beneficiaries *a morte testatoris*, or whether such vesting was postponed until the period of division, that is, either the death of the last surviving child or of the widow? and secondly, Whether the heritable estate left by the truster is to be treated as moveable or as heritable *quoad* his succession? The Lord Ordinary has found that the fee of the trust-estate did not vest *a morte testatoris*, but only on the death of the truster's widow in 1880, and, on the second question, he has found that the heritable estate is in the distribution to be treated as moveable succession. Hence the present reclaiming-note.

One part of the truster's estate was conveyed to trustees for behoof of his son and seven daughters equally among them in liferent for his and their liferent uses allenarly, and the lawful child or children procreated or to be procreated of his or their bodies equally among them in fee, the whole children of his son and daughters having right equally among them *per capita* and not *per stirpes*. Another portion of his estate was conveyed to the trustees for behoof of his son and five of his seven daughters and their children in liferent and fee, in exactly the same terms as the conveyance to the trustees for behoof of the son and seven daughters. The question of vesting is the same in each of these trust purposes, and accordingly may be decided as it would have been supposing that the whole estate had been given to the trustees for behoof of the children of the truster in liferent and to their children in fee without distinction between one portion and another portion of the truster's family or succession.

The material inquiry obviously is as to the terms of the trust upon which the property was held by the trustees. These appear to me to be clear and explicit. The succession was committed to the trustees for behoof of his sons and daughters in liferent, for their liferent use allenarly, and the child or children procreated or to be procreated of his or their bodies equally among them in fee, the whole children of his son or daughters having right equally among them *per capita* and not *per stirpes*. It is true that in the matter of the liferent rights there is properly no accretion in favour of surviving children, but there is what is substantially equivalent, namely, the direction to pay that part of the income of the estate, the liferent right to which had lapsed through death, to other specified beneficiaries. It appears to me, consequently, that the clause in question is substantially a direction to hold for behoof of the children in liferent and their children or those substituted to their children in fee. If this is a true reading of the clause there can be no doubt as to the result. A conveyance to trustees to hold primarily for liferenters, and for fiars who are to take upon the death of the liferenters, is not a case in which vesting is postponed beyond the death of the testator. There is no inconsistency between the simultaneous acquisition of a liferent right by one and of the right to the fee by another. The postponement of the period of payment is a result accomplished, not in consequence of a presumed intention on the part of the testator to delay the period of vesting, but simply to provide for that which was the purpose of his will, namely, the payment of the liferent to those who are entitled to the income of the property. Postponement must occur, otherwise the liferent right could not be enjoyed, but as there is no incompatibility, there is nothing which operates against the presumption that it was the wish of the testator that the beneficiaries of the fee should have a vested right in the subjects held in trust for them by the trustees at the earliest period consistent with the purposes of the trust. The fact that there was to be a distribution of the income of the trust left vacant through the death of predeceasing liferenters among specified beneficiaries hardly complicates the decision. The trustees, as there were still liferenters, or as there was a widow whose annuity had to be provided for, behoved still to hold the trust-estate, but this consideration in no way prevents the acquisition by the fiars, any more than did the existence of the original liferent right, of a vested interest in the fee as at the death of the testator.

This view of the matter was assumed by the Lord Ordinary to be correct, and was hardly contested by those claimants who supported the Lord Ordinary's judgment. But what is said is

that there are other clauses in the trust-deed and codicils which require to be considered in order to ascertain the truster's intention, which of course is the *regula regulans* on this as on all similar occasions. Accepting this qualification, my first observation upon it is, that where the fundamental purpose of the trust is so plain, the other clauses by which its effect would be overcome must be equally clear and unambiguous—such, in short, as indubitably to show that the will of the testator was that the vesting of the fee should be postponed. None of the clauses seem to me to warrant the result at which the Lord Ordinary has arrived. One consideration which is relied on is, that whereas one portion of the estate is divisible among the truster's son and seven daughters, and the other portion (leaving out of view the disposition of special subjects to individual beneficiaries) among the truster's son and five of his daughters, the fee of each portion is to be kept in hand by the trustees, not merely till the death of the beneficiaries entitled to that portion, but till the death also of the beneficiaries among whom the other portion is to be distributed. What is the purpose of this delay? is the question which has been asked. To this the answer has been suggested that it could only be because the truster intended that the rights of all his children's children in the fee of the succession should be determined only when the period of division arrived. This, I think, is a strained and unsupported theory. A more obvious consideration is this, that the liferent rights of the truster's children in the fee of the property, and rights to a share of the income left vacant by the death of predeceasing liferenters, were not restricted to the shares of the estate in which the liferenters' children as fiars were separately interested. There was, so long as a liferenter or the widow survived, an interlacing of interests in the income of the estate till the time arrived—whether that should be at the death of the children (that is to say, the last of the liferenters) or the death of the widow, who was an annuitant—there was no portion of the estate free from burden, and there was no portion which, according to the truster's arrangements, was set free for division among the appointed beneficiaries.

It has been also suggested that there are clauses in the settlement which substantially provide for a survivorship among the beneficiaries of the fee. The most material of these is that referred to by the Lord Ordinary in his note, and which is paraphrased by him as a clause declaring that in case of the decease of any of the truster's grandchildren during the subsistence of the trust leaving lawful issue, such issue should be entitled to the same share to which their parents would have been entitled had their parents been in life. If the clause referred to had been a clause applicable to the fee of the succession, there would have been a plausible ground for the conclusion reached by the Lord Ordinary. But it appears to me to be plain that in this clause, as in the immediately antecedent clauses, liferent rights or right to the income, and not the rights of fiars, are the things, and the only things, to which this clause has application. The consequence is that, according to my reading of the settlement, there is no clause by which the effect due to the fundamental declaration that the estate is to be held by the trustees for the children in liferent and for their children in fee, can be held to be counteracted. That declaration accordingly must have its natural and recognised effect. In other words, we must find that there was vesting of the fee in the grandchildren of the truster as a class who were in existence at the death of the truster.

Many decisions were referred to both here and in the Outer House, all of which I have considered, but all I have to say as regards these is, there is none inconsistent with the reading of the settlement which I have adopted, and that the reasons for this reading are so plain and elementary that the result I have reached is one for the adoption of which authority is unnecessary.

With reference to the second of the questions raised for decision, my opinon is equally clear. Not only, as I think, was it not the intention of the truster that the heritage which he left should by the distribution of his estate be dealt with as moveable, but there is unusually strong evidence of the contrary. Admittedly there is no direction to sell or convert. There is, however, a power, but is that so given as to show that, exercised or unexercised, it should be taken as the expression of an intention that the truster's heritage should be dealt with as moveable succession? This is the clause—The "truster authorises his trustees either to hold his heritable estate generally in their own names for behoof of his children in liferent for their liferent uses allenarly, and of his children equally among them *per capita* as aforesaid, or, with consent of his daughters, or the children of any of them who may have predeceased the truster, to sell and dispose thereof, and either to purchase other heritable property with the prices thereof, or to lend out the proceeds on good heritable securities, one or more, and to take the rights and securities thereof to his trustees for behoof of his children as liferenters, and their children in fee, as aforesaid." And thus there are two qualifications on the exercise of the power of sale. One is the consent of the beneficiaries; the other is the condition that the money derived from the sale shall be laid out on heritage. Both of these provisions appear to me to be inconsistent with the idea that this power, whether exercised or unexercised, was intended to operate as a constructive conversion.

But this is not all, because the truster subsequently directs that the trust in the persons of his trustees shall, as to all the property, heritable and moveable, "hereby conveyed remain and subsist during the lifetimes of my said son and of the whole of my said seven daughters, and the survivor of them, and upon the death of the survivor of them and my said son my said trustees shall be bound to denude in favour of the persons who shall then have right to the different subjects hereby conveyed in terms of this deed." Thus not only is the heritage to remain till the time appointed for the division of the estate, but the estate as held by the trustees they are to denude themselves of in favour of the fiars. Clearer provisions against conversion could, as I think, hardly be figured.

For these reasons my opinion is, that upon both questions the judgment of the Lord Ordinary should be altered, and that as regards the first we should find that there was vesting in the grandchildren of the truster as a class *a morte*

testatoris, and that the trust estate, so far as it consisted of heritage at the period of distribution is divisible as heritage and not as moveable succession.

Lord Young—I agree that the vesting here was *a morte testatoris*, and that upon the application of a clear and well-established rule of law. The truster conveyed his whole estate to trustees, who from his death onward held it for behoof of the truster's children in liferent, and the lawful child or children procreated, or who might be procreated, of their (that is, the truster's children's) bodies equally among them in fee. The trustees, therefore, from the first, from the death of the truster till the period of distribution, whenever that should occur, held the trust-estate for behoof of the truster's children in liferent and their children—that is, the grandchildren—in fee.

Now, it would require something very distinct to the contrary to prevent the vesting of these beneficial rights upon the truster's death, and I think, differing from the Lord Ordinary, and agreeing with my brother Lord Craighill, that there is here nothing to the contrary. The distribution was by the trust-deed itself postponed until all the truster's children—that is to say, all the liferenters—were dead; and by a codicil it was further postponed until the death of his wife, if she should happen to survive all his children, as in point of fact she did; but that postponement did not affect the question at all. The beneficiaries having the vested right are simply not to have that satisfied until the period specified—that is to say, none of the fiars are to have their beneficial interest or right of fee satisfied until all the liferenters are dead. As there are numerous liferenters, it was of course necessary to provide somehow for the case of their dying in succession one after another—to say what is to be done with so much of the income of the trust-estate as is set free by the death of one liferenter after another successively; and the testator in his own way instructs his trustees how they are to dispose of the income so set free until the period for distributing the capital among the fiars comes. But it seems to me to be totally immaterial to the vesting of the fee what the directions—which here are a little out of the way, though intelligible enough—may be. It is sufficient to say that the directions here as to dealing with the income set free as one liferenter after another dies really do not in my opinion, and I think so very clearly, affect the vesting of the fee at all.

Therefore, upon these short grounds, I agree with Lord Craighill, and differ from the Lord Ordinary as to the vesting.

With respect to the conversion, I must say that my sympathies generally are in favour of conversion; but I am not at liberty, with my view of the law, to interpret this will as containing a direction, express or implied, to the trustees to convert those portions of the estate which are heritable into moveable estate. It would no doubt be very convenient—probably be found to be practically necessary—there being, as it happens, a great number of parties, though there might have been very few—to convert the heritage into moveable property in order conveniently to affect the division. But that consideration, although of some moment in construing what is the true construction of the deed, is by no means in itself conclusive. You must, through the medium of it alone, or connected with something else, be able to reach the conclusion that the truster has directed the conversion to be made. Now, I cannot reach that conclusion here, because the truster has, as nearly as possible, directed the contrary; for he has told the trustees that if in the course of their management they sell any of the heritable subjects which he left, they shall re-invest the prices in heritage; and his direction as to the distribution at the end is in words very remarkable—so far as my experience goes such has never occurred in any case where conversion was held to be directed. The direction is in these words:—"And upon the death of the survivor of his children, my said trustees shall be bound to denude in favour of the persons who shall then have right to the different subjects hereby conveyed in terms of this deed." I think, therefore, with respect to its character of heritable or moveable, the estate must be taken in the condition in which the truster left it, and which he gave to his trustees, directing them to hold it until they came to denude, and the rights of parties must be regulated accordingly.

On this question also I differ from the Lord Ordinary and agree with Lord Craighill.

Lord Rutherfurd Clark—I am of the same opinion, and do not think it necessary to add anything.

Lord Justice-Clerk—On the question of vesting I entirely concur; but on the question of conversion I should have some doubt whether a direction to divide in those terms implies division of the estate as it existed at the date of the truster's death. I do not know that that could be considered to be sufficient fulfilment of the testator's injunctions. It was manifest, I should have thought, that this was a mere investment intended to last until the period of division arrived, and beyond all doubt—it was not contended — not intended to continue after that. But your Lordships are of a different opinion; and there are some expressions in the settlement so peculiar as not to raise the difficulty to which I have referred in a very favourable manner. Your Lordships therefore alter the interlocutor, and find that these provisions vested *a morte testatoris*, and that the testator did not intend conversion.

The Lords therefore altered the interlocutor of the Lord Ordinary, found that there was vesting *a morte testatoris*, and that there was no conversion.

On a separate point raised by the reclaiming note on behalf of Mrs Thomas, the Court found her entitled to a share with the other grandchildren *per capita* in the whole estate other than the additional share left to her father by the second codicil, and found her entitled as representing her father to the fee of that share.

Counsel for Mrs Thomas—J. P. B. Robertson—Shaw. Agent—Thomas White, S.S.C.

Counsel for Pursuers, and for Grandchildren surviving the Widow—M'Kie—Guthrie. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for other Claimants—Mackay—Kirkpatrick—Keir—M'Kechnie. Agents—Lindsay, Howe, Tytler, & Co., W.S., and Thomas Carmichael, S.S.C.

Thursday, March 16.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CULLEN AND ANOTHER *v.* DOWNIE'S TRUSTEES.

Succession—Vesting—Fee and Liferent—Accretion.

A father by an irrevocable bond of provision bound himself to pay to trustees the sum of £36,000, to be held by them for the benefit of his three daughters "and their issue and successors as afterwards pointed out." It was further provided that any daughter marrying in her father's lifetime should receive £12,000, to be settled on herself in liferent and her issue in fee. Each daughter was to enjoy an annuity, calculated at the rate of 3½ per cent. on the sum of £12,000, during her father's life, and was to be entitled to test upon £3000 if she should survive her father and die unmarried. The remainder of the sum of £12,000 in that event it was provided should "accresce and belong to the surviving sister or sisters" and their only brother. In the event of any daughter predeceasing the father it was provided that the whole sum of £12,000 should "accresce and belong" to the surviving brother and sisters. The whole sum of £36,000 it was provided should bear interest from the date of the father's death in the event of his being survived by his three daughters and they still unmarried. The father was survived by his three daughters, who all subsequently died without issue. *Held (per* Lord Rutherfurd Clark) that the last survivor of the daughters had right to so much of the sum of £36,000 as had not been disposed of by the predeceasers, or had fallen to their brother, and that no part of the fund returned to the estate of the father.

By bond of provision, dated 9th June 1834, Robert Downie the elder, Esquire of Appin, on the narrative that for his love, favour, and affection for his children he had resolved to execute the irrevocable bond of provision for their benefit therein written, bound himself to pay to trustees for the benefit of his "sons and daughters after mentioned, and their issue and heirs as after stated," certain principal sums and annuities. He bound himself to pay to trustees, to be held by them for the benefit of his three daughters "Georgina Frances, Roberta Harriet, and Rose Downie, and their issue and successors," as therein pointed out, the principal sum of £36,000. This capital sum was declared payable in manner after mentioned—that is to say, if the whole of his said three daughters should remain unmarried at the period of his death, then the said capital sum of £36,000 sterling should bear interest from and after the day on which that event should take place. For the maintenance and support of his said three unmarried daughters, till the foresaid capital sum for their benefit and that of their issue and successors should become payable, Mr Downie bound himself to make payment to said trustees in behalf of his said daughters, but subject to the conditions therein and after mentioned, of a clear yearly annuity of £420 sterling for each, at the terms and with penalty and interest as therein mentioned, it being declared that the same should come to an end at his death, or as to each daughter on her marriage; and he also bound himself to make payment to said trustees, for the benefit of his son Robert Downie, of a clear yearly annuity of £440 per annum during his own lifetime. It was further provided that in the event of the marriage of any of his said three daughters, the sum of £12,000 should, in the case of each daughter, provided the marriage were approved of by the trustees or a majority of them, be settled and secured on each of said daughters respectively in liferent and their issue respectively in fee, or in the event of their leaving no issue in manner thereinafter mentioned. It was further provided that, on the death of any of his said daughters leaving lawful issue, the fee of the said sum of £12,000, and accumulation of annuities and interest due to her, should vest in her child or children, with a power of apportionment to their mother. The bond of provision thereafter proceeded to provide for the event of any of said daughters surviving their father and dying unmarried, and declared that the daughter so dying should be entitled by will, or other deed under her hand, to dispose of £3000 sterling, part of the foresaid provision of £12,000, and the whole of any accumulation of annuity or interest which may have arisen on her provision; and that in the event of any of his daughters dying after him unmarried, and leaving such will disposing of the £3000, or any part thereof, the remainder of the said sum of £12,000 so destined for her and her children shall accresce and belong to her then surviving sister or sisters before named, and to her brother Robert Downie, all in equal proportions. The bond also provided for the event of any of said daughters dying before their father without having executed any will, when it was declared that the said £12,000 and accumulations shall accresce and belong to her surviving brother and sisters. After providing for the case of any of the said daughters being married and dying without issue, there followed a declaration that in regard to any share or shares of the said several provisions of £12,000 which might devolve on any of said daughters who might survive through the decease of any one or other of them, and through the occurrence of any one of the foresaid events, and in consequence of any of the provisions made as aforesaid, then such share or shares of the said principal provisions so devolving in such events on the surviving sisters or sister should fall and be held for them or her by the said trustees in liferent, and for the children of such daughter or daughters respectively in fee; and that the said liferent should be exclusive of the *jus mariti* and right of administration of their husbands, should be purely alimentary, and not liable to be arrested by creditors;