sideration contained in it is a debt of the company. Now I am clearly of opinion that no such debt is due. The first question is, Whether the transaction is a legitimate one? But we may deal alternatively, with the view that it is either a transaction *ultra vires* of the directors of the railway company, or else altogether illegal. If legitimate, it was the granting of a security by the company for advances to be made by the bank. I do not wish to countenance the view that such a use of a mortgage or bond is illegal. But assuming it to be legal, what relation but that of debtor and creditor is thereby constituted? the debtor being the railway company for the sums so advanced if this was a legitimate transaction, and if the advances are less than the sum contained in the mortgage, it is quite clear that the bank is not a debtor for the amount of the balance. A security for advances does not compel the bank to advance to the full amount of the security. The bank is not thus paying a debt, but making a loan, whose extent depends upon various circumstances, for many considerations must be taken into consideration by the directors of the company in determining the amount of the margin.

But if the transaction is altogether illegal, the directors of the company, on that view, have no power to impignorate the mortgage or bond for advances made or to be made to them. It is therefore good for nothing as regards the advances, and the only remedy is to have the mortgage cancelled or delivered up to the railway company. The arresting creditor cannot be put in a better position, or entitled to demand more than his debtor could from the arrestee. And so, whether the mortgage is to be held good or bad, no money is due by the arrestee to the principal debtor, and I am therefore of opinion that there is no foundation for the conclusion of furthcoming.

Lord Mure.—I agree with your Lordship in the conclusion arrived at, and have little to add. I give no opinion that the bond was beyond the powers of the railway company and the question therefore simply is, Whether the arresting creditor can attach for advances not yet made? I do not see that he can be in a more favourable position than if he had arrested on an ordinary cash-credit bond. The bank here were not bound in all circumstances to pay over the balance, and there is therefore here no indebtedness on their part to the railway company, and the arrestment has consequently failed to attach anything.

Lord Shand—I am of the same opinion. The material averments are merely that the railway company on 17th December 1878 delivered the mortgage to the bank, which they accepted, and which was duly registered in their name, and for which no consideration was given. It is said that if these averments are proved, the legal result is that the bank became indebted to the railway company in the sum contained in the bond of £3000, and are now bound for the same. I cannot assent to that view. It depends entirely upon the footing upon which the mortgage was delivered and taken whether such an obligation exists or not. No arrangement is averred here beyond the bare statement that the deed was delivered, and no money was given for it, and the legal result appears to me to be, not that the bank became debtors for the sum in the bond, but that having got the deed for which no consideration was given they are bound to give it up. That is the position of the railway company on that assumption, and on the footing that the sole obligation of the bank is to return the document, it can hardly be maintained that the arrestment has attached anything. The other alternative it is equally difficult to admit. Taking it that there was an arrangement that the bank should make advances to the amount of the bond, the creditor must allege it, and the Court would then inquire into its substance, as was done in the case of the *Regent's Canal Company* in 1876, cited to us in the course of the debate. If the mortgage constitutes a security at all, we have no reason to doubt it would be good for the amount of the advance, and the creditor's right would be to hold it till repayment, and then return it. But it is said we must here infer an obligation to advance to the amount of the security. There seems to me great difficulty in holding that such obligations could be attached by a creditor, for many circumstances might intervene to greatly change the relationship between the parties. None, for example, would be more effectual than having the funds to be advanced arrested, so as to prevent his using them. But I think the creditor here cannot proceed on the footing that there was such an arrangement with such a meagre record, and I therefore agree in holding the present arrestment ineffectual.

The Court sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Respondent—Kinnear—Pearson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defenders and Reclaimers—Asher—J. P. B. Robertson. Agents for the Railway Company — Henry & Scott, S.S.C. Agents for the Bank—Melville & Lindesay, W.S.

Wednesday, December 8.

SECOND DIVISION.

SPECIAL CASE—BAIRD'S TRUSTEES.

Succession — Heritable and Moveable — Implied Conversion.

Held that, according to a sound construction of a trust-disposition and settlement, in which the truster directed his trustees "to pay and convey the residue" of his means and estate equally among his four children, their issue to come in their place if they should predecease the truster, and conferred on his trustees power to sell his heritage, conversion had taken place, and the rights of parties claiming under the trust-disposition must be determined by the rules of moveable succession.

Robert Watson of Burnstyle, near Glasgow, died on 21st October 1878, survived by his four children—Robert Watson, George Watson, Agnes Watson or Lambie, and Jane Watson or Baird. Mr Watson left a trust-disposition and settlement

by which he conveyed to William Watson Steuart and others, as trustees and executors, his whole means and estate as at the time of his death, which consisted of land to the value of £2300, feu-duties to the value of £8600, bonds and dispositions in security to the value of £5350, and personal estate worth £4350. This settlement provided . . . (*Fourthly*) With regard to the residue of my means and estate, I direct my trustees, as soon after my death as possible, to pay and convey the same equally to and among my sons, the said Robert Watson junior and George Watson, and my daughters, the said Agnes Watson or Lambie and Jean Watson or Baird, widow of the deceased James Baird, potato merchant in Glasgow; Declaring that in the event of any of my said children predeceasing the period of payment and conveyance to them leaving issue, such issue shall be entitled to the share which their parent would have taken on survivance; And further, in the event of any of them predeceasing the said period without leaving issue, then the share which such predeceaser would have taken on survivance shall accresce to his or her surviving brothers and sisters and the issue of any brother or sister who may have deceased leaving issue, such issue always being entitled to the share which their parent would have taken on survivance; Which provisions in favour of my said children shall be accepted by them in full of all legitim or other claims competent to them by or through my decease; Declaring that in respect I have advanced to my son George Watson various sums, amounting in all to Two thousand and fifty pounds, for which I hold his bills and acknowledgments of debt, I direct my trustees to impute the same, or such part thereof as may not have been repaid to me before my death, or such further sums as I may yet advance to him, *pro tanto* towards all benefit he or his issue shall receive under these presents; And in respect that I have advanced to my daughter Mrs Jean Watson or Baird sums amounting to One hundred and fifty pounds, for the advancement in business of the said William Baird, her son, and for which I hold her bill and acknowledgments of debt, I direct my trustees to impute the same, or such parts thereof as may not have been repaid to me before my death, *pro tanto* towards all benefit she or her issue shall receive under these presents, and if imputed towards the share of such issue, the same shall be deducted *primo loco* from the share of the said William Baird, and *secundo loco* from the shares of the remaining issue: And with regard to such of the foregoing provisions, or of any provisions that may be made by me in any codicils hereto, as are in favour of or may fall to females, the same shall be purely alimentary and exclusive of the *jus mariti* and right of administration of their respective husbands: And to enable my trustees to carry out the purposes of this settlement, and of any codicils thereto, I confer upon them all requisite powers, and particularly (but without prejudice to the said generality) power to sell my heritable estate, in such lots, at such prices, and with such warrandice as they may think proper." The testator's daughter Mrs Baird died intestate on 18th November 1878, a month after her father. She was survived by four children—William Baird, her eldest son and heir in heritage, Agnes Kirkwood Baird, Allan Watson Baird, and George Baird—and was predeceased by a son Robert Watson Baird, who left two children, Jane Watson Baird and James Baird. These two children were pupils at the time of this case, and their interest was represented by the testator's eldest son Robert Watson, as their factor *loco tutoris*.

Questions having arisen as to the manner in which the estate of the testator fell to be divided among Mrs Watson or Baird's children under the fourth purpose of the deed above quoted, this Special Case was presented to the Court.

William Baird, Mrs Baird's eldest son, claimed that as heir-at-law of his mother he was entitled to the share of the lands and feu-duties belonging to the testator conveyed to her under the settlement, as being heritage. The other children of Mrs Baird and the factor *loco tutoris* for Jane Watson Baird and James Baird, her two grandchildren, maintained that by the settlement the estate of the testator was rendered moveable, and that as such Mr Baird's whole children and the representatives of such as had died were entitled to succeed to it. In these circumstances this Special Case was presented to the Court. William Baird, Mrs Baird's eldest son and heir-at-law, was the first party; Mrs Baird's other surviving children were the second parties; and the factor *loco tutoris* for the children of her son Robert Watson Baird, who predeceased her, was the third party.

The questions were—"(1) Is the first party entitled to one-fourth of the heritable estate, consisting of said land and feu-duties, which the said Robert Watson of Burnstyle died possessed of, or the proceeds thereof? or is the share of the said Robert Watson's estate originally destined by the said trust-disposition and settlement to the said Jane Watson or Baird to be held as moveable, or at least divisible equally among her issue? (2) Are Robert Watson Baird's children entitled to participate in the whole or any part of the share originally destined to the said Jane Watson or Baird *per stirpes* or *per capita?*

Argued for first party—Conversion was not here indispensable in the sense given to that word by Lord Fullerton in *Advocate-General* v. *Blackburn's Trustees*, 10 D. 166, quoted in *Buchanan* v. *Angus* (H. of L.), May 15, 1862, 4 Macq. 374. There were three classes of circumstances which were of importance in the questions of conversion—(1) The condition of the estate; (2) Words of transfer; (3) Number and condition of the beneficiaries. None of these circumstances led to conversion in the present case. (1st) The estate was capable of being conveyed in a heritable form to the beneficiaries intended to be benefited. (2d) The words of transference were "pay and convey," which had been held not to operate conversion. In *Buchanan* v. *Angus* the words of conveyance were "pay over." In *Cathcart* v. *Cathcart*, May 26, 1830, 8 S. 803, they were "dispone, assign, and pay over." In *Patrick* v. *Nicol*, Dec. 7, 1838, 1 D. 207, the directions to trustees was after the death of certain persons to "convey and pay over" to the testator's "own nearest heirs whatsoever." Again, the use of the word "share" did not operate conversion—*Strachan* v. *Mowbray*, Feb. 21, 1843, 5 D. 687. (3d) Number of beneficiaries—*Hogg* v. *Hamilton*, June 7, 1877, 4 R. 845, and *Auld* v. *Anderson*, Dec. 8, 1876, 4 R. 211, were in the first party's favour on this point.

The case of *Fotheringham's Trustees*—July 2, 1873, 11 Macph. 848—where there were nine beneficiaries, and conversion was held operated, was a very special case, and decided on the ground of practical necessity to convert.

Additional authorities—*Durie*, M. 4624 ; *Advocate-General* v. *Smith*, 1 Macq. 760 ; *Gardner* v. *Ogilvie*, Nov. 25, 1857, 20 D. 105.

Argued for second party—Necessity for conversion being a question of intention (Lord Chancellor in *Buchanan* v. *Angus*), the intention of the testator that there should be equal division was plain. The testator directed certain things to be done, and that they might be done gave power to sell.

Authorities — *Blackburn's Trustees, supra; Williamson* v. *Advocate-General*, Dec. 23, 1850, 13 D. 436, *aff.* 2 Bell's App. 89 ; *Somerville's Trustees* v. *Gillespie*, July 6, 1859, 21 D. 1148 ; *Greig* v. *Mackenzie*, Feb. 14, 1868, 6 Macph. 375 ; *Boag* v. *Walkinshaw*, June 27, 1872, 10 Macph. 872 ; *Fotheringham's Trustees, supra ; Nairn's Trustees* v. *Melville*, Nov. 10, 1877, 5 R. 128.

At advising—

LORD JUSTICE-CLERK—It is not necessary to recapitulate the authorities which have been so ably gone over and referred to. My opinion in this case is that there is no ground on which it can be held that the testator meant that the property should be kept together, and the plan of his settlement indicates, as well as the reason and convenience of the matter, that he had no such idea. He gives his trustees powers to carry out the deed, and that indicates that without power of sale they could not carry out his intention. Without going more fully into the case, and it being clear that the heritable property was only held as an investment, and that the sum we are dealing with is certainly residue, I think that the circumstances that the direction contemplates payment in money, that there are several beneficiaries, and that the bequest is a bequest of the price of residue, all lead to the result at which I have arrived.

LORD GIFFORD—I am of the same opinion, and I am led to that conclusion by the nature of the estate—the division into four portions, with the prospect in the testator's mind that some of his children may die before him, and the destination-over to their issue. It is plain that he intended the estate to be paid over in equal shares. No doubt the parties might have agreed to buy an estate in equal *pro indiviso* shares, or in some such way kept up the heritable character of the estate ; but, on the whole, I think the estate must be held to have been made moveable by the settlement.

LORD YOUNG—I am of the same opinion, and without difficulty. No case could be more clearly stated or more ably argued than Mr Murray has put this case. The only general rule I can deduce from the authorities is that we should endeavour to collect from the whole instrument what is the intention of the testator. If he leaves heritage and expresses no intention that it be converted into personal estate, it must remain as he leaves it ; and so also with personal estate. He may convert by express direction, or by such a will as indicates that that is what he intended. Now, this will indicates that this testator intended his heritable property to be converted and to pass to his children and grandchildren as money. That was his intention. He was a great-grandfather, for Mrs Baird, his daughter, was a grandmother, and if she had predeceased him leaving twelve children they would have taken directly under this will, and it would be a proposition approaching nearly to extravagance to say that he contemplated their taking as heirs in heritage. Any of their children might die before him leaving children, and the plain idea in his mind was one which requires conversion of his estate. As your Lordship has observed, that is the very meaning of the power of sale. He says—"And to enable my trustees to carry out the purposes of this settlement, and of any codicils thereto, I confer upon them all requisite powers, and particularly (but without prejudice to the said generality) to sell my heritable estate in such lots and at such prices," &c., as they may think proper. A sale was plainly requisite to exercise his will, as he expresses it, and that it is the very test of conversion to ask "Is it requisite to the execution of the will?" I think it is necessary here, and I find enough here expressed by the testator to lead to that conclusion when he uses the words "all requisite powers." That is equivalent to "necessary," and "necessary" may be put into the deed instead of it without altering the sense. I am glad to be able to take this view, which certainly leads to an equitable distribution of this estate among the parties competing.

The Court answered the questions as follows :—

"Find that the character of the estate of the testator Robert Watson, as impressed on it by his trust-disposition and settlement, was moveable ; and therefore Find (1) That the share of his estate originally destined by his said trust-disposition and settlement to Jane Watson or Baird is moveable, and divisible equally among her issue ; and (2) That the children of Robert Watson Baird are entitled to participate equally in the proportion of said share to which he would have had right had he survived the said Jane Watson or Baird, his mother ; and decern.

Counsel for First Party—Graham Murray. Agent—J. Gillon Fergusson, W.S.

Counsel for Second Party—Ure. Agent—J. Young Guthrie, S.S.C.

Counsel for Third Party—Rankine. Agent—A. P. Purves, W.S.

Thursday, December 9.

SECOND DIVISION.

CRAIG (INSPECTOR OF ST CUTHBERT'S PARISH) AND GREIG (INSPECTOR OF CITY PARISH) *v.* MAGISTRATES OF EDINBURGH.

Act 42 and 43 Vict. c. 132 (Edinburgh Police and Improvement Act).

A parish had for seventy years been in use to receive as poor-rate under a local and personal Act an annual sum of £300 from the magistrates of a burgh in consequence of the