has one, is his wife's. *Gray* v. *Fowlie* is undistinguishable from the case now under appeal, and unless your Lordships are prepared to overrule *Gray* v. *Fowlie* this appeal must be allowed.

The whole difficulty in the case arises from the fact that there are several Scotch decisions since *Gray* v. *Fowlie* which have more or less departed from the principle on which it is founded. Lord Robertson, whose judgment I have read, has traced the origin and progress of the departure from that principle, and I can add nothing to what he has said.

In my opinion the judgment of Lord Young was right, and this appeal ought to be allowed.

Appeal *allowed*, and interlocutors appealed from *reversed* with costs.

. Counsel for the Pursuers and Appellants —The Lord Advocate (Graham Murray, K.C.) — A. O. Deas — Craig Henderson. Agents—Bunhills & Company—H. B. & F. J. Dewar, W.S.—Montgomerie & Flemings.

Counsel for the Defenders and Respondents — Shaw, K.C. — Clyde, K.C. — R. B. Pearson. Agents — Grahames, Currey, & Spens — Charles George, S.S.C. — R. P. Lamond & Turner.

COURT OF SESSION.

Saturday, May 17.

FIRST DIVISION.

WATSON'S TRUSTEES *v.* WATSON.

Succession — Heritable and Moveable — Conversion—Constructive Conversion—Vesting.

A testator directed his trustees to set apart sufficient of the trust property to provide for an annuity to his widow, and also to make provision for securing a liferent allowance to his unmarried daughters, and "on the eldest of my children reaching twenty-three years of age complete, or upon the marriage of any one of my daughters," to cause "an estimate and valuation of the whole remaining trust funds and estate to be made, and to . . . take a portion or share corresponding to the number of my children then in life, . . . and such part or share they shall pay over to my child, son or daughter, who shall have attained the age of twenty-three years." . . . The child or children so paid were at the termination of the annuities to have "an eventual right to receive subsequently his or her share of that part of the estate which shall have been set aside for satisfying annuities or liferents thereon." It was further provided that on each of the remaining children attaining the age of twenty-three or being married, a similar share was to be paid over to them at the times when "they have right thereto and claim the same."

The trustees were given power "to sell and dispose of all or any part of the heritable property at such time or times as to them shall seem proper in the circumstances of the trust." They were also given power, in making the division described above, to allocate the house property or other subjects which they were empowered to sell, so as to make the share of any one or more of the children consist of such property in whole or in part.

The testator died in 1855 survived by his widow, who died in 1878, and by ten children. Various payments were made by the trustees to the beneficiaries. Two of the testator's sons died after attaining the age of twenty-three. At the dates of their deaths certain heritable subjects in Glasgow still remain unrealised in the hands of the trustees. The income from this property, after the death of the widow released the charge upon it, had been divided among the children. No claim had been made by the sons who died for any further payment of their shares.

Held, in a question between the heir in heritage and the heirs *in mobilibus* of the sons who had died, (1) that a right to a *pro indiviso* share of the heritable subjects had vested in these sons in their lifetimes, and (2) that there had been constructive conversion of this heritage, and that their interests therein were moveable rights which passed to their respective heirs *in mobilibus*.

Mr William Watson, manufacturer, Glasgow, died on 22nd July 1855, leaving a trust-disposition and settlement with three relative codicils, by which he conveyed his whole means and estate to trustees.

The trustees were directed to pay to Mrs Margaret Watson, the truster's widow, during her widowhood, a free yearly liferent annuity of £250, and to "set apart such a portion of the trust funds and estate as they may deem sufficient, the income and interest arising from which shall be applied in satisfaction of the said annuity, and till such provision be made they shall pay the said annuity out of the general income of the estate."

The testator further provided *in the sixth place*—(With regard to his daughters who should remain unmarried at the death or re-marriage of his widow if she survived him, and otherwise at his own death) "I hereby direct my said trustees and their foresaids, in addition to the share and portion of my estate falling to such unmarried daughters in common with my sons and married daughters, to pay to them and survivors and last survivor of them unmarried the interest and income arising from the principal sum of two thousand pounds — [reduced by a codicil to £1500] —as a provision for their more ample and comfortable alimentary use and support; and the said sum of two thousand pounds necessary to provide a fund to be

set aside for this purpose I appoint, in case of my wife predeceasing me, to be taken from the general trust funds, but if my said wife should survive me, then the same shall be taken from the sum that may fall back into the trust on her death or re-marriage, as the case may be, by the lapse in whole or in part of the annuity hereinbefore provided to my said wife; . . . and upon the death or marriage of all of my said unmarried daughters, the said sum of two thousand pounds, and furniture and plenishing to be liferented by them as hereinbefore provided, shall fall to and be divided equally among all my remaining children and their issue, the issue of such of them as may be dead being to receive the share that their father or mother would have received if alive at the time, equally among them failing a writing being executed by the father or mother destining the same otherwise, to which writing full effect shall be given: And in like manner the sum that shall have been set apart for payment of the annuities payable out of the estate, as soon as these annuities successively in whole or in part fall, shall be equally divided among the said children and their lawful issue in the same way as is provided with respect to the foresaid sum of two thousand pounds, with this provision or explanation, however, that if the sum that may be set aside for the annuity of my said wife shall be set free in whole or in part by her death or re-marriage, it will be only what remains thereof after setting apart the said two thousand pounds that will in the first instance fall to be divided: . . . *In the eighth place*, my said trustees and their foresaids, upon the eldest of my children reaching twenty-three years of age complete, or upon the marriage of any one of my daughters, whichever of these events shall first happen, shall set aside, unless that has been done previously, as much of the trust subjects and estate as they shall deem necessary to afford an income adequate to satisfy the annuities and liferent allowance to my unmarried daughters hereinbefore provided respectively, and shall cause an estimate and valuation of the whole remaining trust funds and estate to be made in such a manner, and with such assistance, professional or otherwise, as to my said trustees shall appear proper and necessary, and of the estimated value of the said reversion of the said estate they shall take a portion or share corresponding to the number of my children then in life, and of any of them who shall have predeceased leaving lawful issue—that is, if nine be alive and one dead having left issue, they shall take one-tenth part of the said reversion, or such other greater or lesser share or portion as may correspond to the number of children alive, or who may be dead but have left issue, and such part or share they shall pay over to my child, son or daughter, who shall have obtained the age of twenty-three years, or to the daughter who shall be married, as his or her share and portion of the trust subjects; but the child or children so paid out shall have an eventual right to receive subsequently his or her share and portion of that part of the estate which shall have been set aside for satisfying annuities or liferents thereon, payable at the time as hereinbefore mentioned, and upon each of my remaining sons reaching the said age of twenty-three, and upon each of my daughters attaining that age or being married respectively, whichever event shall first happen, a similar share and portion of the estate ascertained in manner above mentioned shall be successively given and paid over to my said sons and daughters respectively at the several times when they have right thereto and claim the same, with an eventual right to their respective shares and proportions of the sums that shall have been set apart for satisfying the annuities payable out of the estate and providing for the liferent use of my unmarried daughters as above mentioned and before provided: . . . Farther, as part of my estate may consist of house property or other subjects which my trustees or their foresaids in making the division foresaid may not deem it advisable to sell and convert into money under the powers after conferred, I hereby expressly provide that it shall be competent to them in making the foresaid division to allocate the whole or part of this portion of my estate in such a manner as to make the share of any one or more of my children consist of such property in whole or in part, or to appropriate the foresaid subjects in whole or in part for payment of the annuities or liferents before written, or any of them; and with the arrangement as made by my said trustees all concerned shall be bound to rest satisfied. . . . Furthermore, I hereby give full and absolute power to my said trustees and their foresaids to uplift, sue for, and receive the debts, heritable and moveable, hereby assigned and conveyed to them, and to discharge or assign the same, as also to sell and dispose of all or any part of the heritable or moveable property hereby assigned or conveyed to them at such time or times as to them shall seem proper in the circumstances of the trust."...

The testator was survived by his widow, who died in 1878 without having married again, and by ten children.

On the death of the testator his trustees at first divided his estate into two portions. One portion called the "divisible" estate was set aside for the children, and the shares falling to sons were paid to them as they respectively attained the age of twenty-three, while those falling to daughters were retained by the trustees for their behoof. The other portion called the "reserved" estate, in which the trustees included the whole heritable estate of the testator, was retained to meet the annuities and liferents provided for in the settlement.

In 1879, shortly after the death of the widow, a further division was made of the remaining estate, and the estate now remaining in the hands of the trustees consisted of certain heritable subjects in Broomielaw, Glasgow, and a sum of £1500 reserved for

the liferent of an unmarried daughter. Since the division in 1879 the income of the estate so far as not required to meet annuities was divided among the testator's children and their representatives or assignees. Two of the sons, Andrew Muir Watson and Alexander Pollock Watson, attained the age of 23 in 1859 and 1860 respectively, and died intestate and unmarried in 1882 and 1892 respectively.

The trustees in 1881, without being called upon to do so, but in order to provide an investment for funds belonging to two of the daughters, borrowed from them a sum of £1050 and paid it in equal proportions of £350 each to Andrew Muir Watson and two of his brothers.

In these circumstances, questions having arisen between the heir in heritage and the heirs *in mobilibus* of the deceased sons as to their rights in the heritable subjects in Broomielaw, Glasgow, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Mr William Watson's trustees; (2) James Mitchell Watson, the heir-at-law of Andrew Muir Watson and Alexander Pollock Watson; and (3) their next-of-kin and heirs *in mobilibus*.

The contentions of the parties as stated in the case were — "The second party maintains that a right to a *pro indiviso* share of the said heritable subjects vested in each of the said Andrew Muir Watson and Alexander Pollock Watson *a morte testatoris* or otherwise when they attained the age of 23 respectively, or otherwise on the death of the said Mrs Margaret Watson the liferentrix, and that he has now succeeded thereto as their heir-at-law. The third parties, on the other hand, contend (*a*) that no right to a share of the said heritable subjects vested in the said Andrew Muir Watson and Alexander Pollock Watson during their respective lifetimes; or alternatively (*b*) that if vesting did take place, constructive conversion had operated to the effect of making their interest in the said heritable subjects moveable, and accordingly that they (the third parties) have now right thereto along with the second party according to their respective rights and interests as next-of-kin and heirs *in mobilibus* of the said Andrew Muir Watson and Alexander Pollock Watson."

The questions for the judgment of the Court were:—"(1) Did a right to a *pro indiviso* share of the said heritable subjects in Broomielaw, Glasgow, vest in each of the said Andrew Muir Watson and Alexander Pollock Watson during their respective lifetimes? (2) Or does a right to a share of said subjects vest in each beneficiary only on the same being claimed from the trustees and made over to him or her, and if so, did vesting take place in the said Andrew Muir Watson on his receiving the advance of £350 specified in the foregoing statement of facts to an extent corresponding thereto or to any extent? (3) In the event of the first question being answered in the affirmative, were the interests of the said Andrew Muir Watson and Alexander Pollock Watson in the said subjects heritable rights which on their deaths passed to their respective heirs-at-law, or were they moveable rights which passed to their respective heirs *in mobilibus?*"

Argued for the third parties—(1) The shares vested at each period of payment respectively, and only what had been paid had vested. It was necessary that a claim for payment should be made, and in the present case no such claim had been made. (2) The proper criterion as to conversion was whether a sale was indispensable for the due execution of the trust — *Galloway's Trustees* v. *Galloway*, October 27, 1897, 25 R. 28, 35 S.L.R. 22; *Sheppard's Trustee* v. *Sheppard*, July 2, 1885, 12 R. 1193, 22 S.L.R. 801; *Buchanan* v. *Angus*, May 15, 1862, 4 Macq. 374; *Playfair's Trustees* v. *Playfair*, June 1, 1894, 21 R. 836, 31 S.L.R. 671. In the present case, while the power of sale given to the trustees was discretionary, it was coupled with such provisions as to render it indispensable for the due execution of the trust. The testator could not have intended this property to remain heritage, for in that case the trust would be of such a complicated nature as to be almost unworkable. Successive periods of payment were appointed, and how could effect be given to that provision if the rights of the beneficiaries were to *pro indiviso* shares of heritage?

Argued for the second party—(1) The whole scheme of the settlement contemplated vesting in the children, at latest on attaining the age of 23. Payment was postponed only to protect the annuities, and the postponement could not affect their rights to their shares, which were dealt with in the settlement as being absolutely fixed and defined. On the death of the widow the whole estate was released, and both these children survived that date. The only burden then remaining was the liferent on the £1500, and all the rest of the estate was divisible. (2) Their interest was heritable. In the first place the character of the estate in the testator must be looked at, and it was clearly heritage. Had anything been done to alter that character? Certainly nothing had been done to that effect by the testator. There was nothing in the settlement to impress the character of moveables on this heritage. The mere giving to the trustees of the power to sell did not operate conversion. There must be a direction to sell, or some necessity arising from the scheme of the settlement showing that the testator intended it. The direction to "pay" to the beneficiaries did not necessarily imply conversion—*Anderson's Executrix* v. *Anderson's Trustees*, January 18, 1895, 22 R. 254, 32 S.L.R. 209; *Playfair's Trustees* v. *Playfair*, *supra*; *Duncan's Trustees* v. *Thomas*, March 16, 1882, 9 R. 731, 19 S.L.R. 502; *Buchanan* v. *Angus*, *supra*. Here the estate had been held for 20 years unconverted, and the beneficiaries had enjoyed it by receiving their shares of the rents. Accordingly, if there had been conversion in 1878, there

had been reconversion through the act of the beneficiaries.

At advising—

LORD M'LAREN—This case raises two questions on the construction of the will of the deceased William Watson, manufacturer in Glasgow. The first question, which relates to the vesting of the shares of residue left to the testator's children is not attended with any difficulty. The second question, that of constructive conversion, requires more consideration.

The testator was survived by a widow and ten children. The chief points in the scheme of the will are (1) that Mrs Watson should receive an annuity of £250 out of the estate, and that so much of the estate as might be set apart to furnish this annuity should be treated as residue at her death, and should be divided amongst the children or their issue according to the directions given with regard to the other residuary estate. (2) With respect to the residue available for division at the testator's death, the trustees were directed to pay to each child who should attain the age of twenty-three, or in the case of daughters who should be married before attaining that age, the sum that should appear to be due on a valuation of the said residue, and on the basis of equal division. The trustees in the execution of their trust made a separation of the estate into two parts, which are described in the case as the "divisible" and the "reserved" estates, the latter being retained to secure the annuity payable to Mrs Watson, and some smaller annual charges.

Two of the testator's sons, Andrew Muir Watson and Alexander Pollock Watson, attained the age of twenty-three. Andrew died in 1882 and Alexander in 1892, both unmarried and intestate. Part of the "divisible" residue consisted of certain heritable subjects in Broomielaw, Glasgow, which remain unsold in the hands of the trustees, and the first question in the case is, whether a right to a *pro indiviso* share of these subjects vested in Andrew and Alexander Watson.

It is, I think, perfectly clear that the right vested, because these sons attained the age of twenty-three, and were entitled to be paid out the value of their shares on respectively attaining that age. The fact that the property remained unsold and that the deceased gentlemen did not insist on immediate payment can make no difference in the nature of their right, which according to the direction in the will was a vested right in them. This disposes of the first and second questions in the case.

The third and only remaining question is whether the interests of Andrew and Alexander in the heritable subjects were heritable or moveable as to succession.

It is unfortunate that no definite and easily applicable criterion is or can be found for determining whether or not trust estate is constructively converted as regards the succession of the beneficiaries. In the leading case of *Buchanan* v. *Angus* (4 Macq. 379) it was affirmed by Lord Westbury that "if the right to sell is made to depend on the discretion or will of the trustees, or is to arise only in case of necessity, or is limited to particular purposes, as, for example, to pay debts, or is not, in the appropriate language of Lord Fullerton in *Blackburn's* case (10 D. 166), "indispensable to the execution of the trust," then in any of these cases, until the discretion is exercised, or the necessity arises and is acted on, or after the particular purposes are answered, or if the sale is not indispensable, there is no change in the quality of the property, and the heritable estate must continue to be held and transmitted as heritable." In this exposition Lord Westbury treats of the various kinds of conditional or qualified powers of sale, and undoubtedly the judgment of the House of Lords in *Buchanan* v. *Angus* has had the effect of confining the operation of constructive conversion within somewhat narrow limits. But the present case, in my opinion, is not a case of a conditional power. We must look at the effect of the will, not in the light of what has been done, but in the light of what the trustees were directed to do, and what the beneficiaries were entitled to demand. What was the right of Andrew Muir Watson, the elder of the two sons whose shares are in question, when he attained the age of twenty-three? The direction to the trustees is that "they shall pay over" (the share ascertained by valuation) "to my child—son or daughter—who shall have attained the age of twenty-three years, or to the daughter who shall be married, as his or her share and portion of the trust subjects." Now, without founding too much on the word "pay," although this word is not unimportant, it is clear, as I think, that the direction could only be carried out by a sale of the heritable property and a payment out of the price. The suggestion, so often made in such cases, of a *pro indiviso* conveyance to the beneficiaries is here unavailing, because the younger children had no vested rights, and a *pro indiviso* conveyance to them in conjunction with their elder brother would be contrary to the provisions of the trust. The scheme of the deed is one of successive vesting in each son as he attained the age of twenty-three (we are not directly concerned with the rights of daughters), with a right to immediate payment, and the trust could only be carried out by realisation of the estate and payment of the shares as they became due in money. In this respect the case is peculiar, and it certainly does not fall within any of the categories of conditional or qualified powers that are enumerated in Lord Westbury's opinion. The only difficulty in the case arises from the clause in which the testator provides that it shall be competent to the trustees in making the division of the residue to allocate the whole or part of the heritable property in such a manner as to make the share of any one or more of his children consist of such property in whole or in part. It may be that in the event of the number of the family being reduced by

death, some such arrangement could have been carried out consistently with the other provisions of the trust. But it is not said that in the actual circumstances of the family the estate could have been divided by assigning specific subjects to each child who attained the age of twenty-three; and I can only regard this clause as being of the nature of a power which might be exercised in special circumstances, but which was not intended to affect what I take to be the normal mode of division under which each child was entitled to be paid his share on attaining the prescribed age.

In other respects the case presents all the elements that have been usually considered to point to the intention to bequeath a pecuniary or moveable interest. Some of these are enumerated in the opinion of Lord Justice-Clerk Moncreiff in the case of *Baird* (8 R. 235), who says—"It being clear that the heritable property was held only as an investment, that the direction appears to contemplate a payment in money, that there is a considerable number of beneficiaries, and that the bequest is a bequest of residue, everything leads to the result that there was conversion."

I may add that I think there is much force in the observation of the present Lord Justice-Clerk in a subsequent case (*Brown's Trustees*, 18 R. 185), to the effect that no case had been cited in which the testator used the words "pay" or "payment" only, without the alternative of specific conveyance, where the decision had been against constructive conversion. If there be such a case, I think it would only be one of those exceptions which prove or at least accentuate the rule.

I am therefore of opinion that the heritable estate has been constructively converted, and that the third question ought to be answered in favour of the heirs *in mobilibus*.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

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

Counsel for the First Parties — Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Second Party—Cullen—M'Millan. Agents — Robertson, Dods, & Rhind, W.S.

Counsel for the Third Parties—M'Clure. Agents—Cumming & Duff, S.S.C.

Saturday, May 17.

FIRST DIVISION.

PARLANE'S TRUSTEES *v.* PARLANE.

Succession—Vesting—Direction to Pay on Death of Child Named—Conditional Institution of Issue—Vesting Postponed till Period of Payment.

A husband and wife directed their whole estates to be divided equally amongst their children, share and share alike, the share of any of them dying before the period of division to be divided equally among the children of the deceaser, whom failing to accresce to the survivors; but provided that the share of a son who was in delicate health should be held for his behoof. By a codicil they directed the trustees to apply for the alimentary maintenance of the son who was delicate a sum not less than £50 per annum and that for all the days and years of his life, and "on the death of our said son . . . then our whole estates shall be realised and divided and paid to and among our daughter and our sons (named) equally, share and share alike: Declaring always that the issue of any of them predeceasing the period of payment to be entitled equally to the share which would have fallen to their parent." *Held* that vesting was postponed till the death of the annuitant.

Succession — Trust — Direction to Pay an Annuity and on the Death of the Annuitant to Divide Whole Estates—Purchase of Annuity.

Where a testator directed his trustees to pay an alimentary provision for the maintenance of one child, and on the death of that child to realise and divide his whole estates amongst his other children, *held* that the trustees were not entitled without the consent of the beneficiaries to provide for the payment of the alimentary provision by the purchase of an annuity.

James Parlane, draper in Paisley, died upon 19th February 1891 leaving a mutual trust-disposition and settlement and a relative codicil granted by himself and his wife, dated respectively 2nd November 1871 and 5th March 1887.

The trust-disposition and settlement, *inter alia*, provided:—"On the decease of my said wife, or at my decease in the event of her predeceasing me, I direct my whole estates to be divided equally to and amongst my children, share and share alike, the share of any of said children dying before the period of said division to be divided equally amongst the children of said deceaser, whom failing to accresce and belong to the survivors of my children. And considering that my son David is of a delicate constitution, I think it prudent to direct my said trustees to hold and retain his share of my means and estate, and pay to or for his alimentary behoof and main-