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-

tenance the interest or annual income arising therefrom, together with such portions of the capital of said share as they may consider necessary from time to time for his comfortable support, and of the amounts and periods of these payments my trustees shall be sole judges . . . ; and I also hereby provide that in no event shall the fiars be paid their shares until they arrive at majority, but their shares while in minority shall be retained by my said trustees and the annual interest or income thereof paid to or for their behoof and maintenance."

By the first purpose of the codicil the testator and testatrix, upon the narrative that their daughter Catherine Jane Parlane had fallen into indifferent health, provided as follows:—"In the first place, we direct our trustees, on the death of the longest liver of us, to apply for our said daughter's behoof a sum of not less than £100 per annum, and to apply for our son David M'Cubbin Parlane's alimentary maintenance a sum of not less than £50 per annum; and our trustees shall continue to apply and pay said alimentary provision for our daughter so long as her illness exists, and for our said son David for all the days and years of his life. But as regards our daughter, we have reasonable grounds for hoping that in course of time her natural good health will be restored, and on that event arising we specially direct our trustees to pay to or for her behoof any excess of income accruing from our whole estates, heritable and moveable, after payment of the above fixed sums for her and David, and that so long as she remains unmarried, providing always that during the period previous to her health being so restored any such excess of income shall be added to capital and invested along with the rest of our estate in good and safe securities in the names of our trustees. And further providing that in the event of our said son David predeceasing our daughter, and she remaining unmarried, our trustees shall pay over annually or half-yearly the sum of £50 to our sons James Thomson Parlane and John M'Cubbin Parlane equally, share and share alike. And we further provide and declare that on the death of our said son David, and in the event of our daughter's marriage, then our whole estates shall be realised and divided and paid to and among our daughter and our sons, James Thomson Parlane and John M'Cubbin Parlane, 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." The last purpose of the codicil revoked and recalled the trust-disposition and settlement "in so far as necessary to give full force and effect to the terms of this codicil, but in all other respects" confirmed the trust-disposition and settlement.

James Parlane was survived by his widow and by the following children—(1) James Thompson Parlane, (2) John M'Cubbin Parlane, (3) Catherine Jane Parlane, and (4) David M'Cubbin Parlane. Mrs Parlane enjoyed certain liferent provisions in her favour contained in the trust-disposition and settlement, and died on 20th February 1901 survived by the following children—(1) John M'Cubbin Parlane, and (2) David M'Cubbin Parlane. The eldest son James Thomson Parlane had died on 20th December 1893, leaving a widow and two children, who at the date of this case were still minors. The only daughter, Catherine Jane Parlane, had died on 19th October 1898 unmarried and intestate.

Questions having arisen as to the interpretation of the trust-disposition and settlement and codicil, this special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees acting under the trust-disposition and settlement and codicil, (2) the widow and children of the deceased James Thomson Parlane, the son who had predeceased his mother, (3) John M'Cubbin Parlane, and (4) David M'Cubbin Parlane.

The questions submitted for the opinion and judgment of the Court were, *inter alia* — "1. Did vesting take place both in the estates of the testator and testatrix on the death of the latter? Or does it not take place until the death of the fourth party? 3. Is the fourth party a fiar or merely an annuitant? 5. In the event of the fourth party being an annuitant merely, are the first parties entitled to buy an annuity for him?"

The first party maintained (1) that vesting was postponed until the death of the fourth party, and (2) that they were not entitled to purchase an annuity for David. The other parties maintained (1) that vesting took place on the death of Mrs Parlane, and (2) that the trustees were entitled to purchase an annuity for the annuitant.

Argued for the first parties—(1) Vesting was postponed by the codicil until the death of David, because there was a proper conditional institution of issue, and that postponed vesting until the date of payment, unless a contrary intention was shown in the deed, which was not the case here—*Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959; *Thomson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346; *Matheson's Trustees* v. *Matheson's Trustees*, February 2, 1900, 2 F. 556, 37 S.L.R. 409. (2) They were not entitled to buy an annuity for David, for that was not an act of ordinary administration—*Graham's Trustees* v. *Graham's Trustees*, December 23, 1898, 1 F. 357, 36 S.L.R. 273; *Graham's Trustees* v. *Graham*, November 30, 1899, 2 F. 232, 37 S.L.R. 163.

Argued for the second, third, and fourth parties — (1) Under the trust-disposition vesting took place on the death of Mrs Parlane. The codicil had been made for the purpose of providing for the daughter, but as she had died before her mother, a contingency not contemplated by it, it became of no effect, and the trust-disposition alone was to be looked to. But whether that was so or not the disposition and the codicil must be read together; the destination in the codicil

then appeared to be merely a repetition of that in the trust-disposition. (2) The purchase of an annuity for the annuitant would be merely an act of ordinary administration—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236.

At advising—

LORD M'LAREN—The questions in this case relate to the construction and effect of a mutual trust settlement executed by Mr and Mrs Parlane in 1871, and a codicil thereto executed in the year 1887. The effect of Mrs Parlane's part of the settlement was that in the event of her survivance, which happened, her estate should be applied in the same manner as the estate of her husband. The trust settlement contemplated an immediate division of the estate on the death of the longest liver of the spouses amongst the children, subject to the declaration that as one of the sons, David, was of a delicate constitution the trustees should retain his share, and apply the income thereof, with such part of the capital as they should consider necessary, towards his maintenance. The destination contains the usual provision for instituting the issue of deceasing children, whom failing survivors.

If this settlement had remained unaltered I think that there can be no doubt that the rights of the testator's children would have vested at the death of Mrs Parlane, the surviving spouse. The difficulty arises from the terms of the codicil, the leading purpose of which was to make provision for the maintenance of the testator's daughter Catherine Jane Parlane, whose state of health had, it is stated, given them cause for deep concern.

Now, Catherine Jane Parlane predeceased her mother, and so this purpose failed. But the codicil also deals with the distribution of the estate, which is thereby postponed to the death of David, and the provisions relating to distribution of the residue appear to me to be quite independent of the special provision in favour of Catherine Jane, and to be inconsistent with the supposition of a vesting of the residue at the death of the surviving spouse. The direction is—"On the death of our son David, and in the event of our daughter's marriage, then our whole estates shall be realised and divided and paid to and among our daughter and our sons James Thomson Parlane and John M'Cubbin Parlane equally, share and share alike, declaring always that the issue of any of these predeceasing the term of payment to be entitled equally to the share which would have fallen to their parent."

It is a curious feature in this ill-drawn will that the testators, in their natural good wishes for their daughter's recovery of health and eventual marriage, have omitted to provide for the alternatives of her death or her survivance without being married. According to the latest and most authoritative decisions regarding the vesting of rights subject to a conditional institution in favour of issue, the contingent rights of the issue of the immediate legatees have the effect of suspending the vesting of the estate until the period of payment, unless there be something in the context of the will which indicates that the testator intended the vesting to take place at an earlier period. But as there are no such indications of intention in the present case, I must hold that if Catherine Jane had survived Mrs Parlane there would be no vesting until the period of payment, viz., at the death of David and the marriage of Catherine Jane. There are here two conditions, one of which can never happen, because Catherine Jane has died unmarried. In the construction of testamentary writings an impossible condition is to be taken *pro non scripto*, and I think the destination in the codicil must be read as if the reference to the future marriage of Catherine were deleted and the estate were to be divided on the death of David. In that view the right to the residue has not vested, and the answer to the first question must be an affirmance of the second alternative. The second question in this view does not arise.

The third question is, whether David Parlane is a fiar or is merely an annuitant? Under the settlement he would seem to have right to a fee to be managed for him by trustees. But under the codicil, while David's right to an annuity of £50 out of the trust estate is confirmed, the whole estate is appointed to be divided at his death amongst the other children or their issue, and therefore the effect of the codicil is to alter the position of David to that of an annuitant.

In answer to the fifth question, I am of opinion that the trustees are not entitled without the consent of the beneficiaries to buy an annuity for David, because their doing so would absorb part of the capital to which the other parties are entitled at his death.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM not having been present throughout the hearing gave no opinion.

The Court pronounced this interlocutor—

"Find in answer to the first question that the residue of the estate has not vested, and that it only vests on the death of David M'Cubbin Parlane, the fourth party: . . . Answer the fifth question in the negative," &c.

Counsel for the First Parties—M'Robert. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Parties—C. D. Murray. Agents—Cumming & Duff, S.S.C.

Counsel for the Third Party—C. N. Johnston. Agent—Andrew H. Glegg, W.S.

Counsel for the Fourth Party—Balfour. Agents—Macpherson & Mackay, S.S.C.