considered. In this case, and according to the agreement, the tenant entered upon the occupation of a farm which was in very bad condition, with a legal expectation that in the course of his tenure the sheep-carrying capacity of the farm would be improved. But it was quite impossible to forecast the time when the expected improvement would be realised, because this depended partly on the weather conditions being favourable for burning, and partly on the system of burning, which to some extent was in the proprietor's discretion. If the burning was done in considerable tracts at a time there would be a sensible improvement as soon as the grass began to grow, but if it were done in small patches scattered over the moor the benefit might be eventually the same, but it would be longer in coming into operation. In any case, as the tenant entered upon an improving lease he could not reasonably make a claim of damage until after the lapse of such a period of years as would be necessary to give the system a fair trial. The most he could do would be to insist on the agreement as to burning being carried out. In consequence of the death of Mr Panton, the first factor, we have not the advantage of his evidence, but I see no reason for doubting the accuracy of the appellant's statement that he complained to Mr Panton year by year of the inefficient way in which the burning was carried out, and pressed for a more speedy fulfilment of the landlord's undertaking in this respect. In the year after Panton's death the parties were negotiating as to the terms of the written lease, and it was not until 1902, when the lease was executed, and when there had been a six years' trial of the proprietor's system of burning, that the tenant can be said to be in a condition to judge for himself whether he had the materials for a specific claim. Up to this time the utmost effect that could be given to his omission to make a claim would be that he could not claim damage for any inconvenience he had suffered in the years that were past.

Then after 1902 the case was further complicated by the occurrence of two unfavourable years for burning, but in 1904 the appellant had satisfied himself that the respondent did not mean, unless compelled by legal means, to carry out fairly his undertaking as to heather-burning. In this conclusion I think he is justified by the attitude taken up by the respondent's advisers at the proof, and also by the circumstance that in the year following the action the heather-burning was for the first time carried out in an efficient way.

Now, if the appellant had brought his action at an earlier period he would very likely have been met by the defence that the heather-burning had not had a sufficient trial, and that he could not expect in so short a time to have the farm in good condition. There is really no criterion for determining at what particular year the damage had declared itself so as to put the tenant to an election either to waive his claim altogether or to enforce it. In all the circumstances I see no sufficient evidence of waiver, and I cannot think it would be a just or equitable result that the tenant must submit during the remaining years of his lease (for this is the Sheriff's judgment) to an actual refusal on the part of the landlord to fulfil his contract because he has not enforced his rights with the utmost strictness in the past. I am therefore of opinion that we should sustain the appeal and restore the judgment of the Sheriff-Substitute, that the appellant is entitled to £100 damage sustained during the years 1904 and 1905 through the negligent performance of the respondent's obligation to burn a fair proportion of the heather year by year in terms of the lease.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD PEARSON was absent at the advising.

The Court sustained the appeal, recalled the interlocutor of the Sheriff dated 16th February 1907, affirmed that of the Sheriff-Substitute dated 26th December 1906, repeated the findings therein, and decerned.

Counsel for the Appellant — Dean of Faculty (Campbell, K.C.) — Macmillan. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—Constable —Ramsay. Agents—Gillespie & Paterson, W.S.

Saturday, March 7.

FIRST DIVISION.

JACK'S EXECUTOR *v.* DOWNIE.

Succession—Testament—Words Importing (1) *Gift of Heritage and* (2) *Power of Sale.*

Terms of a testamentary writing which were held to carry heritage and to confer power to sell it.

Grant v. *Morren*, February 22, 1893, 20 R. 404, 30 S.L.R. 442, *distinguished.*

David Jack died on 22nd October 1906 leaving a will in the following terms:—"I, David Jack, Christmas-card publisher, residing at Fairview Strand, in the city of Dublin, hereby revoke all wills and testaments heretofore made by me; I appoint Archibald Hunter of Roselea Drive, Dennistoun, in the city of Glasgow, to be the sole executor of this my last will and testament. I direct my said executor immediately after my death to realise all my estate and pay all my just debts and testamentary expenses. . . . [*Then followed legacies to a grandchild and to nieces.*] . . . I direct that the residue of my estate after the payment of the aforesaid legacies shall be divided equally between my wife Lucy Annie Jack, my son James Jack, and my son David Jack. I desire that my said wife Lucy Annie Jack shall have the choice of any of the furniture and books which she may desire, all remaining

furniture or effects to be realised as aforesaid. I direct my said executor to place the realisation of my estate in the hands of Mr John Brown of 23 Exchequer Street, in the city of Dublin: In witness whereof I have hereunto signed my name this 3rd day of October 1905. . . . [*Then followed the signatures of the testator and two witnesses.*]"

In addition to certain moveable estate in Dublin, the testator owned a heritable property situated at 151 Sword Street, Dennistoun, Glasgow. His executor being desirous of realising this property exposed it for sale, when it was purchased by Robert Downie, Glasgow.

Questions having arisen as to the executor's title to heritable property and his power to sell it, a special case was presented in which the executor was the *first party*, and Downie, the purchaser, the *second party*.

The *contentions* of parties were:—"The first party maintains that the whole estate, heritable and moveable, which belonged to the testator was validly and effectually conveyed to him by said will and testament, and that there is an implied power of sale therein. The second party maintains that the first party has no title to said heritable property, as it was not conveyed to him by said will and testament; that the said will and testament deals only with moveable estate, and that there are no words of direction or conveyance therein applicable to heritage in virtue of which a notarial instrument can be expede thereon in terms of the Titles to Land Consolidation (Scotland) Act 1868. He further maintains that even if the property were effectively conveyed to the first party under the said will and testament there is no power of sale given to him therein."

The *questions of law* were:—"(1) Has the said heritable property which belonged to the deceased been validly conveyed under said will and testament to his said executor, the first party hereto? (2) In the event of the foregoing question being answered in the affirmative, Is it competent to expede a notarial instrument in favour of the first party on the foresaid will and testament in the form of Schedule L of the Titles to Land Consolidation (Scotland) Act 1868? (3) In the event of the first question being answered in the affirmative, Has the first party, as executor foresaid, power to sell said heritable property?"

Argued for the first party—The will carried the heritage. All that was necessary were words sufficient to show that the testator's intention was to include the heritage. That intention was clear from the words "all my estate." The will was universal in style, and there was a strong presumption against partial intestacy. The case was ruled by the recent decision in *Copland's Executors* v. *Milne and Others*, January 16, 1908, 45 S.L.R. 314. Reference was also made to the Titles to Land Act 1868 (31 and 32 Vict. cap. 101), sec. 20, and to *Aim's Trustee* v. *Aim*, December 15, 1880, 8 R. 294, 18 S.L.R. 204; *Forsyth* v. *Turnbull*, December 16, 1887, 15 R. 172, 25 S.L.R. 168; *M'Leod's Trustee* v. *M'Luckie*, June 28, 1883, 10 R. 1056, 20 S.L.R. 714. The Executors (Scotland) Act 1900 (63 and 64 Vict. cap. 55) section 2, had assimilated the position of trustee and executor, and therefore no inference that the will did not deal with heritage could be drawn from the fact that an executor, as distinguished from a trustee, had been nominated.

Argued for the second party—The will read as a whole did not deal with heritable estate. It was clear from the expressions used that the testator meant to deal only with moveables. He appointed an executor, used no words applicable to heritage, and used words applicable to moveable estate. The only words hostile to that view were the words "all my estate," and such words occurring in a "testament proper," and in connection with the nomination of an executor, ought to be limited to moveable estate—*Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026, 16 S.L.R. 602; *Grant* v. *Morren*, February 22, 1893, 20 R. 404, 30 S.L.R. 442.

[The second question was not argued by either party, the Court indicating that it was a question for counsel and not for the Court.]

LORD PRESIDENT—The question before us is whether the executor of the late Mr Jack is in a position to give a good title to certain heritable property sold by him as executor, and that depends in the first place on whether the executor had right to the subjects in question, and secondly, whether he had power to sell them.

The first of these questions depends on the terms of the will, and on the 20th section of the Titles to Land Act 1868 (31 and 32 Vict. c. 101). I need not quote the section, for your Lordships are familiar with its terms. The whole point of the section turns on the question whether the words used by the testator show an intention to deal with heritable estate. If they do so, then the section provides that the mere absence of technical terms will not matter.

I think, looking to the terms of the will before us, there is no doubt that Mr Jack meant to dispose of his heritable estate, for he says, "I direct my said executor . . . to realise all my estate," and then, after leaving various legacies, he goes on to direct him to divide the residue of the estate between his wife Lucy Jack and his sons James and David Jack.

Now, whether the use of the word "estate" would or would not in itself be sufficient to indicate that the will was meant to apply to heritable property, I think it is perfectly clear that when the words used are "all my estate," the whole estate, both real and personal, was meant to be conveyed. If that is so, it is obvious that the executor has right to the heritable estate and that he has power to sell it. It would be absurd to suppose that the testator meant that the heritage was not to be realised but to be conveyed *pro indiviso* to the beneficiaries under the will. If the executor has power to sell it follows that he can give a good title to the purchaser.

I propose accordingly that we should

answer the first and third questions in the affirmative. The second question is not one which should have been put to the Court.

LORD M'LAREN—The 20th section of the Titles to Land Consolidation Act 1868 deals with the language necessary to pass estates from the dead to the living, and for the purpose of abolishing the peculiarity which existed in the old law with reference to heritable estate the statute made the provision that the language used to pass moveable estate should now be sufficient to pass heritable estate if it is used with reference to heritable estate. But the 20th section does not profess to solve the question what actual words will suffice to show that the testator intended to dispose of his heritable estate by will? Now I think the decisions upon the latter point are on the whole consistent, and they proceed upon the principle of ascertaining whether the testator had heritage in view when he made his will. In one case the word "property" was held to be sufficient to pass heritage, and the word "estate" seems to me to be quite as general and as sufficient to pass heritage unless where it is used in a more limited sense. I observe that in the case of *Grant* v. *Morren*, 1893, 20 R. 404, where it was held that the will was not habile to convey heritage, I expressed the view that the "estate" there conveyed was confined in meaning to such estate as an executor might administer. But that case is distinguished in two important elements from the case before us. First there was in *Grant's* case no formal gift or direction, but only a bare appointment of an executor to perform the duties of an executor; while here, after appointing an executor, the testator goes on to bequeath legacies and to direct that his estate shall be realised and divided. But I also agree with your Lordship in holding that the word "all" is important. In cases like that of *Grant* the words "my estate" may be controlled by subsequent expressions and by the terms of directions given to the executor, but that is only if the words themselves are ambiguous; and where, as in the present case, the word "estate" is joined with the word "all" there is no ambiguity, and there is no necessity for drawing inferences from other parts of the deed to explain what is already clear, and still less to limit the generality of a clause which on the face of it is a universal bequest of the testator's estate.

LORD KINNEAR—I think that the first question in this case is solved by a consideration of two propositions, both of which have been stated by Lord President Inglis in two different cases, viz.—(1) that the first question in cases of this kind is whether words importing a gift have been used in a will or testament with reference to land, and (2) that that question must be answered in the affirmative if the words employed describe either heritable estate in particular or the testator's whole estate without distinguishing between heritable and moveable. If this is sound the application is easy, because the testator here directs that "all" his "estate" is to be realised, and then, after certain legacies have been paid, that the residue of "my estate" is to be divided between his wife and his sons. I do not think it can be disputed that if he had said in terms "all my estate, heritable and moveable," his intention would have been quite plain in spite of the appointment only of an executor. It is just as plain in the will as it stands, because if a man has heritable as well as moveable estate the direction to realise "all my estate" is not carried out if only his moveable estate is realised.

Upon the question of the power to sell I think that follows as a matter of course, for the reasons stated by your Lordship.

LORD PEARSON was absent.

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

Counsel for the First Party—A. M. Anderson. Agent—C. Strang Watson, Solicitor.

Counsel for the Second Party—Wark. Agent—W. J. Haig Scott, S.S.C.

Saturday, March 7.

SECOND DIVISION.

[Sheriff Court at Greenock.

WALLACE *v.* R. & W. HAWTHORNE, LESLIE, & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 3 (1) *and* 15—*Contracting Out—Scheme Certified under* 1897 *Act in Force at Commencement of* 1906 *Act—Workman Enters Employment Subsequent to Commencement of* 1906 *Act and Agrees to Accept Compensation Provided by such Scheme—Accident Prior to Re-certification of Scheme under* 1906 *Act.*

The Workmen's Compensation Act 1906 came into operation on July 1, 1907. It provides, sec. 3 (1), that the Act shall apply notwithstanding any contract to the contrary made after its commencement, save a contract under a scheme which shall have been certified by the Registrar of Friendly Societies. Section 15 provides, *inter alia*, that a scheme certified under the Workmen's Compensation Act 1897 shall, if re-certified, have effect as a scheme under the Act (sub-sec. 2); shall be re-certified if the Registrar is satisfied with its provisions (sub-sec. 3); shall have its certificate revoked if no re-certification is made within six months of the commencement of the 1906 Act.

A workman entered employment on 9th August 1907. He agreed to accept a scale of compensation provided by a