rally expect, and indeed to which after the desertion of her husband she was probably legally entitled, from the two sons who were residing with her and who were earning substantial sums weekly.

These being the facts of this particular case, we need not anticipate other or narrower cases such as were figured by Mr Christie in his very able argument. Taking the facts here as they have been found by the Sheriff-Substitute, I think we should answer the questions of law in the negative.

Lord Guthrie—I agree. The respondent admits that the mere fact of legal obligation upon the part of the deceased man would not be enough to support the Sheriff-Substitute's judgment. That follows, manifestly, from the occurence of the words in the Act "at the time of his death," that view being confirmed in terms by the case of *Keeling*. But the respondent differentiates this case from *Keeling* in respect of the admitted facts that in this case the desertion was of the wife and not by the wife, that the wife looked throughout to the husband for support, and that she made every effort to make him liable for the support of herself and the children, including obtaining decree for aliment and following it up by arrestment. It is said that that second element is sufficient for the respondent. It appears to me that, on the cases, that will not do, and that the respondent would at the very least require to point us to facts which would bring this question within the case figured by Lord-Justice Fletcher Moulton in the case of *Lee*, when he said "if on the evidence there is any fair probability that the legal rights would at any future time have been actually and effectually asserted by the wife, then there is evidence of dependency." It is not necessary to decide whether that view is sound or not, because it appears to me that there is no such evidence here. The respondent, I think, admitted that no case has occured of children being held dependent on a father who at the time of his death and for a lengthened period before it had been concealing his whereabouts from his family. I would like to add that, while "dependent" seems to me to be "actually dependent," I do not think it necessarily involves actual payment up the time of his death by the father. If a case occurred where the children were being supported on the father's credit by shopkeepers or banks, that, I think, might quite well come within the words of the statute.

I would only add—if it be the fact, as it appears to me to be, that a decision in respondent's favour would be going further than any previous case had gone—I see no reason in principle for extending the rule. The object of the Act evidently was that, when accident takes away the children's support in whole or in part the employer should pay.

It seems to me that the case here does not come within the rule of any of the decided cases or within the principle of the statute.

The Court answered both questions of law in the negative.

Counsel for Appellants—Munro, K.C.—Pringle. Agents—W. & J. Burness, W.S.

Counsel for Respondents — Christie—Young. Agents—R. & R. Denholm & Kerr, Solicitors.

Thursday, March 7.

SECOND DIVISION.

[Lord Cullen, Ordinary.

M'CONOCHIE'S TRUSTEES *v.* M'CONOCHIE AND OTHERS.

Succession—Heritable and Moveable—Conversion — Constructive Conversion — Resulting Intestacy.

By his trust-disposition and settlement a testator conveyed his whole estate to a trustee, under direction—(1) to pay debts "from the readiest of my means and estate, heritable and moveable"; (2) to pay "from my estate, heritable and moveable," alimentary annuities to his brother and his brother's wife; (3) to "set aside from my said heritable and moveable estate and retain" a sum in alimentary liferent for each of his brother's children, with fee to their issue; (4) to pay duty on said provisions "from the residue of my estate, "heritable and moveable"; (5) to pay "out of my estate, heritable and moveable," certain legacies; and (6) to divide the residue among such educational, charitable, and religious purposes within the city of A as his trustee should think fit.

The trustee paid the debts and legacies out of the moveable estate, sold part of the heritage, and expended the price and the surplus moveable estate on improvement of the remaining heritage. The liferents and annuities were satisfied out of the rents of the heritage. The testator died in 1879. His brother, who was his sole heir *ab intestato* in heritage and in moveables, died intestate in 1893. In a special case, brought in 1909, the residuary purpose of the trust was held void from uncertainty.

In a multiplepoinding, the residue, consisting *de facto* of heritage and accumulated rents of heritage, having been claimed—(1) by the heir-at-law, and (2) by the heirs *in mobilibus* of the testator's brother, *held* (*rev.* Lord Cullen, Ordinary) that, the residuary bequest having failed, there was no implied direction to convert the heritable estate to any greater extent than was necessary for the due execution of the trust, that accordingly the residue to which the testator's brother as his sole heir *ab intestato* in heritage and moveables acquired right must be deemed to have been heritable and moveable in the proportions which the heritable and moveable estate bore to

the total value of the estate at the testator's death; and that on the brother's death, intestate, it passed to his heir in heritage and to his next of kin in those proportions.

Opinion reserved *per curiam* as to the effect on the succession had there been an implied direction to convert the whole estate.

Lachlan Mackinnon, advocate in Aberdeen, and another, trustees acting under the trust-disposition and settlement of the deceased George Charles M'Conochie, who died on 13th January 1879, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration, the fund *in medio* being the residue of the trust estate which had lapsed into intestacy, the residuary purpose of the trust having been held void from uncertainty—(See *M'Conochie's Trustees* v. *M'Conochie*, 1909 S.C. 1046; 46 S.L.R. 707).

Claims were lodged by—(1) Alexander Grant M'Conochie, the elder son of James Robert M'Conochie, who was the testator's brother, his heir in heritage, and sole next of kin, and who had died intestate on August 10, 1893, and whose widow had died intestate on July 17, 1895. He claimed (*a*) the whole fund as heir in heritage of his father, or alternatively (*b*) one-third of the fund as one of the next-of-kin of his father and mother; (2) by (*a*) Donald James Robert M'Conochie, the second and remaining son of James Robert M'Conochie, and (*b*) David Welsh, the widower, and Marion Welsh the only child, of Mrs Marion M'Conochie or Welsh, James Robert M'Conochie's only daughter, who died intestate on April 22, 1908. They claimed two-thirds of the funds as heirs *in mobilibus* of James Robert M'Conochie and his wife.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (CULLEN), who, on 14th March 1911, pronounced this interlocutor:—"Ranks and prefers the claimant Alexander Grant M'Conochie to one-third of the fund *in medio*, . . . and ranks and prefers the claimants Donald James Robert M'Conochie and others to two-thirds of the fund *in medio*. . . . *Quoad ultra*, repels the claims stated for the said claimants, and decerns: Grants leave to reclaim. . . ."

Opinion.—"This case raises a question of conversion arising out of the succession of the deceased Charles George M'Conochie, who resided in Aberdeen.

"Mr M'Conochie died on 13th January 1879, leaving a trust-disposition and settlement whereby he bequeathed certain annuities and legacies, and directed the residue of his estate to be divided among such educational, charitable, and religious purposes within the city of Aberdeen as his trustees should select. His heir in heritage and moveables was his brother James Robert M'Conochie, who died in 1893. In 1909 it was decided by this Court, on a special case presented by the trustees and the representatives of James Robert M'Conochie, that the direction as to the disposal of the residue was void from uncertainty. The undisposed of residue was thus estate to which James Robert M'Conochie succeeded *ab intestato*. The present question relates to the mode in which this estate has descended from James Robert M'Conochie, as between his heir in heritage and his heirs in moveables.

"The estate left by the testator consisted of (1) three heritable properties in Aberdeen and one in Keith, valued for legacy duty purposes at £3350, and (2) moveable estate valued at £2816, making together £6166.

"The trust purposes were as follows:—(1) To pay debts 'from the readiest of my means and estate, heritable and moveable;' (2) to pay 'from my estate, heritable and moveable,' alimentary annuities of £50 to the truster's brother the said James Robert M'Conochie and his wife respectively; (3) to 'set aside from my said heritable and moveable estate and retain' a sum of £500 for each of the three children of James Robert M'Conochie in alimentary liferent, with fee to their respective issues, failing whom it was to fall into residue; (4) to pay the Government duty on said annuities and provisions 'from the residue of my estate, heritable and moveable;' (5) to pay 'out of my estate, heritable and moveable,' legacies amounting to £1544, 18s.; and (6) to divide the residue in manner before mentioned.

"These directions represent, in my opinion, a massing of the whole estate, heritable and moveable, for the purpose of effectuating the trust directions, so that had the lapsed portion of the estate fallen to different persons as respectively heirs in heritage and in moveables of the testator *ab intestato*, the effective trust purposes would have fallen to be treated as burdening both the heritage and the moveables conveyed by the settlement according to their respective values—*Cowan*, 14 R. 670.

"On this footing, it is maintained by the heirs in moveables of James Robert M'Conochie that there was under the settlement an implied direction for the sale of the heritage. I am of opinion that this contention is sound. Looking to the value of the heritage and the total amount of the burdens thrown on it jointly with the moveable estate, I think that the testator must have intended that the heritage should be sold. The settlement contains power to sell, but no power to borrow on the security of the heritage.

"If this be so, and if the trustees had followed the scheme of the settlement according to its terms, they would have had now in hand (1) the three sums of £500 directed to be set aside and retained for the children of James Robert M'Conochie in liferent and their issue in fee, and (2) a sum of invested money forming residue derived partly from the heritable and partly from the moveable estate of the testator, and representing what James Robert M'Conochie succeeded to *ab intestato* as heir of the truster in heritage and in moveables in consequence of the failure of the residuary bequest in the settlement. In these supposed circumstances, I take it that,

as what James Robert M'Conochie died in right of was a money residue, his right thereto would have passed on his death to his heirs *in mobilibus*.

"The trustees under the settlement followed a different course of administration, which at least reflects credit on their business sagacity, as it has resulted in a very remarkable enhancement of the value of the trust estate. What they did was to pay the debts and legacies wholly out of the moveable estate, to sell the property in Keith, and *quoad ultra* to nurse the properties in Aberdeen, applying thereto the surplus moveable estate and the price of the Keith property. They did not set aside the three sums of £500, but from the retained heritage satisfied both the liferent claims of the three grandchildren and the two annuities to James Robert M'Conochie and his wife while they endured. Owing to their sagacious treatment of the Aberdeen properties and to a great rise in market value, they have succeeded in producing by their course of administration a trust estate now valued at about £17,000, which, subject to satisfaction of the three bequests of £500 each, represents the lapsed residue of the truster. The trustees hold (1) heritage estimated at £14,944, subject to a bond of £1750, and (2) invested money amounting to £3521, derived from the accumulated surplus rents of the heritage.

"The result has been that when James Robert M'Conochie died on 10th August 1893 the trust estate, to the lapsed residue of which he had succeeded *ab intestato*, consisted *de facto* mainly of heritage, although had the administration followed the scheme of the settlement, according to the views which I have expressed, it would have consisted of invested money in the hands of the trustees.

"In these circumstances, the claimant Alexander Grant M'Conochie, who is the heir in heritage of James Robert M'Conochie, maintains that in the succession of James Robert M'Conochie the rights of his representatives depend solely on the character of the trust estate *de facto* in the hands of the trustees when he died, and that he is entitled to take the heritage held by the trustees and all the rents of such heritage accumulated since 10th August 1893.

"Now what James Robert M'Conochie succeeded to on the truster's death was the undisposed of residue of his estate, subject to the fulfilment in a due course of administration in terms of the settlement of the prior and effective purposes of the trust. He succeeded to this residue partly in his character of heir at law, because the implied trust for conversion did not oust his right as such heir *quoad* any part of the value of the heritage not effectually disposed of. But while he had right to claim in this character, the thing to which his claim applied was, if I am right in the views I have expressed, a money residue; and if the trustees had followed the scheme of the settlement it would have been money alone that would have been receivable by James Robert M'Conochie, or his representatives claiming in his right, from the trustees under the resulting trust. It is only because the trustees have not followed the scheme of the settlement, but have acted otherwise at their own hand, that they happen to hold heritage in place of money. This course of administration never had the approval or authorisation of James Robert M'Conochie so as to admit of the application of the principle of reconversion.

"The claimants who are the next-of-kin of James Robert M'Conochie accordingly contend that as the effect of the trust settlement was to give him in his character of heir in heritage and in moveables of the truster a right to money in the hands of the trustees, that right on his death passed to his heirs *in mobilibus* as the persons entitled to succeed to any money to which he had right, and that this result cannot be varied by the action of the trustees, not contemplated by the truster, in proceeding at their own hand to put the said money in land. The claim of James Robert M'Conochie's representatives, they say, is for a money residue, and it cannot make a difference in their rights that the existing assets of the trust answerable for that claim, in consequence of the trustee's course of administration, happen to be heritable property instead of being money as the testator directed. This appears to me to be a sound proposition. It is supported by the English authorities which were cited at the discussion. The opposite view would mean that the rights of succession in question were liable to be changed by a course of administration on the part of the trustees not contemplated by the testator, and that the quality of the succession is to be that impressed on it by the trustees instead of that impressed on it by the testator himself.

"I am accordingly of opinion that the fund *in medio*, which is the lapsed residue of the truster's estate, falls to be regarded as moveable estate in the succession of James Robert M'Conochie, and as such to be divided among his heirs *in mobilibus*, that is to say, as falling to the extent of one-third to the claimant Alexander Grant M'Conochie, and to the extent of two-thirds to the other claimants in terms of their claim."

Alexander Grant M'Conochie reclaimed, and argued—1. The question in this case was not what estate was left by the testator, but what estate the testator's heir was in right of when he, the testator's heir, died. The residuary purpose of the trust having failed, the testator's brother, as his heir both in heritage and in moveables, might at any time have demanded a conveyance of the residue in the hands of the trustees under burden of the unexhausted liferents and annuities, in virtue of the radical right of the truster which revived in the failure of the trust—*Gilmour* v. *Gilmours*, July 3, 1873, 11 Macph. 853, *per* Lord Justice-Clerk Moncrieff at p. 858, 10 S.L.R. 591; *Neilson* v. *Stewart*, February 3, 1860, 22 D. 646, *per* Lord Ordinary Neaves

at p. 653; *Advocate-General* v. *Smith*, June 15, 1854, 1 Macq. 760, *per* Lord Chancellor Cranworth at p. 763. The residue of which the testator's heir was entitled to demand a conveyance consisted *de facto* of heritage at the time of his death. It must therefore pass as heritage in his succession. The character of the estate as at the testator's death was immaterial, because the trustees were under no necessity of apportioning the rights of heirs in heritage and in moveables, one person being in possession of both rights. This case was distinguishable in this respect from the case of *Cowan* v. *Cowan*, March 19, 1887, 14 R. 670, 24 S.L.R. 469, where the conflict of interest was between the immediate heirs in heritage and in moveables of the testator. 2. In any event, constructive conversion had not taken place. The trust-disposition and settlement contained no express direction to sell, and no such direction was implied in the terms of the deed. A power of sale was given, but conversion only took place under a power of sale when sale was necessary for the execution of the trust — *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; *Sheppard's Trustee* v. *Sheppard*, July 2, 1885, 12 R. 1193, 22 S.L.R. 801; *Anderson's Executrix* v. *Anderson's Trustees*, January 18, 1895, 22 R. 254, 32 S.L.R. 209; *Advocate-General* v. *Blackburn's Trustees*, November 27, 1847, 10 D. 166; *Seton's Trustee* v. *Seton*, July 2, 1886, 13 R. 1047, 23 S.L.R. 770; *Steel's Trustees* v. *Steedman*, December 13, 1902, 5 F. 239, 40 S.L.R. 202; *Duncan's Trustee* v. *Thomas*, March 16, 1882, 9 R. 731, 19 S.L.R. 502. Here no total sale had taken place and no necessity for it had arisen. If a partial sale were necessary for the execution of the trust, conversion would only take place to the extent required—*Gardner* v. *Ogilvie*, November 25, 1857, 20 D. 105; *Advocate-General* v. *Smith*, *cit. sup.* Moreover, the estate here in question was residue which had fallen into intestacy, and the succession to such estate was not affected by the testator's intention regarding property ineffectually dealt with by his will—*Thomas* v. *Tennant's Trustees*, November 17, 1868, 7 Macph. 114, 6 S.L.R. 113; *Smith* v. *Wighton's Trustees*, January 8, 1874, 1 R. 358, 11 S.L.R. 177: *Logan Trustees* v. *Logan*, June 24, 1896, 23 R. 848, *per* Lord M'Laren at p. 853, 33 S.L.R. 638. A disposition of heritage to trustees with an express direction to convert would not deprive the heir-at-law of his right to succeed on a failure of the trust, and the rule of English law that such estate became moveable in the succession of the heir had never been followed in Scotland—M'Laren on Wills and Succession (3rd ed.) pp. 233-4 note; *Gardner* v. *Ogilvie*, *cit. sup.*, *per* Lord Curriehill at pp. 110-111.

Argued for Donald James Robert M'Conochie and others (respondents)—1. The scheme of the settlement clearly showed the testator's intention that the whole estate should be converted and treated as a sum of money—*Baird* v. *Watson*, December 8, 1880, 8 R. 233, 18 S.L.R. 171. Where a direction to convert was so implied, the rule that for conversion sale must be necessary for the execution of the trust was not applicable. In cases such as *Fotheringham's Trustees, &c.*, July 2, 1873, 11 Macph. 848, 10 S.L.R. 540, where the rule had been applied, there was merely a power to sell without any indication of intention to convert. In any event, there was necessity for a partial sale, and it had never been decided that partial sale was possible without total conversion. In *Advocate-General* v. *Smith*, *cit. sup.*, the question was not as to the succession, but as to liability for legacy duty. The fact that the trustees had not actually sold the heritage had no effect on the question of constructive conversion—*Brown's Trustees* v. *Brown*, December 4, 1890, 18 R. 185, 28 S.L.R. 138; *Advocate-General* v. *Williamson*, December 23, 1850, 13 D. 436, *per* Lord Jeffrey at p. 446; *Cowan* v. *Cowan*, *cit. sup.* 2. Assuming a disposition of heritage to trustees under a direction or a necessity to convert, and resulting intestacy as to part of the fee, the disposition admittedly did not oust the right of the testator's heir-at-law; his right, however, was not to receive heritage, but was a *jus crediti* to demand from the trustees the sum of money which they held, or should have held, as a *surrogatum* for the heritage. That right was moveable *quoad* the heir's succession — Bell, Prin., section 1482; *Hewitt* v. *Wright*, 1780, 1 Bro. C.C. 85; *Wright* v. *Wright*, 1809, 16 Ves. Jun. 188; *Curteis* v. *Wormald*, 1878, 10 Ch. D. 172; *Attorney-General* v. *Lomas*, 1873, L.R., 9 Ex. 29; *In re Richerson*, [1892] 1 Ch. 379; Jarman on Wills (6th ed.), pp. 774-6; White and Tudor, Leading Cases in Equity (8th ed.), i, 404; Theobald on Wills (7th ed.), p. 259. The heir might act so as to effect reconversion — *cf. Spens* v. *Monypenny's Trustees*, October 29, 1875, 3 R. 50, 13 S.L.R. 25, 45, but no such action was possible in the present case. 3. Even if conversion did not take place, the appreciation in value of the estate was due in large part to the use made by the trustees of the moveable property. An exact apportionment according to profits being impossible, the estate should be divided in equal shares as if moveable—*Lynch's Judicial Factor* v. *Griffin*, February 21, 1900, 2 F. 653, 37 S.L.R. 462. 4. Alternatively, the estate should be divided in the proportions which the heritable estate bore to the moveable estate as at the testator's death—*Cowan* v. *Cowan*, *cit. sup.*

At advising—

Lord Dundas—I have found this case to be attended with considerable doubt and difficulty; none the less because I have ultimately reached a different conclusion from that to which Lord Cullen gave effect in the Outer House. I shall state as succinctly as I can the reasons which have led me to this result.

Mr George Charles M'Conochie, whom I shall throughout call "the testator," died in 1879, leaving a trust settlement, the purposes of which are summarised by

the Lord Ordinary. His estate was more than sufficient to fulfil the purposes of the trust so far as operative. But it was recently decided by this Court (*M'Conochie's Trustees*, 1909 S.C. 1046, 46 S.L.R. 707) that the testator's directions for the disposal of the residue of his estate were void from uncertainty. He therefore died intestate *quoad* the residue, and the right to it passed on his death to his brother James, who was his heir-at-law and sole next-of-kin. James died in 1893, intestate. The question in this multiplepoinding arises between James's heir-at-law and his next-of-kin, and depends upon the legal character, as heritable or moveable, of the residue of the testator's estate still in the hands of his trustees, which forms the fund *in medio*.

The Lord Ordinary has upheld the claim of the next-of-kin. He considers that there was under the testator's settlement "an implied direction for the sale of the heritage." He says—"Looking to the value of the heritage and the total amount of the burden thrown on it jointly with the moveable estate, I think the testator must have intended that the heritage should be sold. The settlement contains power to sell, but no power to borrow on the security of the heritage"; and he concludes that "as what James Robert M'Conochie died in right of was a money residue, his right thereto would have passed on his death to his heirs *in mobilibus*." I cannot agree with the Lord Ordinary that there was here any implied direction for the sale and conversion of the whole estate into money; and I must part company with him at this vital point in the case. It may very well be that the testator contemplated the total conversion of his estate into money with a view to distribution in terms of his residuary purpose. But that purpose has failed; and we have to deal with the resulting intestacy. Now, I apprehend that in intestacy there is no room for inference of a testamentary purpose; and the Court assumes that even an express direction to convert is made only with the object of facilitating the realisation of the estate effectively disposed of by the settlement. We are not, therefore, here to infer a direction to convert, except so far as conversion may be indispensable to the execution of the operative purposes of the trust. I think the Lord Ordinary has overlooked a well-settled principle of law which was succinctly stated by Lord Cranworth, L.C. (*Taylor* v. *Taylor*, 1853, 22 L.J. Chan. 742, at p. 744), when he said "the result of the authorities is that where there is a direction to sell real estates, and that the proceeds shall form part of the personal estate, the true construction is that the conversion takes effect so far as is necessary to carry out the objects and intentions of the testator; but where the object fails the direction does not take effect. In case of lapse, the personal estate goes to the next-of-kin, not because the testator intended it but because the law carries it to them. So, as to the real estate, the law gives it to the heir; and the law would do the same if the testator said that his real estate should not go to his heir but omitted to make a valid devise of it." The same principle has often been expressed in our own Courts—*e.g.*, in *Gardner* (1857, 20 D. 105, *per* Lord Curriehill); *Neilson* (1860, 22 D. 646, *per* Lord Neaves); *Thomas* (1868, 7 Macph. 114, *per* Lord Barcaple). In *Cowan* (1887, 14 R. 670) there was an express direction to realise the whole estate. In the present case there is no express direction, and none can be implied, in regard to what has turned out to be intestate succession of the truster.

One must consider, then, what was the nature and character of the residue of the testator's trust estate as it stood—or as, in accordance with the well-known maxim of trust law, *quod fieri debet infectum valet*, it must be held to have stood—in the hands of his trustees (1) after due execution of the prior operative trust purposes as at Martinmas 1879, being the first term of Whitsunday or Martinmas occuring six months after the truster's death; (2) at James's death in 1893, or at the death in 1895 of his wife, when the annuities after-mentioned came to an end; and (3) at the present time. If I use, as I propose to do, some figures in reference to the estate, I shall only use them as exegetical or illustrative of the views I am expressing, and not as being necessarily accurate or agreed-on figures.

The operative purposes of the settlement were for payment of debts and Government duties (which I understood from the bar might be roughly put at £500), and legacies amounting to £1544, for the setting aside and retaining of three sums of £500 for the benefit of persons named in liferent and fee respectively—these sums making in all about £3544; and for payment of annuities of £50 each to James M'Conochie and his wife and the survivor. All these purposes were directed to be satisfied "from my estate, heritable and moveable"; and I agree with the Lord Ordinary that they must all be treated as burdening both heritage and moveables according to their respective values. The estate left by the testator is stated as having been worth about £6166—£3350 of heritable and £2816 of moveable estate. It seems clear, therefore, that in order to satisfy the above purposes, other than the annuities, it would have been necessary in a strict course of administration to realise heritage to a considerably larger extent than was actually done (with the corresponding result that less of the moveable estate would have been required than was in fact applied to these purposes); and to this extent, but no further, I think the express power to sell and the direction to pay "from my estate, heritable and moveable," did unquestionably amount in law to a direction to sell. We must assume heritage and moveables to have been respectively realised and applied to the satisfaction of the said prior purposes,—requiring roughly a sum of £3544 or thereby,—in the due proportions.

On this assumption, the trust estate remaining in the trustee's hands as at Martinmas 1879 would be represented by a mixed estate to the value of some £2622 (the balance of the gross value of £6166, consisting of heritage and moveables in the relative proportions of £3350 and £2816). The revenue arising from this estate would, I suppose, be sufficient, but not more than sufficient, to provide the two annuities of £50 each; and it would, I apprehend, be the duty of the trustees to hold it primarily for that purpose, and (subject thereto) for the person legally entitled to it, viz. the testator's heir *ab intestato*, in heritage and moveables respectively. There was neither necessity nor duty, so far as I can see, to realise the heritable estate to any further extent than I have indicated. The proper way to provide the annuities was from the revenue of the estate, not by recurring sales.

If such was generally the value and character of the trust estate, after due execution of and provision for the operative trust purposes, one must next consider how matters stood, or must be held to have stood, as at the death of James M'Conochie in 1893, or as in 1895, when his wife died and the annuities ceased to be payable. If one keeps in view that the actual course of administration pursued by the trustees, though its results were highly beneficial to the interests of all concerned, was unauthorised by the terms of their trust, and that the maxim *quod fieri debet* falls, as already pointed out, to be applied, we must, I think, assume that at the latter date the property would have been practically the same as it was at the earlier one. The whole available revenue would *ex hypothesi* have been spent in payment of the annuities. No doubt the heritable or the moveable estate might have to some extent increased or fallen in value during the period between 1879 and 1895; but we cannot speculate about this; and I do not see how we can allow either the heir or the next of kin in James's intestate succession to claim, to the exclusion of the other, more than a proportional share of the advantage which has resulted from the beneficial but unauthorised administration of the trustees.

One must now consider the present position of matters. The fund *in medio* represents a trust estate very greatly enhanced in value. It in fact consists mainly of heritage, but the question is as to its just distribution in a competition between the heir and the next of kin of James in his intestacy. These claimants, according to their main contentions, each claim the whole estate. The heir maintains that the fund *in medio* represents heritage or the rents of heritage accumulated after 1893; and that as James (if he had ever been aware of his rights) might have insisted on the trustees handing over the whole estate to him, subject to the real burden of the annuities, his heir is now in the same position except that the annuities have ceased to be exigible. A sufficient answer to the latter contention seems to me to be that James did not in fact make such a demand; and that it is not now open to his heir to do so for the purpose and with the result of frustrating the rights of the next of kin. On this point some observations by Lord Cranworth in *Buchanan* v. *Angus* (1862, 4 Macq. 374 at p. 385) seem to be apposite and instructive, The next of kin, on the other hand, contend that James's succession being (as the Lord Ordinary has held it to be) truly to a money residue, though part of the money may have come to him in his capacity as his brother's heir at law, the whole fund *in medio* must pass as moveable estate to them. As already stated, I disagree with the Lord Ordinary's conclusion that this was truly a money residue. I am unable to sustain either of these extreme contentions. The true solution seems to me to be found in a middle course upon the lines already indicated, The matter is not solved by asserting, as counsel for the next-of-kin asserted, that James's right was merely a *jus crediti;* for assuming that to be so, a *jus crediti*, I apprehend, partakes of the nature and quality, heritable or moveable, of the subject itself in regard to which the *jus crediti* exists, and is governed by the same rules of law as to its transmissibility by descent as are applicable to that subject (see *per* Lord Westbury, L.C. in *Buchanan*, *sup. cit.*, at p. 378). James succeeded his brother *ab intestato* in the whole residue of the mixed trust-estate in his double capacity as heir and sole next-of-kin. I think James's right of succession must be held to have passed on his intestacy to his heir-at-law so far as it was truly a heritable right to a heritable subject, and *quoad ultra* to his next-of-kin. I therefore conclude that the whole estate now in the hands of the trustees—the fund *in medio*—must be regarded in the present competition as heritable and moveable in the proportions which the value of the heritage and moveables respectively bore to the whole value of the testator's estate at the time of his decease; *i.e.*—using the figures as merely illustrative—in the proportions of £3350 and £2816 to the total of £6166.

If the views I have expressed are sound there is no necessity, and indeed no room, to consider or decide an aspect of the case which the Lord Ordinary had to (and did) deal with, and which bulked largely in the discussion at our bar. The Lord Ordinary held (erroneously as I think) that James's succession was to a money residue, though the money he succeeded to came to him partly in his character as heir in heritage of his brother. On this footing he decided that the whole of this money must pass in James's intestacy as moveable estate. On the assumption postulated I should, as at present advised, be disposed to agree with the Lord Ordinary's conclusion. It seems to be quite in accordance with the opinion indicated *obiter* by Lord Curriehill in *Gardner's* case (1857, 20 D. 105, at pp. 110 and 111), and to be supported, as the Lord Ordinary considered it to be, by English decisions. But if, as I hold there is and can be here, no implied direction to convert

beyond the requirements in that respeot of the operative trust purposes, there is, as I have pointed out, no room in this case for the application of the doctrine referred to, and I prefer to reserve my opinion until the matter comes before us in a case where it has to be decided.

In my opinion, for the reasons now stated, the Lord Ordinary's interlocutor must be recalled, and we should find (1) that Mr G. C. M'Conochie died in 1879, leaving a trust settlement and estate more than sufficient for the trust purposes, so far as operative, which purposes fell in terms of the settlement to be implemented out of his heritable and moveable estate in rateable proportions; (2) that the truster's directions for the disposal of the residue of his estate were (as this Court decided in 1909) void from uncertainty, and that he died intestate *quoad* the residue; (3) that the right to this residue passed on the truster's death to his brother James as his heir and sole next-of-kin *ab intestato*; (4) that there was no express or implied direction to convert the truster's heritable estate to any greater extent than was necessary for the due execution of the operative purposes of the trust, and that to that extent, but no further, the trustees must be held in law to have realised said heritage; (5) that the residue to which James M'Conochie acquired right must be held to have been heritable and moveable in the proportions which the value of the heritable and moveable estate of the truster bore to the total value of his estate at his death; (6) that on James's death in 1893, intestate, the said residue passed to his heir in heritage and his next-of-kin in the foresaid proportions; and (7) that the said heir and next-of-kin are now entitled to the said residue, being the fund *in medio*, in the foresaid proportions. With these findings, the normal course would be to remit the case to the Lord Ordinary for further procedure as may be just.

LORD SALVESEN—The late Mr Charles George M'Conochie died on 13th January 1879, leaving a trust-disposition and settlement whereby he bequeathed certain annuities and legacies and directed the residue of his estate to be divided in terms of a direction which has now been held void from uncertainty. To the extent, therefore, that his estate was not required to meet the said annuities and legacies it falls to be dealt with as intestate. There was no express direction to sell his heritable estate, but a power was conferred upon the trustees to do so either by public roup or private bargain. As the trust could not come to an end until the death of the annuitants, it is plain that the testator contemplated at all events a portion of his estate being invested, and power was given to his trustees to invest the trust funds in accordance with the various Trust Acts.

Had there been nothing from which a contrary intention might be inferred the debts and legacies would have been primarily chargeable against the moveable estate and the annuities against the heritage. I agree, however, with the Lord Ordinary that, as the testator expressly directed that the trustees were to pay the annuities from his estate "heritable and moveable," and made a similar provision with regard to the legacies and debts, the effective trust purposes fall to be treated as burdening both the heritage and moveables conveyed by the settlement according to their respective values. The legacies amounted to £3044, 18s., and in addition the trustees were to pay Government duty on the annuities and provisions "from the residue of my estate, heritable and moveable." These purposes, however, did not exhaust much more than one half of the total estate, leaving the remainder intestate succession.

The first question in the case is whether there was under the settlement an implied direction for the sale of the heritage so as to have the effect of converting the whole estate into moveables. It so happened that the truster possessed three properties in Aberdeen and one property in Keith; and in the course of their administration the trustees have not, in fact, sold any of these properties with the exception of that in Keith, which realised a nett price of £258, 4s. 4d. They did not, however, set aside the sum of £500 as they were directed to do for each of the three children of James Robert M'Conochie (whom I shall afterwards call James), who was the testator's sole heir and next-of-kin; but they have paid corresponding sums out of the rents of the heritage which remained undisposed of, and have similarly dealt with the annuities to James and his wife. Owing to a rise in the value of property in Aberdeen, and also to the trustees' capable administration, they now hold heritage to an estimated value of nearly £15,000, subject to a bond of £1750, and invested money amounting to £3521 derived from accumulated surplus rents.

James appears to have assumed throughout that his brother's will validly disposed of his whole estate, and this was the view upon which the trustees acted until 1909, when it was decided that the residue clause was void from uncertainty. The contest in this case is accordingly between the heir and the next-of-kin of James, the former claiming the whole property now in the hands of the trustees as being *de facto* heritable, subject only to his handing over to the trustees the £1500 which they were directed to invest for behoof of James's three children.

The claimant Alexander M'Conochie (who is the heir of James) contended that the rights of parties fall to be determined as at the date of the death of James in 1893. At that date all the property which the trustees held was heritage or the accumulated rents of heritage; and as James was entitled to the whole estate as the sole heir and next-of-kin of his brother, it was maintained that that estate passed to James's heir. It would undoubtedly have done so if the estate had been made over to James during his lifetime; but the fal-

lacy underlying this argument is apparent from the fact that the heritage which forms the fund *in medio* never formed part of James's estate, for it remained vested in the trustees and James had only a *jus crediti* against them. If, therefore, the whole or part of the estate was moveable succession in the person of James, or if the whole estate had been impressed by the testator with that character, this *jus crediti* would have passed to James's executors. I am accordingly of the opinion that this solution of the question, the chief merit of which is its simplicity, cannot be entertained.

The Lord Ordinary has sustained the claim for James's next-of-kin on the ground that the will contains an implied direction to realise the whole heritable estate and to mass it along with the moveables, and that this direction operated conversion of the heritage, although in fact part of the heritage was never disposed of. On this assumption what James died in right of was a money residue which passed on his death to his heirs *in mobilibus*.

Had the settlement been operative in all its parts it may be that the Lord Ordinary's view would have been most in accordance with the presumed intention of the testator, although even in that case I am not sure that the trustees would have required to sell the whole heritage in order to distribute the estate amongst the residuary legatees. If they happened to possess only two heritable properties when the trust came to be wound up I do not at present see any reason why they should not have conveyed them to two selected charities. But as the residue clause has proved to be inoperative it is difficult to determine what the testator's intention would have been in an event which he obviously could not contemplate. Accordingly the will must be construed now exactly as if it had made no disposal of the residue, and no direction to sell is to be implied beyond what was necessary to carry out the operative purposes.

The Lord Ordinary speaks of James's right as being to a money residue. That is not an accurate statement. His right as next-of-kin and heir-at-law of his brother was to succeed to the whole estate so far as undisposed of, and it vested in James in 1879 when the succession opened, although he remained ignorant of it throughout his own lifetime. In 1879 he was entitled to call upon the trustees to denude in his favour of such portions of the moveable and heritable estate as, on the footing that they had provided for the trust purposes, strictly they did not require to retain in their hands. *Quoad* the intestate succession, the trustees had no right to administer the estate. It fell to him not by virtue of the deed but because of his relationship to the deceased.

It is settled by a series of authorities that an implied direction to sell has exactly the same potency in altering the quality of the succession as an express direction. A direction to sell, however, will not be implied unless it is indispensable to the execution of the trust. Perhaps the most authoritative dictum on this subject is to be found in the case of *Buchanan* v. *Angus* (4 Macq. 374), where the Lord Chancellor (Westbury) said (p. 379)—"If, instead of an absolute and unqualified trust or direction for sale, 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 Fullarton in the case of *Blackburn*, 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 the same case Lord Cranworth said (p. 384)—"If there was an absolute duty imposed upon these trustees to sell at all events and without reference to any discretion on their part for the convenience of those who were interested in the produce—if there was an absolute duty imposed upon them to turn this into money—then, whether they had turned it into money or not would be immaterial, and in whatever form it was then held it would be treated for the purpose of succession as if it were money." These two *dicta* supply the key to the questions raised here. Can it be affirmed that there was an absolute duty on the trustees of Mr M'Conochie to sell all the heritable property belonging to the truster? In other words, could they have compelled James's heir to take his succession in the form of money? I do not see that they had any such duty or right. So far as indispensable for the execution of the trust they had no doubt a duty to convert, but beyond that I think they had no duty; and it is perfectly plain that a large proportion of the heritable estate need never have been converted into money even if they had complied strictly with the direction to invest the sum of £1500 for James's three children. Even where trustees holding only a single heritable property find themselves compelled to realise it as a *unum quid* in order to meet debts or legacies, the price of the heritage, so far as not required to fulfil the trust purposes, remains heritage in the person of the heir. This was expressly decided in *The Advocate-General* v. *Smith* (14 D. 585), where Lord Rutherfurd delivered the unanimous opinion of five Judges. There the estate of the deceased consisted of £4000 of moveable funds and a heritable bond for £16,000. In order to pay debts and special legacies the trustees required to apply £10,000 of the sum in the heritable bond. They accordingly uplifted the whole heritable debt and re-invested the balance. It was held that the power to sell granted by the deed did not in these circumstances imply a direction to realise the whole heritable estate, and that the balance of £6000 was to be treated as

heritable succession and not as money arising from the sale of heritable estate. That case was affirmed on appeal (1 Macq. 760), and appears to me to be conclusive of the question raised in the present case. In dealing with the argument founded on the actual realisation of the heritable bond, which was undoubtedly done in terms of the express power of sale, Lord Rutherfurd said (p. 590)—"We apprehend it to be involved as a principle that what the trustees do, if their dealing be founded on, shall be done by them in the necessary or at least the plain and natural course of their execution of the trust. For if the trustees sell, not in execution of the trust, not in obedience to the testator's will, their actings have no relevancy. In like manner, if the trustees shall change an investment merely from one form to another simply in ordinary management, and for better preservation of the estate, that change of investment cannot be considered as a part of the execution of the trust, nor can the circumstance of a temporary alteration of the investment of the estate into money, not for ultimate distribution, be held to have changed a conditional into an absolute direction." The power to sell in the deed there construed was as absolute as it is in Mr M'Conochie's deed, but it was construed as a conditional direction to sell, the condition to be read in being "so far as necessary in the execution of the trust."

The case of *Buchanan* v. *Angus* is also an authority upon the second question argued for the next-of-kin. They maintained that even if, on the authority of *Cowan's* case, James as heir was entitled only to the proportion of a mixed estate corresponding to the amount of heritage which was left over after satisfying the charges with which the testator had burdened it, the estate in his person became moveable and was thus transmitted to his executors. The argument was based upon a rule which appears to be well settled in England and which was given effect to in *Wright* (16 Ves. Jun. 188) and *Curteis* (10 Ch. D. 172). It is to be noted, however, that in all the cases in which the rule has been applied there was an express direction to convert the heritable estate; and while this was held not sufficient to oust the heir, it had the effect of making the estate in his person moveable succession. If I am right in holding that there was no implied direction to sell beyond what was necessary for the fulfilment of the operative trust purposes, these cases have no application. The reasoning on which they proceed did not commend itself to so eminent a Judge as Lord M'Laren, and there has been no case in Scotland where they have been followed. I refrain, therefore, from expressing an opinion as to whether the rule which they laid down is a rule which we ought to apply, as in the view I take the question does not arise. In *Buchanan's* case the controversy was exactly as it is here—between the heir and next-of-kin of the testator's heir, and there the declaratory conclusion of the summons, to which the judgment of the House of Lords substantially gave effect, was that one equal half of the residue of the trust estate "of the deceased John Smith, in so far as it consisted of heritable property, remained in the *hereditas jacens* of Major Smith and now belongs to the present appellant as his heir-at-law." *Mutatis mutandis*, these words apply to the present case.

The only other thing that remains is to apply the principles above set forth. The estate held by the trustees is in fact all heritage, and I was at first disposed to hold that as the trustees could have been made personally liable in a question with the next-of-kin for their failure to set aside the provision of £1500, they must be held to have nursed the heritable property for the benefit of the persons who might ultimately become entitled thereto, and that the next-of-kin's claim would be satisfied if they received the net amount of the personal estate which existed at the testator's death, with such interest as was not required to meet the due proportion of the annuities and charges falling to be borne by the moveable estate. On reconsideration, however, I have come to be satisfied that this view is unsound, and that the estate falls to be divided in the manner proposed by Lord Dundas. If the trustees, instead of retaining the heritable property and utilising the moveable funds for the purpose of its development, had sold all the heritage and invested the proceeds in moveable securities which had appreciated, it would scarcely have been equitable to hold that the whole appreciation effeired to the moveable estate and that no part of it was to be credited to the price of the heritage. If so, the converse proposition must also hold good. The result is that the existing property falls to be divided between the heir and the next-of-kin according to the respective values of the heritable and moveable estate as existing at the date of the testator's death after due implement of the effective purposes of the trust. This method has also the merit of being more equitable than if the whole estate were given to one or other of the competing claimants.

I accordingly agree with your Lordship that the interlocutor of the Lord Ordinary should be recalled, and that we should pronounce findings in terms of those suggested. I do not apprehend there will be any difficulty in the parties working out our judgment.

LORD JUSTICE-CLERK—I will confess that at first I was inclined to the opinion of the Lord Ordinary, in view of the undoubted rule of law that in such a case as this an implied direction is as effectual to convert as an express direction. But I have come to see that looking to the position into which this estate came by the fact that a large part of the estate fell into intestacy by the decision of the court that the testator's desire to make charitable bequests fell from uncertainity, what the testator's intention might be, could not be implied in regard to a state of circumstances which was not in

his contemplation, and therefore he could not have formed an intention at all. I have therefore come to the same conclusion as your Lordships, and content myself with expressing my entire concurrence in the opinion of Lord Dundas, which I have had an opportunity of studying.

LORD GUTHRIE, who was present at the advising, gave no opinion, not having heard the case.

The Court recalled the interlocutor of the Lord Ordinary and found in the terms suggested by Lord Dundas.

Counsel for the Claimant Alexander Grant M'Conochie (Reclaimer) — Sandeman, K.C. — Jameson. Agents — Boyd, Jameson, & Young, W.S.

Counsel for the Claimants Donald James Robert M'Conochie and Others (Respondents) — Murray, K.C. — W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Trustees — Dunbar. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Friday, March 8.

FIRST DIVISION.

[Sheriff Court at Hamilton.

M'GINN *v.* UDSTON COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec* 8 (1), (2), *and* (5), *and Third Schedule as Extended by Schedule to Statutory Rules, dated May* 22, 1907 — *Review — Medical Referee — Finality — Industrial Disease—Statement that Disease not due to Employment.*

Where a workman is employed in a process mentioned in the second column of the Third Schedule to the Act, and obtains from the certifying surgeon (or on appeal from the medical referee) a certificate that he is suffering from a disease mentioned in the first column of that schedule set opposite the description of the process, but the certifying surgeon (or medical referee) certifies that in his opinion the disease is not due to the nature of the employment, then, while the statutory presumption of section 8, sub-section 2, that the disease is due to the nature of the employment, is thereby excluded, yet on the other hand the workman is not foreclosed from proving in terms of section 8 (1) that the disease was due to the nature of the employment.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 8—"(1) Where—(i) the certifying surgeon . . . certifies that the workman is suffering from a disease mentioned in the third schedule to this Act, and is thereby disabled from earning full wages at the work at which he was employed, . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement . . . he or his dependants shall be entitled to compensation under this Act as if the disease . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:— . . . (*f*) If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement, . . . the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee whose decision shall be final. (2) If the workman at or immediately before the date of the disablement . . . was employed in any process mentioned in the second column of the third schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment unless the employer proves the contrary. (6) The Secretary of State may make Orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the Order, not being injuries by accident. . . ."

By Order in Council, dated 22nd May 1907, the list of processes and diseases contained in the third schedule to the Act was extended to include, *inter alia*, the following:—

Description of Disease or Injury.	Description of Process.
12. Nystagmus	Mining.

John M'Ginn, miner, Burnbank, Hamilton, *appellant*, claimed compensation under the Workmen's Compensation Act 1906 from his employers the Udston Coal Company, Limited, Hamilton, *respondents*, on the ground that he was suffering from nystagmus, an industrial disease due to the nature of his employment as a miner, and that he had been thereby disabled from earning full wages since 7th February 1911. Being dissatisfied with the determination of the Sheriff-Substitute (HAY SHENNAN) acting as arbitrator under the Act, M'Ginn appealed by Stated Case.

The case stated, *inter alia*—"It was admitted that the appellant had been employed as a miner by the respondents for some time prior to 7th February 1911.

"The appellant produced along with his application (1) certificate of disablement granted by Doctor Christopher Crawford, Hamilton, the certifying surgeon under the Factory and Workshop Act 1901 for the district of Hamilton, dated 20th February 1911, which certified that the appellant then suffered from nystagmus, and had been disabled thereby since 7th Feb-