Tuesday, January 23.

FIRST DIVISION.

[Lord Cullen, Ordinary.

MEIKLE AND OTHERS (WINGATE'S TRUSTEES) *v.* WINGATE.

Succession—Trust—Conversion—Approval by Beneficiary of Scheme of Division of Trust Estate.

A beneficiary, entitled to one-half of an estate held in trust, his right having vested, assigned it to the extent of five-sevenths to his mother. The assignation was duly intimated to the trustees. Thereafter the trustees submitted to the beneficiary a scheme of division of the estate. The scheme of division allocated to the beneficiary and his mother certain investments which were in the main heritable. The beneficiary wrote to the trustees stating that he was quite satisfied, and the mother's law agents also wrote stating that she agreed. The mother then died and the beneficiary (her son) claimed legitim out of the five-sevenths of the trust estate assigned to her. *Held* (*diss.* Lord Johnston) that the mother and son having approved of the allocation, their right to half of the trust estate was thereby converted into a right to the investments allocated to them, *in forma specifica*, and that the son was not entitled to legitim out of the five-sevenths of the estate assigned to his mother, but only out of such of the investments allocated to the mother as were moveable *sua natura*.

Succession—Trust—Legitim—Legitim Out of Estate of Assignee of Beneficiary under a Trust with Bonds and Dispositions in Security — Titles to Land Consolidation (Scotland) Act 1868 (32 *and* 33 *Vict. cap.* 116), *sec.* 117.

A beneficiary under a trust who had right to certain bonds and dispositions in security, assigned a right to his mother. She died and he claimed legitim out of her estate. The bonds and dispositions in security were taken in the name of the trustees, who were infeft. *Held* (*per* the Lord President, Lord Mackenzie, and Lord Skerrington) that the son was not entitled to claim legitim out of the bonds and dispositions in security, because if his mother was not the creditor therein the Titles to Land Consolidation Act 1868, section 117, did not apply, and the bonds were heritable at common law, but if his mother was creditor in the bonds, then in terms of section 117 they were not moveable for the purpose of legitim.

The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101) enacts, section 117—"From and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus* in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor . . . provided that where legitim is claimed on the death of the creditor no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim."

Wilson Rowan Meikle and others, testamentary trustees of the deceased Mrs Margaret Ashmore Kyle or Wingate, widow of Andrew Wingate, engineer and shipbuilder, Whiteinch, *pursuers*, brought an action against Ashmore Kyle Paterson Wingate, only child of the said Mrs Wingate, *defender*, concluding for decree of declarator "that the amount of the legitim payable to the defender out of the trust estate in the hands of the pursuers is £1456, 17s. 8d., and that on payment of this sum by the pursuers to defender with interest at the rate of 3 per cent. from the date of death of the said Mrs Margaret Ashmore Kyle or Wingate, or consignation thereof in bank in name of defender, or otherwise as to our said Lords shall seem proper, the pursuers are entitled to be discharged of the defender's claim for legitim; and the defender ought and should be decerned and ordained, on payment to him of the said sum of £1456, 17s. 8d. with interest as aforesaid or consignation thereof in bank in his name or in such other manner as our said Lords shall order, to grant to the pursuers a full and complete discharge in common form exonerating them from his claim for legitim from the said trust estate, and in the event of the defender failing or refusing to grant said discharge remit should be made to the Clerk of Court or such other person as our said Lords may appoint to grant a discharge exonerating the pursuers upon consignation as aforesaid being made."

The pursuers *pleaded*—"1. The amount of legitim due to defender being as stated in the summons, decree should be pronounced in terms of the declaratory conclusions of the summons."

The defender pleaded—"*Separatim*—4. In the event of the Court holding that the defender has elected to take his legal rights, the amount of legitim due to the defender includes, in the circumstances, one-half of the portion of his share of Thomas Wingate's trust funds assigned to his mother in respect that no allocation of the securities of which that share consisted was made or consented to by him, and the defender should accordingly be assoilzied."

The *facts* of the case are given in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on 23rd November 1916 pronounced this interlocutor—"Finds that in ascertaining the amount of legitim payable to the defender from the estate of his deceased mother, there does not fall to be taken into account Mrs Wingate's right and interest in the bonds and dispositions in security, and

other heritable assets held at her death by the trustees of the deceased Thomas Wingate: Grants leave to reclaim."

Opinion.—"The subject-matter of this action is the defender's right of legitim from his mother's estate, and the question now arising for decision relates to the ascertainment of the amount of the legitim due from one part of Mrs Wingate's estate, that part being a share and interest which she held in property which had been settled under the trust settlement of Thomas Wingate, defender's grandfather. Thomas Wingate died in 1869, and under his settlement one-half of his estate was settled in liferent on defender's father Andrew Wingate, and in fee on defender. Andrew Wingate died in May 1909, whereupon the fee of said one-half vested in the defender. On 6th June 1909 the defender conveyed his right thereto to his mother, to the extent of five-sevenths thereof, by assignation duly intimated. The other half of Thomas Wingate's estate was held by his trustees for behoof of defender's uncle Wilson Wingate. The parties are agreed that the directions in Thomas Wingate's settlement for payment and division of the fee of his estate operated conversion of his heritage, so that the defender's *jus crediti* at the date of his said assignation in favour of his mother was moveable in character. On 5th October 1909 the law agents of Thomas Wingate's trustees, Messrs Andersons & Pattison, wrote to Messrs Carruthers, Gemmill, & Mackillop, who acted for Mrs Wingate, a letter which was in the following terms—'We enclose statement of the capital estate in this trust as at 31st August last, the valuations being taken as at 10th May, the date of Mr Andrew Wingate's death. Appended to the statement is a scheme of division showing how we propose to divide the estate as between Mr Wilson Wingate and Mr Andrew Wingate's representatives. We shall be glad if you will examine it and let us know whether the proposed apportionment is approved of by Mrs Andrew Wingate and Mr Ashmore Wingate. We have sent a copy to Mr Wilson Wingate for his approval and it is still subject to the approval of the trustees.' Messrs Carruthers & Company communicated this letter to Mrs Wingate and also to the defender, both of whom wrote in reply stating that they agreed to the division proposed in it. The defender in his letter added—'They will (I presume) make the second division between my mother and myself.' No formal allocation, however, of the defender's portion of Thomas Wingate's estate as between his mother and himself, to the extent of five-sevenths and two-sevenths thereof respectively was ever made. The investments representing the one-half of Thomas Wingate's estate, apportioned as above mentioned to the pursuer and his mother without a further division between them, stood in the names of Thomas Wingate's trustees, and following on the apportionment and up to the time of Mrs Wingate's death on 30th November 1912—that is to say, for about three years—these trustees continued to hold said investments, and they collected the income arising therefrom and paid over the same from time to time to Mrs Wingate and the defender in the proportion of five-sevenths and two-sevenths thereof respectively. As some of these investments are heritable the question has now arisen in ascertaining the amount of the defender's legitim from his mother's estate whether her five-sevenths interest in one-half of Thomas Wingate's estate continued up to her death to be a moveable *jus crediti*, as it admittedly was at the date of the assignation in her favour granted by the defender, or whether, on the other hand, the effect of the apportionment made between the two halves of the estate in 1909 was to change the originally moveable *jus crediti* into a right to five-sevenths of each of the investments set aside by the apportionment in order to satisfy the claim of Mrs Wingate and the defender to the one-half of Thomas Wingate's estate in which they were interested, so as to operate reconversion as regards such of these investments as were heritable in character, and thus exclude Mrs Wingate's interest therein from the scope of the defender's claim of legitim. I think that the latter alternative is the right one. The apportionment made in 1909 was a transaction between the trustees and the beneficiaries. Prior to it the right competent to the defender and his mother under Thomas Wingate's settlement was to have the whole trust estate realised and to receive one-half of the money proceeds between them. What the trustees proposed by the letter was that the directions in the settlement should be departed from, that there should be no realisation of the estate, but that the defender and his mother should agree to have their claim satisfied by taking over certain specified items of property estimated to be worth one-half of the value of the whole trust estate. The defender and his mother agreed to have their claim satisfied in this way, and the proposed division was made. Neither the defender nor his mother could thereafter appeal to the direction in the settlement for realisation of the whole estate and division of the proceeds. They had agreed to pass from and not ask fulfilment of it and to accept a *surrogatum*. That *surrogatum* consisted of the specified investments *in forma specifica*. The defender appears to have so understood the transaction at the time, because in his letter accepting the division he contemplated the trustees going on to divide *in forma specifica* the apportioned investments between his mother and himself. This was not done, probably because it would have been troublesome and of no particular advantage so long as the two beneficiaries were content to leave the investments in the hands of the trustees and to have the income divided between them. The defender argues that the direction for realisation and division of the proceeds contained in the settlement was carried forward into the transaction, so that it was the right of the two beneficiaries or either of them thereafter to insist on the apportioned investments being realised and the proceeds divided in money

between them. This was not expressed in the transaction, and I do not see any sufficient grounds for holding it to have been implied. If the defender's view were right, then if the trustees after the apportionment had realised all the approved and apportioned investments without consulting the two beneficiaries, and had invested the proceeds in some different kind of trust investment sanctioned by Thomas Wingate's settlement, they would have been acting entirely within their administrative powers. I am unable, however, to so construe the transaction of 1909. I think the meaning and effect of it was to give to the defender and his mother a *jus crediti* entitling them to have the approved and apportioned investments made forthcoming to them *pro indiviso* by the trustees.

"A separate point was stated regarding certain bonds and dispositions in security included among the apportioned investments. These bonds are heritable at common law. The defender, however, says that the effect of sec. 117 of the Titles to Land Act 1868 is to cause such bonds to be regarded as moveable for the purposes of his legitim claim. Perhaps I did not adequately appreciate the argument, but I am unable to see how this result can be reached from the terms of that section. If the words 'creditor in such security,' which occur in the opening provision, be taken in their natural meaning the provision does not apply here, seeing that Mrs Wingate, whose succession is in question, was not creditor in the bonds. On the other hand, if the said words could be stretched to apply to the case of Mrs Wingate the exception as to legitim at the end of the section would also apply. In the case of *Gilligan*, 18 R. 387, referred to by defender's counsel, Gilligan senior was himself the creditor in the bond."

The defender reclaimed, and argued—Prior to the assignation to his mother the defender's right to one half of his grandfather's estate was admittedly a moveable *jus crediti* which had vested in him on his father's death. The other half of his grandfather's estate was held in liferent for his uncle Wilson Wingate. Prior to the assignation no allocation had been made of the funds of the grandfather as between the defender and his uncle. In that state of affairs the defender assigned his unallocated share of his grandfather's estate to his mother. The assignation placed the mother to the extent of five-sevenths of his share in the shoes of her son and gave her five-sevenths of his moveable *jus crediti*, but the defender had by the date of the assignation become entitled to payment of his share of his grandfather's estate, and it had become necessary for the pursuers to make an allocation as between him and his uncle. They could have done so either (1) by selling the whole of the trust estate in their hands and dividing the proceeds, or (2) by segregating the defender's share from the share held for his uncle. They chose the latter alternative, and the sole effect of the agreement thereto was simply to segregate those investments and not to vest them *in forma specifica* in the defender with the result that his right to them became heritable or moveable according as the investments themselves were heritable or moveable. Properly construed that was the necessary result of the agreement, for the defender could not have called upon the pursuers to convey any particular investment to him. The plain object of the arrangement was obviously to save the trouble and expense of realisation, not to change the character of the defender's right. Further, that construction was to be preferred because it avoided the inconvenience which would result if, as the pursuers contended, the investments were held *pro indiviso* for the defender and the other beneficiaries. Further, the defender after the allocation was entitled to call upon the defenders for advances towards his share; if the pursuers' contention was right, the pursuers could not have made any advance to him. *Williamson* v. *Paul*, 1849, 12 D. 372, was distinguished, for in it a particular title was taken in favour of a person entitled to a fund, with his approval and consent. In *Grindlay* v. *Grindlay's Trustees*, 1853, 16 D. 27, the beneficiary's own actings impressed a heritable character on a beneficial interest which might have been moveable but for those actings. *Hogg* v. *Hamilton*, 1877, 4 R. 845, 14 S.L.R. 542, was decided on the same principle. *Robinson* v. *Fraser's Trustees*, 1881, 8 R. (H.L.) 127, 18 S.L.R. 740, was decided on the same principle as *Grindlay's* case (*cit.*). Consequently the rights of the defender assigned to his mother remained moveable and were subject to his legitim on her death. But assuming that there was conversion of the investments in the bonds and dispositions in security, the right of the creditor therein was moveable—Titles to Land Consolidation (Scotland) Act 1868 (32 and 33 Vict. cap. 116), section 117. The creditors therein were the trustees who were actually infeft, not Mrs Wingate, who had merely a *jus crediti* as against them, and who was not infeft in the bonds. Her right was moveable and was subject to the defender's legitim—M'Laren, Wills and Succession, section 382; *Gilligan* v. *Gilligan*, 1891, 18 R. 387, 28 S.L.R. 172.

Argued for the pursuers (respondents)—The effect of the consent of the defender and his mother to the arrangement proposed by the pursuers was to authorise the pursuers to hold those securities *in forma specifica* for the defender, and in virtue of his assignation for his mother *pro indiviso*. That being so the pursuers became mere custodiers of investments for the defender and his mother, whose right to those investments was heritable or moveable as the investments themselves were heritable or moveable—*Williamson* v. *Paul* (*cit.*), *per* Lord Medwyn at p. 382, *per* Lord Moncreiff at p. 384, and Lord Fullerton at p. 390; *Grindlay* v. *Grindlay* (*cit.*), *per* Lord Ivory at p. 44, and Lord Rutherfurd at p. 36; *Hogg* v. *Hamilton* (*cit.*); *Robinson* v. *Fraser's Trustees* (*cit.*), *per* Lord Selborne at p. 129. As regards the bonds and dispositions in security, those were heritable at common law, and section 117 of the Titles to Land (Scotland) Act 1868 (*cit.*) applied only to the creditor in the bond. If Mrs Wingate was

not the creditor in the bond that section did not apply; if she was, then in her succession those bonds were heritable *quoad* legitim.

At advising—

LORD PRESIDENT—I agree with the conclusion reached by the Lord Ordinary in this case, and with the reasoning on which it rests.

The sole question in controversy is what is the true meaning and import of what the Lord Ordinary calls the transaction of 1909. Its meaning seems to me to be not doubtful. On 14th October 1909 the defender's solicitors intimated to the trustees of his grandfather that Mrs Wingate and the defender were satisfied with the apportionment expressed in the detailed scheme before us, and from that moment the character of the investments therein set forth became fixed and unalterable save by the consent of the defender and Mrs Wingate, and the trustees were made mere custodiers of the security writs. It was exactly as if the defender and Mrs Wingate had been paid the cash to which they were entitled, had devoted that cash to the purchase of the investments set out in the detailed apportionment, and had thereafter handed the security writs to the trustees for safe keeping. From that time onwards it is apparent that the trustees, being mere custodiers, could make no alteration of any kind on the investments without the instructions and without the approval and consent of the defender and Mrs Wingate.

It is important to observe that there was no controversy of fact raised in this case. It is common ground that the defender and his mother both knew and approved of the apportionment expressed in the scheme of division, and it is of no moment that neither of them may, at the time or subsequently, have fully recognised the legal effect of what they had done. For, as Lord Medwyn observed in the case of *Williamson* v. *Paul*, 1849, 12 D. 372, at p. 383, which was quoted to us, there is "the legal presumption that when one authorises or approves a peculiar investment of money, he must be held to know the consequences which result from the particular mode of its disposal and must intend it to take effect accordingly." I refer also to Lord Fullerton's opinion in the same case. He states fully and clearly the principle applicable to such a case as the one now before us.

I am for adhering to the Lord Ordinary's interlocutor.

LORD JOHNSTON—[*whose opinion was read by Lord Mackenzie*]—I do not find it easy to accept the view of the Lord Ordinary in this case. I think that it is fundamental to the determination of the question at issue thoroughly to dissociate the mother whose estate is in question, and the son, the defender, whose claim for legitim upon that estate has to be adjudicated upon. The Lord Ordinary is alive to this, but I do not think that he altogether fully attends to it as he proceeds with his reasoning.

I have always understood that where the act is not directly that of the owner, conversion from heritable to moveable and *vice versa* depends not merely upon the fact of conversion but upon the intention, and that knowledge and appreciation of the situation underlies intention. The present case is extremely special, just as was that of *Williamson* v. *Paul*, 1849, 12 D. 372, in which there was much diversity of opinion in the whole Court, such eminent Judges as Lord President Boyle, Lord Justice-Clerk Hope, and Lords Moncreiff and Wood being among the minority. And I think that it is just as necessary in this case to consider very closely the special circumstances before giving effect to the actual condition of the investments held for the person on whose estate the claim for legitim is made.

Thomas Wingate, the grandfather, died in 1869, leaving by his settlement a share of his estate to his son Andrew in liferent and the fee to the latter's children, vesting to take place only on the death of the longest liver of himself, his wife, and Andrew Wingate. Andrew Wingate died in 1909 survived by his widow Mrs Margaret Wingate, and by an only child, the defender Ashmore Wingate. The direction in the testator's settlement was that his estate should be *realised* and divided into shares corresponding to the number of his children, and that one share should be allotted and apportioned to each child when his trust became operative. This I gather was not done, for on the death of Andrew Wingate in 1909 there remained in the hands of the trustees £18,000 variously invested, one half of which effeired to Wilson Wingate, another son of the testator, and therefore brother of Andrew Wingate and uncle of Ashmore Wingate, I assume in liferent only, and the other half to Andrew Wingate and his issue.

On the father's death Ashmore Wingate proceeded to assign to his mother "All and whole my whole beneficial right, share, and interest as vested or contingent in and to the means and estate, heritable and moveable, real and personal, including both capital and income of the said Thomas Wingate, my grandfather, in virtue of his trust-disposition and settlement of 1867, together with the said trust-disposition and settlement itself, whole clauses and contents thereof, and my whole right, title, and interest, vested or contingent, therein, but that only to the extent of five-seventh parts thereof." It is admitted by the pursuers that Thomas Wingate's settlement by its direction to realise operated conversion of his heritable estate into moveable, and that at Andrew Wingate's death his son Ashmore Wingate's right was a moveable *jus crediti* in one half of the residue. The assignation by Ashmore Wingate to his mother was dated 6th June 1909, and was intimated to the trustees under Thomas Wingate's settlement. At their meeting of 9th June 1909 the trustees gave instructions to their agents to apportion the balance of the estate between Wilson Wingate, the surviving liferenter, and Ashmore Wingate and his assignee, as in right of the share liferented by the late Andrew Wingate. It is, I think, important to notice that this apportionment was a matter which the trustees, had they acted strictly

under the settlement, should have seen to forty years before, and had they done so their action would have had no effect on the quality of the funds held by them thereafter for behoof of any beneficiary under Thomas Wingate's settlement. As directed their agents made an apportionment of the estate as it then stood, parcelling out investments, some of them heritable bonds, some of them stocks and shares, and the balance being cash. None of these investments belonged to the testator in his lifetime, though if they had belonged to him his direction to realise would have virtually converted them into moveable. The trustees had, I understand, in fact realised, and the re-investment had been theirs. In the hands of the trustees the whole estate was in law moveable. Had the trustees done their duty at the time this apportionment on Andrew Wingate's death would not have been needed. Had it been made at the time it would not, however, have affected the character of the estate in the person or succession of any of the ultimate beneficiaries. The trustees' agents submitted their scheme of apportionment to Mrs Wingate and her son the defender in October 1909, and Mrs Wingate in reply wrote, "I have read enclosed papers and agree to arrangement as stated in them," and she never did anything more except receive from Thomas Wingate's trustees through their agents her share of the interest of the invested funds retained by them. I think that the whole question in this case turns on the conduct of the trustees of Thomas Wingate and their agents. What did they do? What did they suppose that they were doing? and What did they lead Mrs Wingate to suppose that they were doing? They ought to have apportioned the residue forty years before. Their doing so then would not have affected the character of any portion of it. They were in 1909 making this apportionment. Having made it their duty was then and there to *pay, dispone,* and *assign* the share which should have been apportioned to Andrew Wingate and his issue, and was now being apportioned to that issue, to Ashmore Wingate and his assignee. Had they done so, once paid, disponed, and assigned, it would in Ashmore Wingate and his assignee's own persons and successions have taken its character at law. But they did not do any such thing. They continued to hold the share, though thus specifically apportioned, under Thomas Wingate's trust as their title and only title. It is not an uncommon thing that trustees and their agents are slow to part with a trust fund, and they often go on managing it after the trust should have been wound up. I daresay Thomas Wingate's trustees never gave the matter a thought, but just allowed their agents to go on managing as if the share of Ashmore Wingate was still in trust in their hands, and in fact it was still in trust in their hands as Thomas Wingate's trustees. Thomas Wingate's trustees have never parted with it and have never yet been discharged. The Lord Ordinary assumes, though he does not say so in so many words, that what he calls the *transaction* of 1909 between the trustees of Thomas Wingate and Ashmore Wingate and his mother ended the one trust and created a new trust—ended Thomas Wingate's trust and created a new trust in which Ashmore Wingate and his mother were the trusters as well as the beneficiaries—and that the creation of that new trust stamped a new character on the trust funds. Before I could accept such a conclusion I should require some evidence that the nature of the so-called *transaction* was explained to Mrs Wingate. I do not believe that it was even in the minds of the trustees of Thomas Wingate. If it was they deceived Mrs Wingate by concealing what they were doing and undertaking; and here it must be remembered that the terms of the assignation in her favour quoted above are such as to lead one unacquainted with legal business to believe that what was being done was all regular and in order. What I do think is the truth of the case is that things have drifted without intelligent action on the part of Mrs Wingate into their present position by the unauthorised action of the agents of Thomas Wingate's trustees, and that both the trustees and Mrs Wingate understood and believed, and were justified in doing so, that Thomas Wingate's trust was still going on, and that Ashmore Wingate's apportioned share was still properly held by them under the trusts of Thomas Wingate's settlement. A "transaction"—I understand the Lord Ordinary to use the word in its technical and not its popular sense—is a contract, and a contract requires intelligent understanding not only of the terms but of the fact that a contract is being made, and it appears to me that such intelligent understanding was wholly absent from the minds of the contracting parties, and was not even to be found in those of the agents of one of them, who, as I have pointed out, are really and solely responsible for what has happened.

There is another matter to which I shall advert shortly. The Lord Ordinary holds that from and after October 1909 the trustees of Thomas Wingate held for Mrs Wingate a *pro indiviso* five-sevenths share of each investment apportioned by the trustees to her son Ashmore Wingate. This could not be so, for Ashmore Wingate had already received a sum in cash, and Mrs Wingate's five-sevenths of his right and interest in his grandfather's estate was not represented by a *pro indiviso* five-sevenths of each of the investments. The point is technical and narrow, but where the pursuers are in the invidious position of endeavouring to deprive Ashmore Wingate for the benefit of relations on his mother's side of a share of funds with which with somewhat ill-advised generosity he had so recently endowed her, he is, I think, entitled to take against them every point, however technical or minute.

For these reasons I am unable to concur in sustaining the Lord Ordinary's judgment.

LORD MACKENZIE—My opinion is that the Lord Ordinary has come to a right conclusion, and that upon the grounds stated in his Lordship's note, to which I do not think it necessary to add anything.

LORD SKERRINGTON—Like the majority of your Lordships I am well satisfied with the judgment of the Lord Ordinary.

It does not seem to me that any light is thrown upon the case by figuring what would have happened if the trustees had made the apportionment at the time directed in the will, because the will did not contemplate that the fiars should be made parties to the apportionment. Of course the fiars were not then ascertained. But if we could suppose that a fiar had then been in existence and had come forward and said to the trustees, "Instead of paying me my share, I wish you to hold it as it stands, in certain investments," then the question would have been exactly the same as the question which we are now called upon to answer.

The only other observation I wish to make is with reference to the case of *Gilligan* (*Gilligan* v. *Gilligan*, 1891, 18 R. 387), which was founded upon by the pursuers' counsel and which is mentioned in the Lord Ordinary's note. The ground of judgment is stated as follows by Lord Rutherfurd Clark at p. 389—"The son as a beneficiary under the trust . . . was not entitled to any share of the heritable bond. His right was to a certain share of a moveable estate." These words seem to me exactly to describe the position and rights of the defender prior to the date of the transaction with which we are concerned in the present case, but they certainly do not describe his legal rights after that transaction had been entered into.

For these reasons I agree with your Lordship.

LORD JOHNSTON was absent at the advising.

The Court adhered.

Counsel for the Pursuers (Respondents)—Sandeman, K.C.—Burnet. Agents—Carmichael & Miller, W.S.

Counsel for the Defender (Reclaimer)—Chree, K.C.—Dykes. Agents—Lewis & Somerville, W.S.

Saturday, February 3.

SECOND DIVISION.

RACKSTRAW *v.* BRYCE DOUGLAS AND OTHERS.

Entail—Disentail—Heir-Apparent—Presumption as to Childbearing—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *secs.* 3 *and* 52.

A lady, an heir of entail in possession, in her eighty-second year carried through a petition for disentail with the consent of her sister, aged seventy-eight, and the sister's only daughter, born in 1867, as the two next heirs-apparent in successive order. Under the destination there were called to the succession first after the petitioner the heirs whomsoever of her body. On the ground that the petitioner fell to be regarded as still capable of bearing issue, and consequently that her sister was not the heir-apparent, a person sought to reduce the instrument of disentail, averring that he was one of the three nearest heirs in existence whose consent to the disentail should have been obtained, and that he had not been called as a respondent to the petition. *Held* (*dis.* Lord Salvesen) that there is no presumption in law that a woman is past childbearing at any age, that there was no room for inquiry, and that reduction must be granted. *Question* (*per* Lords Dundas and Guthrie) whether cases might not arise in which inquiry would be allowed.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), sec. 3, enacts—"It shall be lawful for any heir of entail, being of full age and in possession of an entailed estate in Scotland holden by virtue of any tailzie dated prior to 1st August 1848, to acquire such estate, in whole or in part, in fee simple. . . . Provided always that such heir of entail in possession . . . shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir-apparent under the entail and of the heir or heirs in number not less than two including such heir-apparent, who in order successively would be heir-apparent . . ." Section 52—". . . The words 'heir-apparent' shall be construed to mean the heir who is next in succession to the heirs in possession and whose right of succession, if he survive, must take effect. . . ."

John George Hay Rackstraw, Sunderland, *pursuer*, brought an action against Miss Elizabeth Bryce Douglas, Edinburgh, and others, *defenders*, in which he sought to reduce a decree granted on 14th July 1914 by the Lord Ordinary officiating on the Bills (ANDERSON) approving and authorising the recording of an instrument of disentail of the lands of Burnbrae in the county of Dumbarton, of which the principal defender was the heir of entail in possession.

The pursuer averred—"(Cond. 4) On 9th June 1914 the defender, the said Miss Elizabeth Bryce Douglas, presented in the Bill Chamber of the Court of Session a petition under the Entail Acts, and in particular the Act 11 and 12 Vict. cap. 36, sec. 3, and relative Acts of Sederunt, for, *inter alia*, authority to record an instrument of disentail in order that she might acquire in fee-simple the subjects of the said entail, which then consisted of the lands of Burnbrae and others disponed in the said disposition and deed of tailzie, excepting the portions or rights disponed as aforesaid under statutory powers, and also of the said feu-duties or rents and the investment covered by the said deed of declaration of trust. (Cond. 5) In the course of proceedings following on the said petition a pretended deed of consent consenting to the proposed disentail was granted by the defenders Mrs Agnes Smith Bryce and Miss Janet Bryce. These