BUCHANAN, ... APPELLANT.
ANGUS, ET AL., ... RESPONDENTS (*a*).

1862. *May 15th.*

Doctrine of Constructive Conversion.—A testator conveyed his whole estate, heritable and moveable, to trustees, directing them, after the discharge of legacies, to "pay over" the residue to his brother and sister equally, with power to the trustees, "if necessary, to convert the same into money." Held, by the House (reversing the unanimous judgment of the Court of Session), that the settlement did not convert the heritable or real into personal or moveable estate.

Per the Lord Chancellor (*b*) : The doctrine of constructive conversion appears to be the same in England and Scotland. In both countries the question is one of intention depending on the nature and effect of the directions given; p. 379.

Per Lord Cranworth : If an absolute duty is imposed upon trustees to turn an estate into money, then, whether they have turned it into money or not will be immaterial ; for in whatever form it was then held it would be treated for the purpose of succession as if it were money; p. 384.

Per the Lord Chancellor : If the right to sell is made to depend on the discretion of the trustees, or is to arise only in case of necessity, there is no change in the quality of the property; p. 379.

BY general trust disposition and settlement, dated 19th April 1854, John Smith conveyed his whole estate, heritable and moveable, to trustees upon trust, after the payment of debts and legacies, to pay over the residue of his means and estate, or the prices and produce thereof, to his brother, Major Archibald

(*a*) See this case fully reported as decided by the First Division of the Court of Session, on the 13th March 1860, 22 Sec. Ser. 979.

(*b*) Lord Westbury.

Smith, and his sister, Mrs. Margaret Heugh, "equally betwixt them, share and share alike."

The testator or truster died on the 2nd August 1854. He was survived by the two residuary legatees, namely, by his brother, Major Archibald Smith, and by his sister, Mrs. Heugh.

Major Archibald Smith died on the 28th June 1855, unmarried and intestate, survived by Mrs. Heugh, who was his only sister, his heir-at-law, and his sole next of kin.

Mrs. Heugh made up no title by service or otherwise to Major Smith's share of the heritage vested in the trustees; but on the 5th November 1855 she executed a trust settlement, whereby she made a disposition of her property, including what she supposed had come to her from her brother.

The Appellant, Archibald Buchanan (*a*), was "cousin german of and nearest and lawful heir in general served and decerned both to Mrs. Heugh and to Major Archibald Smith." This Archibald Buchanan was the Pursuer of the action, and his contention, so far as necessary for the present report, was that the share of John Smith's heritable estate given to his brother was heritage in his brother's person, and never became vested in his sister, Mrs. Heugh, but on the contrary belonged to the Appellant, as Archibald Smith's heir-at-law. The Defenders (Respondents before the House), namely, Alexander Angus and David Simpson, the trustees of Mrs. Heugh, contended that the *jus exigendi* or *jus crediti*, to which Major Smith was entitled under John Smith's settlement, vested in Mrs. Heugh by her survivance of the Major, without service, and was consequently carried by her trust deed.

(*a*) Described in the pleadings as holding the office of "ploughman to Mrs. Janet Mackay, of Craig's Inn, near Bathgate."

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The *Lord Ordinary* (*a*) on the 28th January 1859, found that the *jus crediti* of the Major was moveable; in other words, he held that a constructive conversion had taken place; and upon a reclaiming note to the First Division of the Court of Session, the *Lord President*, Lord *Ivory*, Lord *Curriehill*, and Lord *Deas*, on the 13th March 1860, concurred with the *Lord Ordinary*, and adhered to his Interlocutor. Hence the present Appeal.

Mr. *Anderson* and Mr. *Neish* appeared on behalf of the Appellant.

The *Lord Advocate* (*b*) and Mr. *Rolt* for the Respondents.

The following opinions were delivered by the Law Peers :—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*c*) :

My Lords, in order to render the opinion which I have to offer to your Lordships in this case intelligible, it may be necessary for me concisely to make a statement of the facts of the case. The question in dispute between the parties arises on a trust disposition and settlement of a gentleman of the name of John Smith. By that trust disposition and settlement he vested his heritable and moveable estate in trustees; and after directing them to pay his debts and legacies, he gave (in words which I do not at present stop to consider) the whole of his estate between his brother and sister, Major Smith and Mrs. Margaret Heugh. Those two persons survived him, but Major Smith died intestate, leaving his sister, Margaret Heugh, his next of kin and also his heir-at-law. The share in the general estate of the truster, if it consisted purely of personal property, or if by the dispositions of the trust settle-

(*a*) Lord Ardmillan. (*b*) Mr. Moncreiff.
(*c*) Lord Westbury.

ment it had acquired the quality in the eye of the law of pure personal property, would, under the circumstances, have vested absolutely in Mrs. Margaret Heugh, she being his sole next of kin. On the other hand, if that share, so far as it consisted of heritable property, retained the character of heritable estate, it would have descended, no doubt, to the sister, Margaret Heugh. The question would then arise whether it was incumbent upon Margaret Heugh, in order to complete her title as heir, to take up that inheritance by serving as heir to her deceased brother, Major Smith.

My Lords, that particular point I think was taken for granted in the Court of Session, because the circumstances are these:—Mrs. Margaret Heugh, although she never served as heir to her brother, made a trust disposition of the whole of her property, real and personal, and the contest at the bar arises between the parties claiming under that disposition and the individual who, on the death of Margaret Heugh, became entitled in law to serve as heir of Major Smith. If the right of Margaret Heugh to the share of Major Smith was a right which she had the power of disposing of by her trust disposition, then, *quâcunque viâ*, the Respondents at your Lordships' bar would have been entitled, and the question of the construction of the trust settlement of the truster, John Smith, would have been an idle and superfluous discussion. But the Court of Session took it as an indisputable fact, that if the share of the Major remained heritable, so far as it was constituted of heritable estate, then that share, by reason of the want of service on the part of Margaret Heugh, did not pass under the trust disposition to Margaret Heugh. The admission, that that share remained *in hæreditate*

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jacente of the Major, and consequently passed to the present Appellant, is an admission and an acknowledgment that becomes the very basis of the discussion before your Lordships. And, as I have already observed, unless that had been taken as an indisputable and acknowledged fact, the discussion would have been the most idle and irrelevant in the world. I have no doubt, therefore, that there is no room at present for the question that has been so raised. But if there had been room for entertaining that question, I should have had no hesitation in advising your Lordships to come to the conclusion, upon all the authorities and all the text-writers that have been referred to upon the law of Scotland, that the *jus crediti* which the Major had to one share of the general trust estate, and of the heritable property as constituting part of it, partook of the nature and quality of the subject itself, and is governed by the same rules of law as to its transmissibility by descent as are applicable to the subject to which it applies. If the subject, therefore, being heritable estate, required, on its transmission by descent from the Major to Margaret Heugh, that she should make up her title to the heritable right, and serve as heir to her brother, then the *jus crediti* which is attempted to be distinguished from the estate itself, becomes, I think, subject to the same rule. But in reality it is a distinction in name and not in fact, for the *jus crediti* is no more than another denomination of what may be called the estate of a beneficiary, or an equitable estate ; and it receives that title only when it is regarded under the aspect of the right which the beneficiary has to call upon the trustees to convey, to transfer, or to denude themselves of the possession of the subject. I have no hesitation, therefore, in advising your Lordships that there is

nothing at all of reality and substance in that objection which has been now attempted to be raised.

Then, my Lords, if that be so, the determination of the cause depends entirely upon the inquiry, whether the share of Major Smith, under the trust settlement of John Smith, in the heritable estates therein comprised, was at the death of Archibald of the quality of heritable or of moveable property. And this depends upon the other question, whether by the trust disposition and settlement of John Smith his heritable estate was absolutely converted into moveable property.

The principle or doctrine of conversion appears to be the same both in England and in Scotland. Conversion is a question of intention, and depends on the nature and effect of the directions given in any settlement or will. If real or heritable property be vested in trustees upon an absolute and unconditional trust for sale, either declared or necessarily implied, and the proceeds of such sale are disposed of, there is (in the quaint phrase of the English law) an out and out conversion for the purposes of that disposition; and the interest of every beneficiary taking under the disposition is of the nature of personal or moveable property. But 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 (*a*), "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,

(*a*) 10 Sec. Ser. 166.

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there is no change in the quality of the property; and the heritable estate must continue to be held and transmitted as heritable. These principles are clearly deducible in Scotch law from the cases of Durie (*a*), Patrick (*b*), Blackburn (*c*), Williamson (*d*), and Pearson (*e*), which have been cited at the bar.

The words of Lord *Fullarton* in Blackburn's case are felicitous. Lord *Fullarton* there says, in one part of his judgment (*f*), "The very terms of this leading direction necessarily imply a conversion of the heritage, and a money payment of the shares into which the succession was to be divided." And in another part his Lordship, speaking of the provisions of that settlement, says (*g*), "I can read these provisions in no other way than this, that the whole estate was to be valued in money, and that each child's share was to be estimated and paid in money as they respectively arrived at the age of 25. That being the case, it is clear to me that the exercise of the power to sell or convert was not optional but indispensable to the execution of the trust."

I think that particular inquiry so expressed by Lord *Fullarton* is exactly the inquiry which we have to prosecute with reference to the language of this settlement, in order to arrive at a correct conclusion of the intention of the truster, and the effect of the trust disposition which he has made. I shall, therefore, inquire, in the language of Lord *Fullarton*, whether there be in this trust disposition an imperative direction to sell at all events, or whether the sale is an indispensable condition for the execution of the trust.

(*a*) Morr. 4624. (*b*) 1 Sec. Ser. 207.
(*c*) 10 Sec. Ser. 166. (*d*) 13 Sec. Ser. 436.
(*e*) 20 Sec. Ser. 105. (*f*) 10 Sec. Ser. 186.
(*g*) 10 Sec. Ser. 187.

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Now, inviting your Lordships' attention to the settlement which has been so much discussed, you will find its effect to be that the *universitas* of the property is first absolutely vested in trustees. They are directed "from the produce of my means and estate" to pay the debts. They are then directed to pay a variety of legacies which are enumerated; but there is in no part of any one of those directions anything which requires them of necessity to begin by selling the real estate before they address themselves to the performance of those directions.

Then the truster takes up the disposition of the residue; and it is agreed on all sides that the question in controversy turns on the true meaning and the legal effect of the disposition so made. The language is this:—"I direct and appoint my trustees to pay over the residue and remainder of my means and estate generally above disponed, or the prices and produce thereof."

The words "pay over," it is admitted on all sides, are regarded as equivalent only to a direction to transfer or convey (*a*). And if they are so construed (in conformity with what was said by Lord *Fullarton*), then, adopting the observation of Lord *St. Leonards* in the case of Smith (*b*), your Lordships will find from the very words of the trust disposition that the truster contemplated the residue of his estate being transferred; because it is plain that he uses those words under the supposition that the estate might remain in its integrity as he left it. For he puts as an alternative "or the prices and produce thereof." In plain language, therefore, it is a direction to the

(*a*) Per Lord St. Leonards: The word "pay" is used in the same sense as "transfer." 1 Macq. Rep. 764.

(*b*) *Advocate-General* v. *Smith*, 1 Macq. Rep. 760.

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trustees to convey the residue of the real estate or the produce of that estate when sold. He goes on then to speak of this being the division to be made between his brother and his sister, "equally betwixt them, share and share alike;" words which would be clearly applicable to a disposition of the property when given to two persons in the character of tenants in common. And he adds these words: "and their heirs and assignees whomsoever, with all the rights and securities thereof which may be vested in my trustees;" a direction pointing immediately to the possession of the title to the property comprehended within the direction. But he goes on to put beyond the possibility of doubt, that so far from directing a sale in all circumstances and under all contingencies, he contemplates a sale only if it becomes necessary. Necessary for what? Necessary for the particular purposes of this disposition. If it was not necessary, then the trustees are vested with the ordinary power and authority for the management, the leasing, and the administration of the heritable estate in that character. Accordingly he says, "with power to my trustees to enter into possession of the whole of my heritable and moveable estate, to make up all necessary titles thereto, to lease the heritable property thereof, or if necessary to convert the same into money."

There is not one word of that particular clause which can be made consistent with anything like that which Lord *Fullarton* describes as an imperative obligation to sell, or with anything similar to that which Lord *Fullarton* in other words describes, "a sale being an indispensable condition to the execution of the trust." It is very far from the meaning and intent of this testator that a sale should either be made a matter of peremptory obligation, or that a sale

should be regarded as indispensable to the execution of the trust.

Lord Chancellor's opinion.

My Lords, without fatiguing you further, although there are many other things that no doubt will occur to your Lordships as bearing upon and confirming this conclusion, I think I may venture to say that there never was a trust disposition to which the character of imposing a peremptory duty, an absolute and unconditional obligation to sell, could be attributed with less accuracy or propriety than it can be attributed to this trust settlement. The whole foundation, therefore, of the judgment of the Court below appears to me (with all deference to the learned Judges of that Court) to fail altogether; and I have no hesitation in advising your Lordships to reverse that judgment, and to make a declaration in conformity with the prayer of the summons of the present Appellant, namely, that the one just and *pro indiviso* 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 *hæreditas jacens* of Major Smith, and now belongs to the present Appellant as his heir-at-law.

That, as I have said, is the true conclusion that ought to be arrived at from the facts before you and from the interpretation of the law bearing upon the case. And I therefore recommend your Lordships to reverse the judgment of the Court below, and to substitute that declaration.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, I have very little to add in this case beyond expressing my entire concurrence in the view which has been taken by the *Lord Chancellor*. Upon the first point that was argued by the *Lord Advocate*

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here, but which certainly was not argued or investigated in the Court below, when the question comes to be sifted and examined, there really is no doubt whatever. There can be no doubt that as a general proposition all heritable subjects in Scotland are subject to the necessity on the part of the heir of taking up service or being served either by general or by special service. In the present case it is by general service; because there is no doubt that the passages cited from Mr. Bell (*a*), and referred to in the printed cases, clearly show that a *jus crediti* of this sort requires service just as if it had been an estate not of that character.

That difficulty being removed, the only question is whether the view taken by the learned Judges below on the subject of conversion was or was not a sound and correct view. I entirely concur in what the Judges below said, that 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. It is impossible, I think, consistently not only with our notions in England, but with the other cases which have been referred to by my noble and learned friend on the woolsack, and which are very numerous, to hold that there was any such absolute duty imposed upon these trustees. On the contrary, I think this is a case in which there is the strongest reason for in-

(*a*) Principles, § 1482.

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ferring that it was meant distinctly in the mind of the truster to be left to their discretion. The very circumstance that they may lease, and that they may make up title and so forth, seems to me to put that beyond all doubt.

It was said that either Archibald Smith or Margaret Heugh might have insisted upon the estate being sold. In my view of the case it is not at all necessary to controvert that. Supposing they had insisted upon its being sold, they might have altered the character of the property. But, inasmuch as they did not insist upon its being sold, and it was not sold, it is impossible to hold that their representatives after their death could insist upon its being sold; because that would be just to enable one person to say, "it shall belong to me;" whereas, in another view of the case, it would belong to another person.

On the whole, therefore, it seems to me that the course suggested by my noble and learned friend is perfectly correct. The judgment of the Court upon that part of the summons which relates to the reduction does not come before us, and appears to be substantially right. Therefore it is only the other part of the judgment which ought to be reversed, with the declaration that my noble and learned friend has suggested.

Lord Kingsdown's opinion.

Lord KINGSDOWN:

My Lords, I quite agree with your Lordships as to the conclusion at which you have arrived, and the grounds upon which you have placed it. And as we are not desirous of encouraging the repetition of arguments at the bar, I think that, perhaps, I should set a good example to learned Counsel by avoiding repetition in my judgment.

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JUDGMENT.

It is *Ordered* and *Adjudged*, That as respects the one just and *pro indiviso* equal half of the residue of the trust estate of John Smith, in the proceedings mentioned, in so far as that residue consisted of heritable property, the Interlocutor of the Lord Ordinary of the 28th of January 1859, and the Interlocutor of the Lords of Session, of the First Division, of the 13th of March 1860, respectively complained of in the said Appeal, be reversed. And it is hereby *Found* and *Declared*, That the said one just and *pro indiviso* equal half of the residue of the trust estate of the said John Smith, which by his trust disposition and settlement the said John Smith provided for his brother, Archibald Smith, and his heirs and assignees whomsoever, in so far as that residue consisted of the heritable estate of the said John Smith, never vested in the deceased Margaret Heugh and that the same was not carried by the trust disposition and settlement in the proceedings mentioned, executed by the said Margaret Heugh, and that the same or the claim thereto remained in *hæreditate jacente* of the said Archibald Smith, and now belongs to the Appellant, Archibald Buchanan, served and decerned his heir as aforesaid, &c.

HOLMES, ANTON, TURNBULL, & SHARKEY—GRAHAME, WEEMS, GRAHAME, & WARDLAW.