

pursuers are wrong on the first point, I doubt if there is a case of essential error. The pursuers were not so much in error as merely ignorant. No specific error is set out on record, merely ignorance.

LORD COWAN—As to the first issue, I concur. Indeed, it seems a most clear case of fraudulent concealment of matter of fact. Taking the pursuers' case as stated, I think the first issue is one that will try the case.

On the second issue, I differ. I think the issue granted ought to be adhered to. There is enough on record to satisfy me that there was essential error, and if it was induced by misrepresentation, the issue should be granted. Essential error, induced by misrepresentation, is enough without the addition of fraudulent.

LORD BENHOLME—I concur. I object to the second issue because I do not see a statement of error. The only statement is of misrepresentation, not of what the party was induced to believe.

LORD NEAVES—I have no doubt the first issue should be granted with the addition of the word fraudulent. Without that addition it would be ambiguous. I would prefer the word "undue." I see no good ground for granting the second issue. The error which the pursuers were under is not explained. I do not understand what it was. Did they believe the other party had the whole? It is plain the other party never said they had right to the whole estate; they were only to give up the legacies. Innocent misstatement should not be covered. If the statements are fraudulent, that case is covered by the first issue.

Counsel for Pursuers—P. Fraser. Agent—W. G. Roy, S.S.C.

Counsel for Defender—C. Scott. Agent—A. K. Morison, S.S.C.

Wednesday, July 2.

SECOND DIVISION.

SPECIAL CASE FOR TRUSTEES OF ANDREW FOTHERINGHAM AND OTHERS.

Succession—Trust Settlement—Power to Sell—Conversion.

Terms of trust-settlement and codicil under which *held* (1) that the trustees were entitled to sell the estate; (2) that a share of the succession was intended to be made moveable in the event of a sale.

This Special Case was brought by the trustees of the late Andrew Fotheringham under the following circumstances:—Andrew Fotheringham died on 1st October 1861, leaving a trust-disposition and settlement and codicil in the following terms:— "In the third place, I appoint my said trustees to pay to my said wife during her lifetime, in the event of her surviving me, the rents, interest, and free yearly produce of the residue of my whole heritable and moveable property, generally and particularly above disposed, pertaining and belonging to me, after deducting the interest of money which may be borrowed, insurance, repairs, and all other necessary expenses in the execution

hereof, and shall also deliver to her, for her own use and behoof, my whole household furniture, books, plates, china, and generally my outright and insight plenishing of every description, declaring however that she is only to have the life use of the books, which after her death are to be disposed of by my trustees as after mentioned. In the fourth place, I appoint my said trustees after my death, or the death of my said wife, in case of her surviving me, to pay or allow to the said Andrew Richardson and his wife Barbara Salmond, and the survivor of them, during their, his, or her lifetime, the free yearly rent of the shop and other premises presently occupied by them under me in St John Place, after deducting the ordinary necessary repairs, public burdens, and insurance, or allow them to possess the same rent free under the burden of making these payments. In the fifth place, I appoint my said trustees to pay after my death, or the death of my said wife in case of her surviving me, to the said James Thomas, during his lifetime, the free yearly rents of my property in New Scone, purchased by me from the said Mrs Penelope White or Miller, forming part of the lands of Balgarvie, as before mentioned, after deducting public burdens, the ordinary necessary repairs and insurance, or allow him to occupy the same rent free under that burden. In the sixth place, I appoint my said trustees, upon my death, or the death of my said wife in case of her surviving me, to deliver up my whole books to the kirk-session of the Secession Congregation at Craigend, to form part of the library belonging to that congregation, never to be disposed of nor alienated in any way; but under the express condition that all persons bearing relationship to me shall have the privilege and liberty of obtaining any of these books out to read when they please, they being always bound to take good care of and return the same within a reasonable time. In the seventh place, I appoint my said trustees, after my death, or the death of my said wife, in case she survives me, and making the payments before mentioned, and also paying all repairs, insurance, and whatever other expenses may be necessary in regard to the said subjects, or for carrying these presents into execution, to devote and pay the free residue and remainder of the rents or yearly produce of the said subjects, in the first place, in extinction of whatever debts may have been left owing by me at the time of my death, or may be contracted by my trustee in the execution of this trust, and have not otherwise been discharged; and so soon as these purposes are fulfilled, to pay to the treasurer of the City and County of Perth Infirmary, for the benefit of that institution, a free year's rent of the said subjects, after deducting insurance, public burdens, and ordinary repairs and expense of management for the year. In the eighth place, after the whole purposes before mentioned are implemented and fulfilled, I direct and appoint my trustees to divide the remainder of my said heritable and moveable property into nine equal shares or divisions, and to dispose, assign, and pay over one of these to my sister, Catherine Hay, in life, and one to each of the said John Hay, my brother, Isabella Hay or Comb, Catherine Hay, and Janet Hay, my nieces, the said William Hay and David Hay, my nephews, and Rachel Corner and Elizabeth Fotheringham M'Gregor, nieces

of my said wife, in fee, and their heirs, executors, and assignees respectively. In the ninth place, on the death of the said Catherine Hay, Andrew Richardson and his wife, and James Thomas, as these events shall severally occur, I direct and appoint my said trustees to dispone, assign and, pay to my own and my wife's relations last above mentioned, and their foresaids, the parts of my heritable property so severally liferented by the said Catherine Hay, Andrew Richardson and his wife, and James Thomas. Lastly, I direct and appoint that at my death my said trustees shall provide themselves with a mourning ring each from the first part of my means, estate, and effects; and I hereby authorise them to pay out for that purpose the sum of £10 sterling for the purchase of each ring; which provisions before-conceived in favour of my said wife I hereby declare to be in full satisfaction to her of all terce of heritage, share of moveables, and of everything else she could be entitled to claim through my death in any manner of way. Further, I do hereby authorise and empower my said trustees, and the survivors or survivor of them, to assume any person or persons to be joined with themselves as trustees in the management of the affairs committed to their care by this deed; declaring that such trustees so to be assumed shall have the same power and privileges vested in them as if they were specially named herein; and I also authorise my trustees before named, and those to be assumed, as said is, to nominate and appoint one of themselves, or any other person, to be factor under them, with such salary and allowance as to them shall seem proper, for the more especial management of the affairs of this trust, and to grant tacks of my heritable subjects from time to time to such persons and for such rents as they may think proper. And I do hereby further authorise and empower my said trustees before named, or to be afterwards assumed, after the death of the longest liver of me and my said wife, and after the whole debts owing by me, or contracted by my trustees in the course of their management, and provision to the City and County Infirmary, have been paid, and the liferents of the said Catherine Hay, Andrew Richardson and his wife, and James Thomas severally satisfied, to bring the whole, or such part of my heritable property to sale as they may think proper, and to grant absolute dispositions to the purchasers, should they be of opinion that such sale is advisable for more effectually carrying the purpose of this settlement into execution."

The codicil was in the following terms:—

"I, Andrew Fotheringham, residing in New Scone, considering that since I executed my foregoing deed of settlement Rachel Corner, niece of my wife Elizabeth Swanson or Fotheringham, has died without leaving any children, therefore I do hereby recal the provisions in my said settlement in favour of her and her heirs, executors, and assignees to a share of the residue of my estate, declaring that my trustees shall not be liable for payment of the same; and I hereby substitute in her stead Rachel M'Gregor, her cousin, also niece of my said wife, and daughter of Benjamin M'Gregor, formerly at Wick, hereby appointing my trustees to dispone, assign, and pay over to the said Rachel M'Gregor, and her heirs, executors, and assignees, the share of the residue and remainder of my heritable and moveable property

which would otherwise have fallen to the said Rachel Corner or her foresaids: And declaring further, as it is hereby expressly provided and declared, that the provisions in my said settlement and this codicil in favour of the female relations of me and my wife shall be purely alimentary, and not subject to the debts or deeds of the husband or husbands of any of them who may be married, the *jus mariti* of such husband or husbands being hereby expressly excluded, and that the sole discharge of their wives shall be sufficient to my said trustees, independent of their husbands. Moreover, I do hereby recal the stipulation in my said settlement that my books, on death of me or my wife, shall be delivered over to the Secession Congregation at Craigend, declaring that the same shall be at the sole disposal of my said wife, the same as my household furniture and other effects; and I hereby leave and bequeath the same to her without any stipulation whatever. And considering further that the heritable subjects aftermentioned, to which I some years ago acquired right, have not been specially disposed in my foregoing deed of settlement to my trustees therein named, therefore I have assigned and disposed, and do hereby assign, dispone, convey, and make over to Elizabeth Swanson or Fotheringham, my wife, during her widowhood; Andrew Richardson, merchant in Perth; John Hay, at Provost Mains, my brother-uterine; William Hay, coach-maker in Edinburgh, my nephew; and James Thomas, writer in Perth, and the survivors or survivor of them accepting, my trustees nominated under my foregoing deed of settlement, and to the other trustees whom they may assume into the management in virtue of the powers conferred upon them therein, (the majority alive at the time being always a quorum), as trustees for the ends, uses, and purposes therein specially narrated, and with all the rights and privileges thereby conferred upon them, and to their assignees, heritably and irredeemably, but in trust always, as after mentioned. *First*, All and Whole—[*Here follow special descriptions of various subjects.*]—But declaring always that these presents are granted in trust always, and with and under the burdens, provisions, and conditions specially narrated in the foregoing settlement and this codicil, as far as not altered or revoked by these presents; hereby specially declaring that my residuary legatees are the said John Hay, my brother, Isabella Hay or Comb, Catherine Hay or Raitt, and Janet Hay, my nieces, the said William Hay and David Hay, my nephews, and the said Rachel M'Gregor and Elizabeth Fotheringham M'Gregor or Dow, nieces of my said wife Mrs Elizabeth Swanson or Fotheringham, and their respective heirs, executors, and assignees, but subject always to the burdens and provisions and liferents specified in the foregoing settlement, with entry at my death."

Janet Hay, mentioned in the settlement, married the said Robert Paterson, and died intestate on 22d October 1866, leaving the following children, viz., the said Elizabeth Paterson, who has attained majority, and the said James Paterson, who is aged eighteen years. Rachel M'Gregor, mentioned in the codicil, married the said Charles Thomson, and died intestate on 28th October 1865, leaving one child, viz., the said Rachel Elizabeth Fotheringham M'Gregor Thomson, who is aged seven years. James Thomas, mentioned in the settlement, died on 12th March

1865. Mrs Barbara Salmond or Richardson, mentioned in the settlement, died on 4th April 1869. The testator's brother-uterine, John Hay, mentioned in the settlement, died on 1st February 1871, leaving a testament in favour of his sister, Catherine Hay, mentioned in the settlement. The said Catherine Hay died on 21st February 1871, leaving a general settlement in favour of the said John Hay Macfarlane. The said Andrew Fotheringham's wife, mentioned in his said settlement, died on 14th April 1872. The other beneficiaries are all alive.

The heritable property left by the testator, the said Andrew Fotheringham, was estimated as of the value of £4050 or thereby in all. The yearly rental amounted to £280 or thereby.

The moveables left by the testator consisted chiefly of the furniture and others bequeathed to his widow by the third purpose of the trust, as modified by the codicil. The remainder of the moveable estate was taken to pay the deathbed and funeral expenses, and the expense of the mournings mentioned in the settlement, with some floating debts which were due by the deceased, and which required to be paid at the time.

The other debts due by the testator at his death consisted chiefly of loans which he had obtained on personal security. Those other debts, including some trifling debts which were not secured, amounted to £1254, 19s. 4d. or thereby. Of the above sum payments have been made to the extent of £113, 1s. 11d., leaving debts to the amount of £1141, 17s. 5d. still due. In terms of the second purpose of the trust, bonds for these debts fell to have been granted by the trustees in favour of the creditors; but the debts were allowed to remain on the original vouchers granted by the testator, and no bonds have been granted therefor. Out of the rents the trustees have paid the interest, as required by the second purpose of the trust. The creditors are now pressing for payment.

In terms of the third purpose of the trust, the widow received the balance of the rents falling due during her lifetime. She also received the furniture and others bequeathed to her as aforesaid.

In terms of the fourth purpose of the trust, Andrew Richardson was, after the death of the testator's widow, put into possession of the St John Place subjects, therein mentioned. These subjects are now let *in cumulo* with other premises; and of the total rents the said Andrew Richardson draws the share effeiring to the St John Place subjects above mentioned. The gross yearly rents of the remaining subjects belonging to the trust-estate amount to £270 or thereby, of which there remains £100 per annum, or somewhat less, after paying public burdens and repairs, and also the interest due upon the testator's unpaid debts.

As it would be several years before the debts still remaining could be paid out of the free rents of the trust-estate, the residuary legatees have called upon the trustees, with the consent of the said Andrew Richardson, and of the treasurer of the infirmary, mentioned in the settlement, to sell the whole of the trust-estate, and after paying from the proceeds the whole debts owing by the trust-estate, and also after paying to the said Andrew Richardson and to the said treasurer such sums as may be agreed on for a discharge of their claims under the settlement, to distribute the balance among the beneficiaries entitled thereto, in terms of the ninth purpose of the

trust, as modified by the codicil. Negotiations are in progress with the view of conditionally adjusting with the said Andrew Richardson, and with the said treasurer the sums to be paid to them respectively for a discharge of their claims aforesaid. The parties hereto believe that the amount to be so paid will be adjusted without difficulty.

The questions submitted to the Court for opinion were—

- (1) Are the trustees entitled, with the consent of the second and third parties hereto, and of the said Andrew Richardson and the treasurer of the said infirmary, now to sell the trust-estate; and after paying out of the proceeds the whole debts due by the trust-estate, to distribute the balance forthwith among those entitled thereto?
- (2) With regard to the share of the said balance effeiring to the said Janet Hay or Paterson, does this share belong to the said James Paterson, as the said Janet Hay or Paterson's heir-at-law; or does it belong to the said James Paterson and Elizabeth Paterson equally, as the said Janet Hay or Paterson's heirs *in mobilibus*; or to what other person or persons does the said share belong?

At advising—

LORD-JUSTICE-CLERK—Two questions arise here. On the first, Whether the trustees are entitled now to sell the estate? I think an affirmative answer should be returned, because every thing appears to have been done that are required to be done by the previous purposes of the trust.

On the second, which raises the more delicate question, whether the share effeiring to Janet Hay is heritable or moveable, the general rule on the subject, which has been followed and applied in a class of cases which were not very favourable for laying down a general canon, has been, that where trustees hold heritable subject with an injunction to sell, that makes the succession moveable; but, where there is only a power to sell, it does not change the character of the subject. The leading case of *Buchanan v. Angus* is a very strong one. In that case there was a direction to pay or make over, with power to sell if necessary, and the question was, whether it was reasonable to sell and divide the money? and the House of Lords held there was no conversion. But I think here that the reasonable construction of the settlement is, that the property was intended to be sold and the share to be made moveable. There is nothing in the deed leading to an opposite conclusion. I think the express direction to divide, when the period of division has arrived, is conclusive.

LORD COWAN—There are peculiar clauses in this trust-deed, but which are accounted for by the nature of the subjects conveyed to the trustees. The value of these subjects is stated to be about £4050, and the yearly rental amounts to about £280; and from the trustees' statement it would seem that the subjects consist mainly, if not wholly, of house property, yielding a higher rental than the price if realised would have done of yearly interest. This I think explains the second purpose, which directs that, so long as his wife survives, the debts owing by the trust should be paid off by means of money to be borrowed on the security of the trust subjects. The liferent of his

whole property was provided to his widow, and it was no doubt with the view of securing to her a higher yearly income that a sale of the subjects was thus postponed while she survived. And hence may be accounted for, also, the provision made as to the payment of debts thus contracted by the trustees before the division and sale of the residue should take place. Extensive powers, however, are conferred with regard to their realisation of the estate, and, in particular, they are empowered, "after the death of the longest liver of me and my said wife, and after the whole debts owing by me or contracted by my trustees have been paid and the liferents provided for" have been satisfied, to bring the whole or such part as they think proper of the trustor's heritable property to sale, "should they be of opinion that such sale is advisable for more effectually carrying the purpose of this settlement into execution.

From the facts stated in the case, it appears that the widow died in 1872, and that the liferents provided of certain small portions of the estate no longer exist. The debts, however, have not been discharged, and the creditors are now pressing for payment; and, farther, there remains of the rental little more than £100 per annum after payment of public burdens, repairs, and interest of debt.

Having regard to the terms of the trust-deed and the circumstances set forth in the case, I am of opinion that the trustees are entitled now to exercise their power of sale, and that the first question should be answered in the affirmative.

The second question depends upon the inquiry whether it is to be held that by the directions of the deed there has been effected conversion of the heritage conveyed to the trustees into moveable estate in succession as regards the several shares of the property to be distributed among the children of the testator. The words of the deed are—"I direct and appoint my trustees to divide the remainder of my said heritable and moveable property into nine equal shares or divisions." Such are the express words employed by the testator as regards the distribution of his estate, and effect cannot, as I think, be given to them without reducing the whole property by sale of the heritage into a divisible fund. A *pro indiviso* conveyance of the property to the nine children will not meet the directory words. There must be division, and that is simply impossible having regard to the nature of the subjects, consisting of houses and shops. No doubt there follow the words, "and to dispoise, assign, and pay over one of these (shares) to my sister in liferent, and one to each" of the parties named, "in fee, and their heirs, executors, and assignees respectively." But although the word dispoise does occur, I do not think it can alter or affect the clear and unambiguous terms of direction contained in the previous part of the sentence, which, as I have said, is not capable of being fulfilled otherwise than by the heritable property being sold. And any difficulty that might have been experienced, or any necessity that might have existed of applying for judicial interposition, are obviated by the power of sale conferred on the trustees. No doubt that power is conferred in words implying that it was to be exercised according to their discretion, and as they might judge as to its exercise being advisable for more effectually carrying the testa-

tor's purpose into effect. The words are not such as in express terms to make it imperative that they should exercise the power of sale, but they truly have that effect when the trustor's purpose in the division of his estate cannot be otherwise carried into effect. There might have been room in the course of the subsistence of the trust management for the trustees being called on to consider the advisability of a sale, and in whole or in part to exercise the option conferred on them. But when the trust requires to be wound up and the estate distributed, the trustees are in effect called on and bound to exercise the authority and power conferred on them by the deed, to bring the subjects to sale. Nor does the 9th purpose of the trust, as I read it, present any obstacle to the adoption of this construction. All that it does is to make provision that the subjects liferented by the parties named should be dealt with on the same footing as the rest of the estate upon their several deaths "as these events shall severally occur." In the decision of the House of Lords in the case of *Buchanan v. Cooper*, 4 Macq. 374, the direction as to the residue was different, inasmuch as there was no express direction to divide as occurs in this deed, nor any order to make a division into nine parts. The direction there was simply to pay and make over to two parties equally, share and share alike. For these reasons, I am of opinion that the share that would have been taken by Janet Hay had she survived belongs to her children, James and Elizabeth, equally as her heirs *in mobilibus*.

LORDS BENHOLME and NEAVES concurred.

Counsel for Parties of the First and Second Parts (Fotheringham's Trustees and James Pater-son)—A. Jameson. Agents—W. & J. Burness, W.S.

Counsel for Parties of the Third Part—A. Jameson. Agent—D. F. Bridgeford, S.S.C.

Thursday, July 3.

SECOND DIVISION.

[Lord Mure, Ordinary.

MACADAM *v.* MACADAM.

Jurisdiction—Executor—Arrestment jurisdictionis fundandæ causæ.

Where A took out letters of administration in England in order to take up a subject which was Scottish executry, and where action was raised with reference to the executry funds, preceeded by arrestment to found jurisdiction, used against funds due to A in her own right;—*Held* the arrestment valid, and that the action was competent in the Court of Session.

The summons in this suit—at the instance of Hannah More Macadam, Thomas Patrick Macadam, and Mary Eliza Macadam, residing at Falmouth, in the Island of Jamaica, and all children of the deceased Thomas Macadam, sometime of Jamaica aforesaid, with the special consent and concurrence of Mary Ann Macadam their mother, widow of the said deceased Thomas Macadam, and Andrew Baird Matthews, solicitor in Newton-Stewart, Wigtonshire, their mandatory; against Margaret Macadam, sometime residing at No. 151 Upper Brook Street, Manchester, now or lately at