whole children of the deceased Margaret Macdonald or Macdonald, who predeceased the truster, are entitled equally among them to the shares of the £1000 legacy and residue as claimed, and to which she would have been entitled had she survived the truster, she having been one of the children of the said Mary Morrison or Macdonald, to whom the same was bequeathed. (2) The testator being *in loco parentis* to the said Mrs Margaret Macdonald or Macdonald and to her children, the rule *si institutus sine liberis decesserit* applies."

Upon 25th June 1890 the Lord Ordinary (TRAYNER) repelled their claim, and preferred certain other claimants to the fund *in medio*.

"*Opinion.*— . . . A good deal might have been said in favour of this claim, looking to the liberality with which the *conditio* has been applied in recent years, had Mrs Margaret Macdonald been alive at the date of the settlement. But as she was then dead (a fact of which the testator is not said to have been ignorant), and was not therefore one of the persons instituted to the legacy, I think there is no room for the application of the maxim which sets up an implied conditional institution. 'There must be a legatee instituted in the first instance, otherwise there can be no conditional institution either under the express terms of the deed or under the implied condition' (*per* Lord Cowan in *Rhind's Trustees*, 5 Macph. 109). The law appears to be settled against the validity of a claim made under circumstances similar to those I am now dealing with—*Wishart*, M. 2310; *Sturrock*, 6 D. 117; and *Rhind's Trustees, supra;* M'Laren on Wills, &c., i. 489. There is this further view against any supposed or implied intention on the part of the testator to favour the present claimants, that he specially provided for the case of two nephews, while he made no provision for the present claimants, whose mother, the testator's niece, had died. The grounds on which I have held that the claimants are not entitled to any share of the legacy equally exclude them from any share of the residue."

Norman Macdonald and his brothers reclaimed, and argued—This legacy was left to a class, of which Margaret Macdonald was a member, and therefore she was instituted. It was plain from the terms of the settlement that the testator had inteded to benefit all the children of his sister, and therefore the descendants of a deceased child ought to get the benefit which their mother would have had. The case of *Wishart* turned wholly upon the definition of the word "children," while in the case of *Rhind's Trustees* it was found that the testator was not *in loco parentis* to the parties claiming; there was, however, no such doubt here. The residue followed the same rule as did the legacy.

At advising—

LORD JUSTICE-CLERK—The testator whose will forms the subject of this litigation left certain legacies to the children of his sister Mary Macdonald. One of these—Mrs Margaret Macdonald—died in 1873, many years before the will was made. Her children now demand the benefit of the legacy left to her. The only ground upon which their claim against the estate could be placed was, that Mrs Margaret Macdonald would have been entitled to the legacy if she had been alive, and that therefore her children are entitled to demand it now.

But I think it is clear on principle, and on the authority of the case of *Rhind's Trustees* quoted to us, that where a testator in such a case as this knew all the facts, and knew that his niece was deceased many years before he deliberated on the disposal of his estate, we cannot hold him to have instituted the predeceasing niece, and that therefore her children cannot take under the *conditio si sine liberis decesserit*.

LORD YOUNG—I am of the same opinion. I do not think it would have been irrational if it had been decided in such cases as this that the word "children" should include grandchildren, and I do not think that it would have been contrary to common sense if we could have held that when the testator left a legacy to the children of his sister he meant that it should also go to her grandchildren. But it has been decided otherwise, and that settles the matter. It would be contrary to the decisions if we allowed this claim.

LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for the Reclaimers—Jameson—Cosens. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Mrs Cameron and Others—H. Johnston — D. Robertson. Agents — Traquair, Dickson, & Maclaren, W.S.

Counsel for Miss Macdonald — Lyell. Agents—D. Maclachlan, S.S.C.

Thursday, December 4.

SECOND DIVISION.

BROWN'S TRUSTEES *v.* BROWNS.

Succession—Heritable and Moveable—Conversion—Intention.

A testator directed his trustees to hold the residue of his whole estate and effects, heritable and moveable, for behoof of his children equally, share and share alike. The rights of daughters were limited to a liferent, with the fee to their children. The trust-deed provided that "the principal of said shares provided to my said sons shall be payable to them respectively in five equal yearly instalments." An annuity was provided for the testator's wife if she survived, and "in fixing the principal sums to be paid to my said sons" the trustees were instructed always to "retain a sufficient sum . . .

to meet and provide for the proportions of annuity provided to my said wife." The trustees were empowered, "if they judge proper, to sell and dispose of my whole subjects, heritable and moveable." *Held* that the trust-deed operated conversion of the heritable estate.

The late Mr Hugh Brown, merchant in Glasgow, died on 3rd December 1870, predeceased by his wife, and survived by all his children—three sons and three daughters—leaving a trust-disposition and settlement dated 1st April 1865, and with relative codicils, recorded in the Books of Council and Session on 9th December 1870, in favour of his testamentary trustees, the first parties to the present case.

This deed, *inter alia*, provided—"Lastly, my said trustees shall hold the rest and residue of my whole estate and effects, heritable and moveable, real and personal, above disponed and conveyed, and that in the terms and under the declarations, conditions, and provisions after mentioned, for behoof of my whole lawful children procreated and that may be procreated of my body, equally, share and share alike," with the usual provisions for issue and survivors; "declaring always that my said trustees shall from time (*sic*) pay to my sons the interest or annual proceeds of the said shares provided to them as the same shall accrue, or at such periods, at least twice in each year, as my said trustees shall consider most suitable, and the principal of said shares provided to my said sons shall be payable to them respectively in five equal yearly instalments, commencing the first yearly instalment at the expiry of one year after the first term of Martinmas or Whitsunday which shall occur after my death; but in fixing the amount of annual proceeds so to be paid to my said sons, my said trustees shall always deduct the proportion of said annuity payable to my said wife; and in fixing the principal sums to be paid to my said sons my said trustees shall always retain a sufficient sum, of which they shall be sole judges, to meet and provide for the proportions of annuity provided to my said wife, declaring that notwithstanding anything to the contrary herein contained, the said shares of residue provided to my daughters, and whatever portions of the shares of residue of my children to which my daughters may succeed on the failure of any of my said children, or of the issue of any of my said children, in the events before provided, shall be held by my said trustees for behoof of my said daughters respectively in liferent for their respective liferent alimentary use allenarly, and for behoof of their respective lawful children, under the conditions, restrictions, and provisions after expressed, in fee, whom failing, my other children and their issue in the terms as above provided, . . . declaring always that the above provision in favour of my children shall be in full of all claim of legitim, dead's part, or other claim competent to them by law or otherwise, and if any of them claim their legal provisions, or repudiate or challenge the above-written provisions, conditions, and declarations, then he or she shall forfeit all right to my whole property before conveyed, the same going in that case to augment the fund for division among my other children." For the more effectually enabling the trustees to carry out the provisions they were empowered to sell the whole estate.

One of the testator's children, Robert Brown, died intestate on 26th August 1878, leaving one son, an only child, Robert, the second party to the present case, and a widow, Mrs Isabella Donaldson Findlay or Brown, the third party. The deceased Robert Brown and the said Mrs Isabella Donaldson Findlay or Brown had no marriage-contract, and on his death his moveable estate, which was of considerable value, passed to his widow and son—the former succeeding *jure relictæ* to one-third and the latter to two-thirds thereof.

The moveable estate of the late Mr Hugh Brown, the testator, amounted to £225,000 sterling or thereby, and his heritable estate was estimated to be worth about £35,000. Part of the heritable estate, amounting to £8000, had not at the date of the death of the said Robert Brown been realised, but was held by the trustees for the purposes of the trust on the instructions of the beneficiaries, and in the hope of a rise in the property market.

The remainder of the heritable property, amounting to £27,000, was sold by the trustees between the testator's death and 1875.

The third party, Mrs Robert Brown, was after her husband's death annually paid one-third of his one-sixth share of the rents of the heritable property still unsold, the remaining two-thirds of the said share being paid to the factor *loco tutoris* of her son, the second party.

No question was raised as to the manner in which the trustees had dealt with the property sold before 1878, but a question having arisen as to whether they had acted rightly in making the said payments to the third party, this special case was presented to the Court by the three parties above mentioned, viz.—(1) the trustees, (2) Robert Brown, the testator's grandson, and (3) Mrs Brown, the mother of the second party—to have it determined whether the trust-disposition and settlement operated as a conversion of the heritable subjects still unsold at Robert Brown's death in 1878, the third party agreeing to repay the sums paid to her by the first parties in the event of the question being answered in the negative.

It was argued for the second party that conversion had not taken place, and if the heritable estate was to be regarded as remaining heritable, the widow had no claim thereto, as terce could not be demanded out of heritage in which the deceased husband was not infeft. A power of sale did not operate conversion. Conversion was not to be inferred unless there was an express direction to convert, or unless, in the words of Lord Fullarton in *Blackburn's Trustees*, *infra*, the directions rendered

"the exercise of the power indispensable for the execution of the trust." Mere convenience or expediency would not involve conversion. There was no necessity here. The estate had in fact remained in heritable form for twenty years, and could easily be conveyed to the beneficiaries without being realised. The trustees were, *inter alia*, directed to "divide" the estate. Even if the deed implied conversion, the actings of the beneficiaries had operated reconversion. See cases collected in the notes to Bell's Prin. 1493, and especially *Buchanan* v. *Angus*, March 13, 1860, 22 D. 979—*rev.* May 15, 1862, 24 D. (H. of L.) 5, and 4 Macq. 374, where the words "pay over" were used, and were held equivalent to convey—*Hogg* v. *Hamilton*, June 7, 1877, 4 R. 845; *Duncan's Trustees* v. *Thomas*, March 16, 1882, 9 R. 731; *Aitken, &c.* v. *Munro, &c.*, July 6, 1883, 10 R. 1097; *Sheppard's Trustee* v. *Sheppard, &c.*, July 2, 1885, 12 R. 1192. *As to the actings of beneficiaries—Williamson* v. *Paul*, December 16, 1849, 12 D. 372; *Grindlay* v. *Grindlay's Trustees*, November 8, 1853, 16 D. 27; opinions of Lord Adam (Ordinary) and Lord Shand in *Hogg* v. *Hamilton*, *supra*.

Argued for the third party—The direction to convert might be implied. A power of sale with a clear indication of intention upon the truster's part that conversion should take place was equivalent to an express direction. Here the intention of the truster was plain from the words he had used. The capital was payable to the sons in five equal yearly instalments, and the trustees in fixing the principal "sums" to be paid were to retain "a sufficient sum" to meet the wife's annuity if she survived, In the event of a child forfeiting his share, it was to go "to augment the fund for division." These expressions were consistent only with conversion. The fact that the beneficiaries had consented to the property remaining unrealised in hope of a better market could throw no light upon the truster's intention—*Advocate-General* v. *Blackburn's Trustees*, November 27, 1847, 10 D. 166; *Baird, &c.* v. *Watson*, December 8, 1880, 8 R. 233; opinions of the Lord Justice-Clerk Moncreiff and Lord Young in *Sheppard's* case, *supra*.

At advising—

Lord Justice-Clerk—There can be no doubt that the decisions upon the general question have been to some extent unsatisfactory as guides in dealing with such a case as this. It appears that the Judges of the Court of Session in the case of *Sheppard*, relied upon by Mr Dickson, would have decided in favour of conversion if it had not been for the case of *Buchanan* v. *Angus*, and especially for the opinion of Lord Chancellor Westbury in that case, or at all events they would have had great difficulty in deciding *Sheppard's* case as they did but for that judgment of the House of Lords.

In questions of this kind the first thing to ascertain is the exact terms of the deed itself. There is nothing in the judgment of the House of Lords referred to against the view, that if the testator makes it plain from the expressions he uses, and from the whole scope of his settlement, that he intended conversion, his desires will be given effect to. There does not appear to be any case in which the decision was based upon a deed which spoke only of paying sums of money, and in which it was held that conversion did not take place. The nearest case is probably that of *Baird*, but it is peculiar, because the terms there used were "pay and convey." That is the nearest case to payment alone, although in that case there was not merely payment. Now, here it is not possible to read this deed without coming to the conclusion that it was the intention of the testator that the heritable estate should be converted into moveable. That is apparent from different expressions occurring in the deed, but it is nowhere clearer than from the passage in which the testator directs that the principal of the shares provided to his sons shall be payable to them respectively in five equal yearly instalments, and further directs that "in fixing the principal sums to be paid to my said sons, my said trustees shall always retain a sufficient sum . . . to meet and provide for the proportions of annuity provided to my said wife." These words are inconsistent with the idea that the estate was to be kept in heritage, because if the estate remained heritable the trustees could never fix what sums were to be retained. To fix such sums they must have found out the value of the heritage by realising it. This passage is plain upon the point, and it is consistent with all the other passages in the deed. None of them imply that the testator contemplated anything else than conversion. If I have rightly interpreted the intention of the testator, it follows that in order to carry it out conversion was necessary.

I am therefore of opinion that in this case the estate has been converted, and that the question should be answered in the affirmative.

Lord Young—There is no doubt about the law of conversion or about the principles upon which that law stands. We are not concerned here with conversion other than conversion by will. That stands upon this, that if a testator directs money to be converted into land, or land to be turned into money, his estate shall be considered to be of that character into which it is to be converted. That is the whole rule and principle of the law. Of course in every will the true meaning and intention in that will must be considered, but if the conversion was clearly intended there is no doubt about the law. But conversion may be implied, and if the whole deed of the testator clearly implies conversion, conversion will be held to have taken place.

There is no difference here, and can be no difference, in gathering the testator's intention, from any other case in which it is necessary to ascertain what the testator intended. We know nothing about his intentions except from what we can gather and collect from his will, but reading that will to inform myself as to what

he intended, I am satisfied that he intended conversion. I think his intention was that his whole property should be turned into money.

The question here applies only to a small part of the heritage, which altogether amounted to £35,000, the whole estate being almost a quarter of a million. Of that £35,000 the trustees in the execution of the will, and in pursuance of what they thought was the testator's intention, have sold heritage of the value of £27,000, and we have been told that no question is raised as to that money, but a question is raised as to the remainder. It seems a curious proposition to submit that the testator did intend conversion to the extent of £27,000 worth of heritage, but did not intend it with regard to the remaining £8000. There was here no necessity to convert, no bankruptcy or anything of that sort, nothing to go upon other than the intention expressed in the will. The trustees in the execution of that will converted £27,000, and are not said to have acted wrongly in so doing, but we are told we cannot collect from the will the intention to convert the comparatively small remainder. I cannot assent to that. The testator clearly intended that the trustees should sell when they could do so to the advantage of the estate. In fact, he meant them to convert. It would require the utmost ingenuity to see how the trust could have been executed without conversion. It is said, looking to the authorities, that in such a case as this, even if a man leaves a shop in equal shares to 100 great-grandchildren, that shop will not be converted into money unless it appears that it was absolutely necessary so to convert it. I could not impute such an intention to any man sane enough to make a will.

I collect from this will, read and construed according to well-established rules, that the testator intended conversion not only of the property amounting to £27,000, which the trustees have in execution of the will already converted, but also of the remaining £8000 property.

LORD RUTHERFURD CLARK—Having in view the two cases of *Sheppard* and *Duncan*, I have had considerable difficulty about this case, but as I understand your Lordships are agreed, I do not dissent from the judgment proposed. I proceed, however, upon the ground that reading the deed as a whole conversion was indispensable and necessary to its due execution. I may, I think, put that construction upon it, and I therefore concur, but I say nothing against the two cases I have referred to.

LORD TRAYNER—Looking to the terms of the deed, I think it was indispensable that the power of sale should be exercised. The trustees could not otherwise have carried out the purposes for which the trust was created, and I gather consequently from that that it was the testator's intention that conversion should take place. I am therefore of opinion that the question should be answered in the affirmative.

The Court answered the question in the affirmative.

Counsel for the First and Second Parties —Dickson—Napier. Agents — Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Third Parties—H. Johnston—Wallace. Agents—Lindsay & Wallace, W.S.

Saturday, December 6.

SECOND DIVISION.

[Sheriff of Dumfries.

JOHNSTONE *v.* DRYDEN.

Process — Caution for Expenses — Pursuer in Receipt of Parochial Relief — Poor's Roll.

An unmarried woman in receipt of parochial relief brought an action in the Small Debt Court, as proprietrix of certain subjects, for arrears of rent. Her title having been objected to, she raised an action of declarator in the Sheriff Court. In that action it was pleaded as a preliminary defence that being a pauper she was bound to find caution for expenses, and upon her failing to do so the defender was assoilzied. The pursuer appealed to the Court of Session. There was no appearance for the defender. *Held* that the pursuer was not bound to find caution for expenses as a condition of insisting in her action.

Anne Johnstone, residing in Lockerbie, brought an action in the Small Debt Court at Dumfries against David Oliver, joiner, Hightae, for payment of arrears of rent due to her as proprietrix of certain subjects in Hightae of which the defender was the tenant. Objection was taken to the pursuer's title, and the action was sisted to have the rights of parties determined.

Anne Johnstone thereupon raised an action in the Sheriff Court at Dumfries against Mrs Jane Richardson or Dryden to have it found and declared that she was the heritable proprietrix of the subjects in question.

The defender pleaded—"*Preliminary*—(2) The pursuer being in the lower rank of life, being a pauper, and having taken no steps to be placed on the poor's roll, which would have had the effect of eliciting a report whether there was a *probabilis causa*, should be ordered to find caution for expenses."

The Sheriff-Substitute (BOYLE HOPE) sustained that plea-in-law. The pursuer failed to find caution, and in consequence the defender was assoilzied both by the Sheriff-Substitute and by the Sheriff.

The pursuer appealed to the Second Division of the Court of Session. She admitted that she received 1s. 6d. a-week