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 truster'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 dispone, 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 dispone 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 testator'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 truster'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 Paterson)—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 causa.

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

No. 63 Tufnel Park Road, Holloway, London, or elsewhere furth of Scotland, administratrix of the late Hannah Breeze or Macadam, sometime of 86 Dorset Street, Hulme, Manchester, who died at 86 Dorset Street aforesaid on 31st July 1864, conform to letters of administration of Her Majesty's Court of Probate at Manchester in favour of the said Margaret Macadam, dated 14th September 1865, concluded for payment of the sum of £789, 6s. sterling, being balance unpaid of legacy falling to the said children of the said deceased Thomas Macadam from the estate of the said deceased Hannah Breeze or Macadam and her husband Thomas Macadam senior, sometime grocer at Newton-Stewart, and balance of residue, division of return of probate duty and interest, all due to the pursuers from said estate, with interest of said sum of £789, 6s. at the rate of five pounds per centum per annum, from the 21st of May 1872 until payment. As the defender was resident in England, arrestments to found jurisdiction were used in Scotland of certain funds admittedly belonging or due to the defender, but whether in her own right, or as part of the executry estate from which the legacy was claimed, did not distinctly appear. It appeared that probate of the will of Mr Macadam, and of defender's mother, had been taken out in England, but that the inventory of Mr Macadam's estate was given up and recorded in Scotland, where the will had been made, and where the greater part of the property was situated. The defender stated that she never intromitted with any portion of her father's succession, nor paid any legacies in connection with that estate, but all that was done by an agent of the name of Martin, who managed the affairs, and in whose hands everything was left by all the parties interested, and that she never employed him to act as agent in the succession of her father.

The pleas in law for the pursuers were—"(1) The defender is amenable to the jurisdiction of the Supreme Courts of Scotland in respect of said arrestments and the funds thereby attached. (2) The defender having, as executrix foresaid, realized and intromitted with the estates of the said Thomas Macadam senior, is liable in the sum sued for, as the proportion of the said estates falling to the said Thomas Macadam junior, and now resting-owing and due to the pursuers. (3) The defender being justly due and indebted to the pursuers the sum sued for, the pursuers are entitled to decree as libelled."

The pleas in law for the defender were—"(1) No jurisdiction, in respect that the defender is not resident in this country, and no funds belonging to the executry estate of the mother have been attached by the arrestments *ad fundandum jurisdictionem* used by the pursuers. (2) The pursuers have no title to sue in their present character, in respect the said Thomas Macadam having survived the period of the division of the estate of his father, his share thereof vested in him, and now belongs to the pursuers as his widow and next of kin respectively. (3) The defender not having intromitted with the estate of the said Thomas Macadam senior, she is not liable for the sums sued for in the present action. (4) The defender is entitled to absolvitor, in respect that, as administratrix of her mother, she paid the debt due from her mother's executry to the representatives of the late Thomas Macadam senior. (5) The pursuer, Mrs Mary Ann Macadam, having on her own behalf, and as the guardian of her children, intrusted the share of the said estate belonging to them to the said David Martin, and he having, after the division of the said estate, held the same on their behalf, with the sanction and under the instructions of the said pursuers, no claim against the defender in respect of the said share can be maintained by the pursuers. (6) The said pursuers having made no claim or demand against the defender for payment of the said share during the lifetime of Martin, but dealt with and recognised him as the only party responsible therefor, the pursuers are barred from making the present claim against the defender. (7) In any event, the defender is not liable to the said pursuer, Mrs Mary Ann Macadam, for the proportion of the said share belonging to her as relict of her husband, nor to any of the pursuers for the foresaid sum of £250 invested by Martin under the instructions, or with the sanction and authority of the said pursuers. (8) The defender not being due the pursuers in the amount libelled, or any part thereof, she is entitled to absolvitor, with expenses."

The Lord Ordinary pronounced the following interlocutor:—

"*25th March* 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, repels the first plea in law for the defender, in so far as it is pleaded as preliminary and excluding the jurisdiction of this Court; and appoints the case to be put to the roll for further procedure: Reserving in the meantime all questions of expenses.

"*Note.*—This case is in some respects not free from difficulty, but in the view the Lord Ordinary takes of it, the question raised is not so much one of jurisdiction as of *forum competens* or *conveniens*, which is not made the matter of a separate plea in defence, and which the case of *Brown's Trustees*, 17th December 1830, mainly relied on by the defender, truly was.

"The circumstances of the case, however, are in some respects different from those of *Brown's Trustees*. For the present is not strictly speaking an action in which an executor is called to account for the execution of his office, or to enter into a general accounting relative to the affairs of the deceased party dying abroad; but one in which the defender is sued for payment of a legacy bequeathed to the father of the pursuers by the late Mr Macadam senior, and for which the defender is alleged to be liable as an intromitter with Mr Macadam's estate; and as she is resident in England, arrestments to found jurisdiction have been used in this country of certain funds admittedly belonging or due to the defender, but whether in her own right, or as part of the late Mr Macadam's estate, does not distinctly appear. The case therefore is one in which the jurisdiction of this Court to entertain the action has, it is thought, been established by the arrestments used against the defender, and falls to be dealt with, in this respect, according to the rules applied in the cases of *Campbell*, March 2, 1809, Hume, p. 258, and *Innerarity*, March 7, 1840, 2 D. p. 816, rather than that of *Brown's Trustees*, which, as explained in the opinions of the Judges in the case of *Macmornie*, Jan. 16, 1845, was not a question of jurisdiction, but of *forum conveniens*, and the present case is distinguishable from that of *Brown's Trustees* in this respect also, that although probate of the will of the late Mr Macadam and of the defender's mother appeared

to have been taken out in England, the inventory of Mr Macadam's estate was actually given up and recorded in Scotland, where the will had been made, and the greater part of the testator's property was situated. This is shown by the residue account, No. 22 of process, signed by the defender, and which appears from the statements in the record to have been prepared and given up by an agent employed on her behalf, and in this respect the case is not dissimilar in one of its features to that of *Macmornie* already referred to, in which the plea to jurisdiction was repelled, leaving it open to the Court to deal with the question of *forum conveniens* on the case being proceeded with."

The defender reclaimed.

Cases cited—*Campbell*, 2d March 1809, Hume p. 258; *Innerarity*, 2 D. 816; *M'Morine*, 7 D. 270.

At advising—

LORD JUSTICE-CLERK—On the whole matter I am for adhering to the interlocutor of the Lord Ordinary. It is plain the case could have been heard in England—the debtor is liable in England, and the obligation is English—but it does not follow that this Court has no jurisdiction, and the only answer is, that the funds arrested are not executry funds. This is not a good reply—the obligation is a personal obligation, limited by the inventory, and it would follow, if it was sustained, that if all the funds were spent the executry would be free. My doubts are whether this is the convenient *forum*, as this seems to me a pure question of English law, and very much a question of English fact.

LORD COWAN—I am for adhering. The only question here is one of jurisdiction; the objection is that a fund has been arrested which does not entitle the pursuer to go on against the defender, and that other executry funds should have been arrested. As we have funds of the debtor I do not see why we should not allow the case to go on. It is quite certain that an action against an English executor for accounting would not be allowed to go on here; but the question in this case resolves into one of personal liability. This is a Scottish succession. The liferentrix confirms in Scotland. She dies, and her daughter puts herself into the position of her mother with reference to the Scottish succession. I rather think the Scottish Court is the one to carry out the case. None of the pleas suggest that England is the proper place. The defence is, that our jurisdiction is excluded, and if the case had come before us in the first instance, I would simply have repelled that plea and allowed the case to proceed.

LORD BENHOLME—What strikes me is, if this estate had been taken to England, and spent in England, it would not have altered the liability of the succession. I am for adhering on the pure question of jurisdiction.

LORD NEAVES—I am for adhering, but I am not sure that the case does not involve questions of international law. There is the specialty that the estate confirmed by Miss Macadam was not the property of another. A party in England takes letters of administration to take up a subject known by her to be Scottish executry, and on the effect of that I pronounce no opinion. Is it clear the English executors of Scottish executry have no liability? When she uplifts she sends it to Scotland and it is administered in Scotland. All these questions I think may as well be expiscated in Scotland.

Counsel for Pursuer — Trayner and Solicitor-General (Clark). Agents—M'Ewen & Carment, W.S.

Counsel for Defender—Strachan and Watson. Agents—Watt & Anderson, S.S.C.

Thursday, July 3.

FIRST DIVISION.

[Lord Shand, Ordinary.

GAVINE *v.* BROWN.

Process—Act of Sederunt, Feb. 16, 1841, § 46—*Notice of Trial.*

The pursuer in an action having taken no steps with a view to trial within a year and a day after the adjustment of issues, the defender moved the Lord Ordinary to dismiss the action; the Lord Ordinary having expressed doubts whether the case should be reported to the Inner House, on the authorities quoted, the pursuer gave notice of trial at the ensuing sittings, and the case being thus transferred to the Inner House was there enrolled,—*Held* that the defender was entitled to be assoilzied, as the pursuer had failed to proceed timeously to trial.

This case raised an important point in procedure. The summons in the action was signeted 11th May 1872, and concluded for "the sum of £200 in name of *solatium*, reparation, and damages," for the loss, injury, and damage sustained by the pursuer. The circumstances shortly were as follows—

The pursuer is a wine and spirit merchant, and the defender a shoemaker, in Rose Street, Edinburgh, and the latter has been employed by the pursuer. In the course of the employment a disputed account of £3, 17s. gave rise to a quarrel, and the pursuer averred that the defender, actuated by ill-will, hatred, and malice, forthwith began to traduce and asperse his reputation and character. These averments the pursuer fully condescended upon, and the defender refused to retract these alleged false, slanderous, and malicious statements.

On 20th June 1872 issues were adjusted for the trial of the cause, but no steps were taken by the pursuer within a year and a day after that date with a view to trial. On 25th June 1873 the defender enrolled the case before the Lord Ordinary to have the action dismissed, in terms of the Act of Sederunt 16th Feb. 1841, sec. 46, and when the case was called before the Lord Ordinary, on June 27, no appearance was made for the pursuer; but his Lordship expressed doubts as to the competency of his granting the motion, and stated that he would report the case to the Court on the Tuesday following. The defender, accordingly, on Saturday the 28th, again enrolled the case for Tuesday. On the afternoon of Monday, the 30th, the pursuer's agent intimated that the Lord Ordinary would be moved to fix a day for the trial of the cause, and in the evening of the same day he gave notice that the case would be tried at the ensuing sittings.

On the case being called before the Lord Ordinary (SHAND), the pursuer objected to the defen-