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-

der's motion being entertained to any effect whatever, on the ground that by the notice of trial the case had been transferred to the Inner House; and thereupon his Lordship suggested that the defender should enrol the case in the Inner House in the ordinary way. The defender's motion for dismissal of the cause was accordingly heard before the First Division, when the pursuer gave as his reasons for not having gone to trial that the defender had left Edinburgh, where he had lived previously, and that he was not able to ascertain his whereabouts; and, further, that the pursuer's former agent had ceased to act for him, he understanding, and being entitled to understand, that an agent was acting for him, while in reality there was none.

The defender replied that he only left Edinburgh and went to Glasgow in pursuance of his trade as a journeyman shoemaker, and that with the knowledge of the pursuer; and farther, in any view no application had been made by the pursuer to ascertain the defender's place of abode.

LORD PRESIDENT—It is evident that here we have an alternative—either the agent neglected the duty he owed to his client, or the client neglected the duty he owed to himself by having no agent.

The Court pronounced the following interlocutor:—

> "In respect that the pursuer has failed to proceed to trial within a year and a day after adjustment of issues, assoilzie the defender and grant expenses."

Counsel for Pursuer—Scott. Agent—A. Nivison, S.S.C.

Counsel for Defender—Mair. Agents—Lawson & Hogg, S.S.C.

Thursday, July 3.

FIRST DIVISION.

REV. JOHN CAIRD D.D. AND OTHERS, PETITIONERS.

Petition—Charitable Bequest—Draft Scheme—Remit—Process.

> A petition having been presented to the Court for approval of a deed of trust and constitution of a school, and a draft scheme having been submitted along with it,—*held* that a remit to a reporter was the proper procedure.

This petition was presented to the Court "for approval of a deed of trust, and constitution of the school and funds connected therewith, founded by the late William Muir Esq."

Mr Muir died January 1, 1869, leaving £15,000 for endowment of schools under certain conditions by will, dated November 1865, and he nominated a body of trustees and directors, but added that "no Papist, no Puseyite, no Tractarian, no Socinian, no Arian, nor any man who by acts or speech was to defend or excuse or propagate the principles or practice of these sects, . . . should be allowed to be directors or trustees." This will was holograph, but there were a number of blanks in it, some filled up in pencil and some left entirely blank. There was also found a prior holograph will, completely written out in ink without blanks, and having four codicils, all being dated 29th April 1864.

On 3d March 1870, a Special Case was submitted to the First Division, by the executors on the first part; the legatees under the last will (other than the School trustees and directors) of the second part; and the then acting school-trustees of the third part. The questions in this special case were disposed of by interlocutor of 18th May 1870 as follows—"*Edinburgh, 18th May* 1870—The Lords having heard counsel on this Special Case as now amended, find and declare, 1*st*, that the parties of the second part are entitled to payment of the annuities and legacies bequeathed to them by the will of 30th November 1865, at the terms specified, and *primo loco* and preferably to the bequest to the parties of the third part; 2*d*, find that in the event of there not being funds sufficient, after paying the legacies and providing for the annuities to the parties of the second part, to pay the school bequest in full, the free balance of the estate is not to be retained by the parties of the first part, as executors of the deceased, until it shall amount (by the falling in of annuities or otherwise) to £15,000, but that the executors are bound to pay over said balance forthwith, additional payments being made by them from time to time to the parties of the third part, as funds become available; 3*d*, find that the succession duty in the bequest of £15,000 falls to be paid out of the balance remaining in the hands of the executors, after paying and providing for the legacies and annuities to the parties of the second part, and decern."

The petition set forth that of the £15,000, £8,500 had been paid over to the School Trustees, £5000 had been eligibly invested, and there was a good prospect of obtaining an investment for the rest. The School Trustees, petitioners, applied to the Court to approve a deed of trust and constitution as they now had sufficient income to afford a prospect of at once commencing the school, and the testator had expressed a wish that this should be done as soon as circumstances should put it in their power, without waiting until the full £15,000 was paid over. The prayer of the petition was "to approve of and authorise them to institute and put in operation the said school as at Martinmas 1873; and further, to approve of the proposed deed of trust and constitution of the said school, and of the several funds therewith connected, in terms of the draft thereof appended to this petition, or in such other terms as may be thought proper by your Lordships; and on the said draft deed being so adjusted and approved, to interpone authority thereto, and appoint the same to be extended, and thereupon to ordain and oppoint the petitioners to execute the same; or to do otherwise in the premises as to your Lordships shall seem proper."

Authorities quoted in support of the application—*Alexander Morrison*, June 30, 1863, 1 Macph. 1009; *Low*, November 17, 1865, 4 Macph. 45; *University of Aberdeen* v. *Irvine*, 6 Macph. H.L. 29.

The Court would not consider the draft scheme suggested by the Petitioners acting *ex parte*, but remitted to Mr Robert Lee, Advocate, to prepare a scheme and report.

Counsel for Petitioners—Horn. Agents—Ronald, Ritchie & Ellis, W.S.