"being a majority of the persons entitled to vote in questions relating to the Mossend Iron Company," that intimation should be given of the intention of the executors to become partners. That minute is referred to, but it is not admitted, and perhaps it is not quite regular to notice its terms, but for the purposes of illustration it is not immaterial to observe that at the first meeting there were present Mrs Neilson, Messrs Hugh Neilson, James Neilson, and J. R. Thomson, and at that meeting a letter was read from the law-agents who were acting for the children of the deceased, urging the trustees to avail themselves of the option and become partners. Mr M'Creath was not present at that meeting, which was therefore adjourned until a later hour of the same day. Mr M'Creath was again unable to attend, and accordingly the meeting was again adjourned. Then at the adjourned meeting there were present Mrs Neilson, Messrs J. R. Thomson, and James M'Creath. These were the trustees who were entitled to decide on this question, because the absentees were not entitled to vote on any question in regard to the Mossend Iron Company. At that meeting it was resolved (Mr Thomson—who desired to be neutral—not voting) to take advantage of the provisions of the contract of copartnery, and the law-agent was instructed to give the necessary notices to the surviving partners. It seems to follow from that that they became, by reason of the resolution and the intimation which followed, partners of the Mossend Iron Company from 24th May 1882. Since then Mr Thomson, who was then neutral, as the minute bears, became more adverse to the resolution, and Mr M'Creath has resigned, but neither of these facts derogates from the authority of the resolution passed, if it was passed. That binds the executors and the company, and the beneficiaries under Mr Neilson's settlement have a vested interest in what was then done. By the operation of the resolution they have become partners of the company, and the beneficiaries, if they stood alone, would be entitled to insist that that resolution shall receive its legal effect. Mrs Neilson, as one of the executors, with the concurrence of the beneficiaries, comes into Court, not as a quorum of the executors—for the number of executors is reduced to two, and Mr Thomson would not concur—but with the consent of the beneficiaries, and brings this action to have it declared that the resolution and intimation have the effect of making the executors partners of the company. Now, that being the state of the facts, my impression is that the pursuer has a good title to sue, but I do not intend to decide that question just now, for I agree with the Lord Ordinary that it would be better to deal with that question when the facts have been ascertained. I agree with the Lord Ordinary.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuer — Pearson — Guthrie. Agents—J. & J. Ross, W.S.

Counsel for the Mossend Iron Company and Others (Defenders and Reclaimers)—Mackintosh—Dickson. Agents—Webster, Will, & Ritchie, W.S.

Counsel for the Defenders Hugh Neilson and Others — Low. Agents — Morton, Neilson, & Smart, W.S.

Tuesday, July 17.

SECOND DIVISION.

BROWN *v.* CARTWRIGHT AND OTHERS (SIR W. STIRLING MAXWELL'S EXECUTORS).

Process—Jurisdiction—Forum non conveniens—*Action against the Estate of a Domiciled Scotsman which has been made the subject of an Administration Suit in England.*

A domiciled Scotsman died possessed of large property, heritable and moveable, in Scotland, and of a house in London, and leaving a will, the executors under which were duly confirmed in Scotland. In an administration suit in Chancery at the instance of his infant children suing by their next friend, his moveable estate was ordered to be administered under control of the Court of Chancery. In an action brought in the Court of Session against the executors by a person claiming a legacy under the will, the executors pleaded (1) "no jurisdiction," and (2) "*forum non conveniens*," in respect of the proceedings in the English Courts. The Court *held* that the Scotch Courts had jurisdiction, and *repelled* these pleas.

Sir William Stirling Maxwell of Pollok and Keir died on 15th January 1878, leaving a holograph will and codicil in which he appointed Thomas Melville Cartwright of Melville, John Glencairn Carter Hamilton of Dalzell, Lanarkshire, the Hon. Ronald Leslie Melville of 75 Lombard Street, London, Sir Michael Shaw Stewart of Greenock and Blackhall (along with William Stuart Stirling Crawford, since deceased, and Alexander Young, who declined to act), as his executors. After leaving certain legacies to relatives and servants, including his butlers, coachmen, and housekeeper, he made a bequest in the following terms:—"To each of my other servants who shall be in my service at the time of my death, and who shall have been with me four years—one year's wages." He was a Scotsman, and died domiciled in Scotland. The executors (other than those who declined office as above stated) were confirmed executors by the Sheriff of Perthshire. At the time of his death his income from heritable estates in different parts of Scotland amounted to £40,000, and his moveable property amounted to £200,000. His only property situated in England consisted of his house in London. After his death an administration suit was raised in the Chancery Division of the High Court of Justice in England at the instance of his two infant children and their "next friend" Mr Stirling Crawford, in which the Vice-Chancellor (HALL) pronounced an order that the testator's personal estate (not specially bequeathed) be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities, if any, given by his will and codicil, and adjourned further consideration of the action. In an appeal to the Court of Appeal this order was not varied.

This was an action raised by Thomas Brown, who had been an assistant blacksmith at Keir for more than four years before Sir William's death, against the executors, for payment of a year's wages as the legacy falling to him under the above-quoted provision in the will.

The executors having been advised that the pursuer was not a "servant" of Sir William within the meaning of the will, defended the action. They narrated the proceedings in the administration suit, and averred that the effect of the decree therein was to place the administration of the estate (wherever situated) under the control of the High Court of Justice in England. The defenders further stated that they had by the said decree been deprived of the power of paying away any part of the trust funds except with the authority of the said English Court, and no such authority had been granted as regards the present claim; that in the course of their administration of the said personal estate Scottish counsel were consulted, *inter alia*, as to the proper construction of the bequest in Sir William's will, and had advised them that the present pursuer and a number of other persons who had intimated their desire to take benefit under the said bequest were not within the category of "servants" thereby provided for; that the Judge in the English administration suit, by an order of 9th April 1880, sanctioned the payment by the executors of the legacies left by the testator, including the said legacy to "servants," the distribution of the latter to be regulated in accordance with the terms of the said opinion of counsel. They averred that the High Court of Justice in England was the only competent *forum* for the trial of the present question, or at least that the said Court was by reason of the said proceedings the more convenient *forum*, and serious inconvenience and embarrassment would arise were the present action allowed to proceed. Further they averred that there was an appropriate and accessible means of trying the question in England under the said judicial administration.

They pleaded—"(1) No jurisdiction. (2) *Forum non conveniens.* (3) The pursuer's statements were irrelevant and insufficient to support the conclusions of the summons. (4) The action should be dismissed, because in respect of the proceedings in the English Court the defenders were no longer liable to a decree against them for payment in this Court. (5) *Separatim*, in respect of said proceedings no decree for payment ought to be pronounced by this Court."

On the merits they pleaded that the pursuer not being a servant within the meaning of the will was not entitled to the legacy.

The Lord Ordinary (Fraser) repelled the first and second pleas stated for the defenders, and appointed the case to be put to the roll for further procedure.

"*Opinion.*—Sir William Stirling Maxwell was a domiciled Scotsman, and executed a will in Scotland by which he named as his executors certain gentlemen, the defenders in this action, all of whom except one are designed as resident in Scotland. His whole property was in Scotland except a house in London. By his will he bequeathed to each of his servants in his service at his death a year's wages, and one of these servants now sues the executors for payment of his legacy. The defenders were duly confirmed executors by the Sheriff of Perthshire, and gave up an inventory of his estate in the Sheriff Court of that county.

"It is contended by the defenders that the Court of Session has no jurisdiction to dispose of the question as to whether the pursuer is a servant entitled to the legacy. This plea is rested upon the ground that in the Chancery Division of the High Court of Justice in England an administration suit was raised by the next friend of the two minor children of the testator,—which is now in dependence. In this suit a decree was pronounced the effect of which, it is said, is to place the administration of the estate, wherever situated, under the control of the High Court of Justice in England; and that the defenders have by the decree been deprived of the power of paying away any part of the trust funds except with the authority of the English Court; and such being the case, the jurisdiction of the Court of Session is ousted.

"Although this decree of administration has been issued in England, it does not follow that this will bar the pursuer from applying to the Court of Session for judgment against his debtors resident in Scotland. If the Court have jurisdiction in regard to the claim, then it is not a matter within their discretion to exercise it or not. They must do so when appealed to by any of the lieges. The defenders, while averring that they have no power to pay any part of the trust funds except with the authority of the English Court, state that no such authority has been granted as regards the present claim. But they have not further stated that they have applied for such authority. It is still more remarkable that in the third article of their statement of facts they aver that Scottish counsel were consulted as to the construction of the will, that these counsel did give their opinion, and that the Judge in the administration suit ordered the legacies to be paid to those classes of servants whom the Scottish counsel thought were entitled to them. It is the Scottish law then which is to be applied to the case. Therefore, whether the residence of the defenders, or the nature of the claim, or the law to be applied, be considered, the Court of Session has clearly jurisdiction in this case, and the first plea must be repelled.

"But it is further pleaded, that assuming that the Scottish Court had jurisdiction, yet it is a *forum non conveniens.* Now this does not quadrate with the averment that the question to be determined is one of Scottish law, and which has been determined by the English Judge according to the opinion of Scottish counsel. If this had been a case where a general count and reckoning was sought to be enforced against the executors, the plea of *forum non conveniens* might with great force be stated, if such a general count and reckoning were going on in the administration suit in England. It is in regard to that class of cases that this plea has hitherto been given effect to. But the present is not a case of that kind. It is a demand for a simple legacy. If it be the fact that no money can be paid away by the defenders without the authority of the English Court, doubtless such authority would be granted if there were presented to the English Court a decree of the Court of Session finding the pursuer entitled to his legacy. The English Court will pay more—certainly not less—respect to a judgment of the Court of Session than they have paid to the opinion of Scottish counsel privately obtained; and the convenient *forum* for ascertaining the true construction of the will is surely that *forum* where the law is administered that must decide what is the true construction."

The defenders reclaimed, and argued—The plea of *forum non conveniens* ought to be sustained. By the proceedings in England the estate had been put in Chancery. The executors had no power to pay away one penny of the estate without its authority—*Stirling Maxwell* v. *Cartwright*, April 7, 1879, L.R., 11 Ch. Div. 522; *Preston* v. *Viscount Melville*, March 29, 1841, 8 Clark & Findlay, 1; *Martin* v. *Stopford Blair's Executors*, December 4, 1879, 7 R. 329; *Clements* v. *Macaulay*, March 16, 1860, 4 Macph. 583. The plea was always sustained where in an action against an executor he could show that he was going to administer the estate in another county or in another Court.—*M'Master* v. *Stewart*, June 17, 1838, 12 S. 731.

Lord Justice-Clerk—In this case I do not think it necessary to call for a reply. The action is brought in this Court by a person alleging himself to be a legatee under the will of Sir Wm. Stirling Maxwell, and the defenders are the executors under that will. It is a Scotch will—the will of a domiciled Scotsman—and as far as I can see the trustees are resident in Scotland.

It is objected by the executors, apparently somewhat reluctantly, that this is not the proper Court to determine questions as to the administration of a Scotch estate administered by Scotch executors, and they say the will ought to be administered and these questions determined by the Court of Chancery because an administration suit had been raised, not by the executor of the will but under the application of Mr Stirling Crawford, to the Court of Chancery. It does appear that the Court of Chancery acted upon that application and sustained the administration suit. What the effect of this may be it is not in my opinion necessary to inquire. The Court of Chancery will explicate its own jurisdiction in its own way, but in the meantime I am satisfied as to the jurisdiction of this Court. Beyond all question I think this Court is the competent *forum* to decide these questions.

There are other matters into which we might enter, but I think that it is undesirable that we should do so, for I am satisfied that there is nothing here to justify us in stopping these proceedings. I am for adhering to the Lord Ordinary's interlocutor.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court adhered.

Counsel for Reclaimers—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—Campbell Smith—Rhind. Agents—M'Caskie & Hutton, S.S.C.

Tuesday, July 17.

SECOND DIVISION.

[Magistrates of Burgh of Hillhead.

MURISON *v.* WHARRIE AND OTHERS.

Property—Feu-Contract—Building Restriction—Billiard-Room—Offices.

The titles of houses in a street within burgh contained a stipulation (which duly entered the record) that the houses should in all time coming be used solely as dwelling-houses, and that the proprietors of each should be entitled to erect upon the ground at the back of his house "such offices" (not exceeding a specified height) "as may be necessary for additional convenience," and that such offices should not be occupied as dwelling-houses, but be used "allenarly as a stable, washing-houses, or other offices." One of the proprietors proposed to erect upon the back ground, for the greater comfort of his dwelling-house, a billiard room, lavatory, sitting-room, and store rooms. *Held* that the erection of this proposed addition was not in contravention of the title.

The houses forming Buckingham Terrace, Hillhead, Glasgow, were built in 1852, and the proprietor of the ground, Andrew Gibson Corbett, disponed the several steadings on which the houses were built to the various purchasers by contracts of ground-annual, imposing on them all a similar set of restrictions. The conditions as to maintaining the front tenements and as to occupying the back-ground behind each of the steadings in the terrace were thus set forth in one of the contracts of ground annual by which three of the steadings were conveyed—"That the said tenements shall in all time coming be used and occupied solely as self-contained dwelling-houses, and for no other use or purpose whatever, and if at any time any of the said houses shall require to be rebuilt, it shall be so rebuilt of the same plan and elevation, external materials, and style of workmanship, and upon the same foundation as at present, as a component part of the said terrace, that the walls enclosing the back-ground of each of the said several steadings shall not exceed 10 feet; but it shall be competent to the said second party [disponee] and his foresaids to erect on said back-ground such offices as may be necessary for additional convenience, but such offices shall not on any account be more than 16 feet in height over the side walls, and shall not be occupied as dwelling-houses, but be used allenarly as a stable, washing-house, or other offices, by the proprietors or tenants for the time being of said respective tenements." These conditions and restrictions were declared to be real liens and burdens on the several steadings respectively in favour of the disponer and his successors as proprietors of the remaining steadings in the said terrace, and the said remaining steadings themselves; and further, the disponer undertook that when he should come to sell or dispose of the remaining lots or steadings in the terrace he should convey each of them subject to the same conditions, and the conditions were further created real burdens on