which made the person performing it alone liable. The defender had not authorised, and was therefore not liable.

Argued for the pursuer—The judgment of the Sheriff was right. This was a joint-adventure, and as the act had been performed for the benefit of the defender, and he had benefited by it he must be held responsible—*Steel* v. *Tester*, 1877, L.R., 3 C.P.D. 121; *Currie* v. *Allan*, July 17, 1894, 21 R. 1004.

At advising—

LORD TRAYNER—The facts of this case have been so fully and accurately stated by the Sheriff-Substitute in the note appended to his interlocutor that it is not necessary here to repeat them. Taking the facts as so stated, the question is, Is the defender liable to the pursuer in the damages which have been decerned for?

The first and main defence stated for the compearing defender Anderson is, that on the occurrence in question his vessel, the "Good Hope," was under charter by him to the other defender Watson, who had the absolute control thereof; that the "Good Hope" was for the time being demised to Watson. Had this been the state of the facts the defence would have been unanswerable. The case of *Schiebler* referred to by the appellant's counsel is an authority to that effect, and the decision in the case of *Bernard*, rightly understood, proceeds upon the same principle. But the facts here do not admit of the application of that principle. The contract or agreement under which Watson had the use of the "Good Hope" was not of the nature of a charter or demise. He had it under an agreement by which the defender Anderson contributed the use of his vessel to Watson and others with whom Watson might agree, in the pursuit of a joint-adventure, under which Anderson was to receive a certain proportion of the net profits or proceeds of a fishing expedition. In the course of that expedition, and for the benefit of Anderson as much as any, the wrong was done for which compensation is now claimed. I agree with the Sheriff in thinking that it would not be a good or sufficient ground on which to base the defender's liability merely to hold that he was the owner of the boat, the crew of which did the wrong. Liability for damages never arises simply *ex domino*. But that is not the kind of case presented here. Anderson, Watson, and the men who worked the boat were all engaged in a joint-adventure for joint behoof, although their proportions or shares of the net proceeds of the adventure were different. The act which was done (which, I take it, was beyond question wrongful) was done, as I have said, for the benefit of all concerned, and all concerned shared that benefit, according to the terms of their joint bargain. It was said, further, that the defender Anderson could not in any view be liable for the delict or wrong of his joint-adventurers because he had not authorised it. But then the thing done was in pursuance of the joint-adventure; it was done to protect the joint interest, and to enhance the joint profit, and all profited by it more or less. Anderson cannot take the benefit of the act by which profit was earned or secured (as he has done in point of fact), and then repudiate the act or means by which that profit was gained.

I think, therefore, that the interlocutor appealed against should be affirmed, and the appeal dismissed.

LORD YOUNG, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—C. S. Dickson—Younger. Agent—W. Croft Gray, S.S.C.

Counsel for the Defender—Jameson—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, January 18

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ANDERSON *v.* ANDERSON'S TRUSTEES.

Succession—Heritable or Moveable—Conversion—Direction to Pay Mixed Estate to Children.

A testator directed his trustees to pay to his widow one-third of his moveable estate and one-third of the income of his heritable estate during her life, and to hold the residue or remainder of his estate, heritable and moveable, for behoof of his five existing children, and of any other children that might be born to him, "equally share and share alike, and pay the same to my said children as they severally attain the age of majority, or if daughters when married, whichever of these events shall first happen under the burden of the foresaid provisions to their said mother." The deed contained no direction to sell but the trustees were given "powers of sale for the disposal of my said estates . . . and in general to do everything necessary for the execution of the trust hereby created."

The testator was survived by his widow and five children. He left heritage to the value of £6000 and a small amount of moveable property. All the children were in majority when their father died.

Held that there was no conversion, as the exercise of the powers of sale was not necessary for the execution of the trust.

James Anderson, died upon 27th August 1884, survived by his widow, three sons, and two daughters. All his children were in majority at the time of his death. He left a trust-disposition and settlement dated 12th March 1860, by which he conveyed his whole moveable and heritable estate to trustees, for, *inter alia*, the following purposes—(1) Payment of debts, (2) Pay-

ment to his widow of a third of his personal estate within three months of his death and a third of the rents of his heritable estate during her lifetime. Lastly the truster directed his trustees to "hold the residue and remainder of my said estates, heritable and moveable, real and personal, above conveyed, for behoof of the said James, John, and William Anderson, my sons, and of Mary and Helen Anderson, my daughters, and of any other lawful child or children that may be born to me, equally share and share alike, and pay the same to my said children as they severally attain the age of majority, or if daughters, when married, whichever of these events shall first happen, under the burden of the foresaid provisions to their said mother: But declaring that the interest or annual produce of said shares shall be applied in the maintenance, upbringing, and education of such of my children as shall be in pupillarity or minority at the time of my death, declaring that the shares destined to my daughters shall not be subject and liable to the debts and deeds of any husbands they or either of them marry, nor to the diligence of their husband's creditors, nor be assignable by such husbands, the *jus mariti* of such husbands being hereby expressly excluded, and in the event of any of my said sons or daughters dying without lawful issue of his, her, or their bodies, before said shares become payable as aforesaid, then and in that case the share or shares of such of them so deceasing shall appertain and accresce to the survivors or survivor of my said children equally as aforesaid, providing and declaring that in case one or more of my said children shall die as aforesaid leaving lawful issue of his, her, or their bodies, then and in that case such issue shall be entitled to the share of my estates which their deceased parent or parents would have been entitled to if alive, equally share and share alike, and the interest of such share or shares shall in such event be applied by my trustees towards the maintenance and education of such issue, and the share itself shall be divisible in equal portions amongst such issue on their respectively attaining the years of majority or marriage, if females, whichever shall first happen."

There was no direction to sell but the truster granted his trustees "powers of sale for the disposal of my said estates, heritable and moveable, by public roup or private bargain, and of compromise and submission, and in general to do or cause to be done everything necessary for the execution of the trust hereby created."

At the date of the truster's death his estate consisted of heritage to the value of £6000, and moveables to the value of £228, 12s. 5d.

The truster's widow died on 11th January 1889. One of his children, William Anderson, died intestate at Paisley on 25th April 1891, survived by his widow and a pupil son, his only child and heir, and the issue of a former marriage. With the consent and at the desire of the beneficiaries the trustees had continued to hold the heritable estate and divide the rents and income among them until shortly prior to the raising of this action, when a part of the property was sold.

In August 1894 Mrs Abigail Bell or Anderson, widow and executrix-dative of the deceased William Anderson, brought an action against the surviving trustees under James Anderson's trust-disposition and settlement to have it declared "that the share in the estate of the said deceased James Anderson to which the said deceased William Anderson succeeded in virtue of the said trust-disposition and settlement was moveable *quoad* his succession, and now belongs to his heirs *in mobilibus*," and for payment of the amount of that share which she alleged to be about £1500.

The pursuer pleaded—"(1) The realisation of said heritable estate being indispensable to the execution of the trust created under the terms of the settlement libelled, and the share of each of the beneficiaries therefore being moveable *quoad* succession, the pursuer is entitled to decree in terms of the declaratory conclusions of the summons. (2) The defenders are bound to hold just and reckoning with the pursuer as the executrix-dative of her late husband William Anderson in respect of the share in his father's estate which vested in him in terms of the said trust-disposition and settlement. (3) In virtue of her right of *jus relictæ*, the pursuer is entitled to one-third of said estate which vested in her said husband, and is thus in her own right entitled to decree of count, reckoning, and payment as concluded for."

The defender pleaded—"(1) No title to sue. (3) On a sound construction of the trust-deed libelled the share of the late William Anderson in his father's trust-estate is heritable, and the defenders should accordingly be assoilzied from the declaratory conclusion of the summons. (4) The defenders, the trustees of the late James Anderson, not being bound to account to the pursuer, the defenders are entitled to decree of absolvitor, with expenses."

Upon 22nd December 1894 the Lord Ordinary (KYLLACHY) sustained the first, third, and fourth pleas-in-law for the defenders, and assoilzied them from the conclusions of the action.

"*Opinion.*—In this case I may perhaps communicate to the parties the grounds of my judgment at greater length, but in the meantime I do not go into detail.

"My view is that there was here no conversion. There was no direction to sell. There was merely a power of sale, and I am unable to hold that a sale of the heritage was indispensable to the execution of the trust. It might have been indispensable if the truster had died, and the trust had come into operation while his children were under age, and when, therefore, there might have been various periods of payment as in the recent case of *Playfair's Trustees*. But in the events which here happened, the whole children were of age when the truster died. There was, therefore, only one period of division, and that being so, it is not suggested that there was

any difficulty in making the division *in forma specifica*. I therefore accept Mr Constable's argument, distinguishing this case from the case of *Playfair's Trustees;* and that I apprehend involves that I assoilzie the defenders from the conclusions of the summons."

The pursuer reclaimed, and argued—In all cases such as this it was necessary to take the intention of the testator as expressed in his deed as to whether there was to be conversion of the moveable estate or not. In this case the truster had expressed his intention by giving the directions to his trustees to pay the residue of his estate to his children, share and share alike, and by giving them power to sell the heritage. To operate conversion it was not necessary that there should be an express direction to sell the heritable estate—*Advocate-General* v. *Blackburn's Trustees*, November 27, 1847, 10 D. 166. The heritable property held by the trustees consisted of urban tenements, and it was therefore practically necessary for the execution of the directions given them to sell the heritage—*Fotheringham's Trustees, &c.*, July 2, 1873, 11 Macph. 848; *Baird, &c.* v. *Watson*, December 8, 1880, 8 R. 233. If the principle of *Buchanan* v. *Angus*, May 15, 1862, 4 Macph. 374, were to be followed, the estate would have to be divided, not according to the intention of the truster, but according to circumstances supervening after his death. The fact that the trustees had held the heritable property for some time after the period of possible payment had arrived did not change the character of the estate when the division was actually made—*Brown's Trustees* v. *Brown*, December 4, 1890, 18 R. 185. The case of *Sheppard's Trustees* v. *Sheppard*, July 2, 1885, 12 R. 1193, did not alter the practice of the Court if conversion could be implied from the terms of the deed. The cases of *Playfair's Trustees* v. *Playfair*, June 1, 1894, 21 R. 836; *Seton's Trustees* v. *Seton*, July 2, 1886, 13 R. 1047, were very special in their terms, and the directions to the trustees were not the same as in this case.

The respondents argued—It was admitted that up to the death of the pursuer's husband there was no change in the quality of the estate, and all the beneficiaries were willing that the estate should remain heritable, and that was an important fact, because even if it could be held that the testator had intended conversion, the actings of the beneficiaries had operated reconversion—*Hogg* v. *Hamilton*, June 7, 1877, 4 R. 845. The word "pay" upon which the pursuer had founded as showing that the truster intended conversion of his heritable estate into money did not convey that meaning as interpreted by the decisions—*Hogg* v. *Hamilton, supra, per* Lord President, 4 R. 848. The intention of the testator as to conversion was to be judged, not at the date of his signing the settlement, but at the date when it came into operation. In the case of *Playfair's Trustees, supra*, there was a necessity to convert the heritage into money, because there were varying periods of payment, but in this case all the beneficiaries were in majority, and capable of receiving their share of the heritage when it came to be divided, so that no conversion could be implied from the difficulty of managing the estate, as it could have been conveyed to the beneficaries *pro indiviso*—*Duncan's Trustees* v. *Thomas*, March 16, 1882, 9 R. 731; *Stuart* v. *Jackson*, November 15, 1889, 17 R. 85. It appeared therefore that conversion was not necessary for the execution of the trust, and in the circumstances it was plain that the rule of the case of *Sheppard's Trustees* v. *Sheppard, cited supra*, was applicable, and that conversion had not taken place—*cp.* also *Auld* v. *Anderson*, December 8, 1876, 4 R, 211; *Aitken* v. *Munro*, July 5, 1883, 10 R. 1097. The case of *Brown's Trustees* was a very special one.

At advising—

LORD JUSTICE-CLERK—The testator by his trust-disposition and settlement left his whole property to trustees, and gave directions that the widow was to receive one-third of his moveable estate, and that the trustees were to hold the residue of the estate for behoof of his children, share and share alike, and to pay each child's share to him when he attained the age of twenty-one, or in the case of a daughter, when she should be married. In the deed a power of sale was given to the trustees, but that power was limited to the case of it being found necessary for the execution of the trust. The circumstances here are that the testator was survived by all his children, five in number, and that they were all major at his death. The question is, one of the childen having died before any division of the property was made, whether his share of the succession, as regards the heritage left by the testator, is to be held as being heritable or moveable in its nature. It was conceded that there were certain provisions in this deed which from their very nature were inoperative at the testator's death, and must be excluded from our consideration.

I think it has been conclusively decided by the case of *Sheppard's Trustee* v. *Sheppard* that in such circumstances as we have here the estate must be held to be heritable. The only result of the decision is that the estate will not be paid in money, but will be conveyed to the beneficiaries *pro indiviso*, and I see nothing unreasonable in that result. Indeed the estate has remained unsold for many years with the concurrence of the beneficiaries, thus indicating that such was the best form in which it could be held in their interests. I am of opinion that the Lord Ordinary was right in the result he arrived at, and that his interlocutor should be affirmed.

LORD YOUNG—In my opinion the judgment of the Lord Ordinary is right, and I should have been of that opinion irrespective of the case of *Sheppard* at all, but the present case is, I think, when the facts are fully brought out, a simple and a clear one.

The testator was dealing in his will in

general terms with the whole of his estate of whatever kind it happened to be at his death, *i.e.*, whether it was heritable or moveable. We were told that he left landed property to the extent of £6000, and a very small amount of moveable property. What we have to deal with in this case is two-thirds of the moveable property and the whole of the heritable property, because he gave one-third of the moveable property to his widow absolutely and the liferent of one-third of his heritable estate, and she is now dead. With respect to the residue, he directs his trustees to hold the residue and remainder of his whole estate for the benefit of his five children who were then living, and of any others that might be born, "equally share and share alike." They are directed to pay, and I read the word "pay" as meaning to pay over money, or to convey heritage according to the quality of the estate, to each of the children upon each of them attaining majority. There is no other direction in the will which has any other bearing on this case, except the power given to the trustees to sell the estates, "heritable and moveable, by public roup or private bargain and of compromise and submission, and in general to do or cause to be done everything necessary for the execution of the trust hereby created."

Now, we must take the property he left as it existed at the time of his death unless there is a conversion, and there is none here unless it is contained in the power of sale, having regard to the fact that the testator was survived by five children all in majority. Now, I do not think that among the views I entertained and expressed in the case of *Sheppard* there is anything stated which would show that I thought that such facts as these I have just stated would show a desire for conversion on the part of the testator. I put the case during the argument whether if in this case there had been only one son surviving his father, it would have been necessary for the execution of the will to hold that conversion had taken place, and I think everybody must be convinced that it would be ridiculous to say that it was necessary. Then is it necessary to hold that conversion has taken place because the testator was survived by five children, all of whom, as we were told, continued to desire for seven years after the testator's death that the estate should remain heritable as it was at his death, and not be sold? Indeed, they are all of the same opinion still except the representative of the deceased son.

I cannot come to the conclusion that conversion is necessary for the execution of the trust, or that by the words of his deed the testator intended that conversion should take place.

I can find no more brief and emphatic explanation of the law relative to this matter than the words of the Vice-Chancellor in the case of *Smith* v. *Claxton*, January 17, 1820, 4 Madd. 484, at p. 492—"Under every will the true question is whether the devisor has expressed a purpose that, in the events which have happened, the land shall be converted into money. Where a devisor directs his land to be sold, and the produce divided between A and B, the obvious purpose of the testator is that there shall be a sale for the convenience of division, and A and B take their several interests as money and not land."

Now, I cannot find that the testator has expressed in his settlement any intention that the heritable property he left should be sold and the price divided among the various beneficiaries. I therefore think we should adhere to the Lord Ordinary's interlocutor.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—There are some principles in the law of conversion which are well settled. A direct instruction to trustees to sell heritable subjects and convert them into money operates conversion. A mere power to sell does not operate conversion unless the necessity for the exercise of the power arises, in which case conversion takes place.

The question we have to consider in this case is in connection with a power of sale given by the testator to his trustees, and we have to say if there is anything in this deed, looked at in view of the circumstances which existed at the time of the truster's death, which would lead us to the opinion that it was the intention of the truster to convert his heritable into moveable estate, or anything which made it necessary for the carrying out of the trust so to convert it.

I am unable to find anything of that kind, and I therefore think we should affirm the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuer—Salvesen—T. B. Morison. Agent—Peter Morison, junior, S.S.C.

Counsel for the Respondents — C. S. Dickson — Constable. Agents — Carment, Wedderburn, & Watson, W.S.

Saturday, January 19.

[Lord Wellwood, Ordinary.

SECOND DIVISION.

LILLY AND OTHERS *v.* STEVENSON & COMPANY.

Shipping Law — Ship — Construction of Charter-Party—Commencement of Lay-Days—Demurrage—Exception.

A charter-party provided that a ship should proceed to one of several ports as ordered by the charterers, and there receive a full cargo of coals "at the berth or berths pointed out by charterers' agents, if required. . . The