that in all cases where a pursuer dies after bringing an action of declarator of marriage, her executor is entitled to be sisted as pursuer so that he may continue the action. The transmissible rights of the deceased which pass to the executor, and which the executor is entitled and probably bound to enforce, might largely depend on whether she was married to the defender or not. Thus, for example, if a man died against whom a woman had brought an action of declarator of marriage, and after him the woman also died, the executors of both would be entitled to come in and insist upon the action being decided, because the executors of both would be interested in the question whether they were married persons or not. If they were not married persons the whole of the man's estate would go to his own executor; if they were married a considerable portion would go to the executor of the widow. An action of damages for seduction would admittedly pass to the executor of the pursuer who died during its dependence, and it is not, I think, doubtful that the defender would be at liberty to aver and prove that he was married to the deceased pursuer—for that would be a legitimate and conclusive defence to the claim of damages for seduction. It is, I think, a mistake to suppose that a question regarding a disputed marriage cannot be raised, tried, and decided after the death of either, or indeed both of the parties, by anyone having legitimate interest in the question. Here it is, I think, the right of the defender to have absolvitor with expenses from the declarator of marriage, unless the executor of the deceased pursuer shall establish it. The executor's right to be sisted is I think absolute.

In this case we are only concerned with the conclusion for damages. The question really is, whether the executor of a deceased pursuer of an action of damages for seduction is entitled to be sisted and pursue that conclusion, or shall be excluded from doing so because there is in the summons a prior conclusion for declarator of marriage. I see no force in the defender's argument, and am therefore of opinion the Lord Ordinary was right in sisting the executor of the deceased pursuer.

LORD TRAYNER—The mode in which the conclusions of the summons are expressed creates a difficulty in disposing of the question raised by this reclaiming-note. Read strictly, these conclusions exclude from the consideration of the Court the conclusions for damages until there has been a decision pronounced on the first conclusion. Now, on the first conclusion there has been no decision or finding of any kind, and I greatly doubt, the pursuer being dead, whether any finding can competently be pronounced thereon.

I desire to reserve my opinion on the question whether a declarator of marriage can in any circumstances be either raised or insisted in by any representative of one of the parties. But having regard to the averments and pleas of the pursuer, I think I may read the conclusion of the summons as really alternative, and in that view of the summons I am of opinion that the deceased pursuer's executor may competently be sisted to insist in the second of the alternative conclusions being one for a money claim.

LORD MONCREIFF—The Lord Ordinary has sisted the executor as pursuer, but he has practically sustained his title only to the extent of suing the second conclusion of the summons, because although he has not dismissed the action as regards the first conclusion, he only allows a proof as regards the second.

Although the second conclusion is awkwardly worded, I think it is in substance simply an alternative conclusion. After the pursuer raised the action she could have departed from the first conclusion at any time and taken up the second. The action was proceeded with because the defender refused to recognise her claims, and the pursuer having died while carrying on the action I do not see why the executor cannot now take up the second conclusion of the summons. I therefore concur.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Pursuer—Comrie-Thomson—W. Wallace. Agent—A. Laurie Kennaway, W.S.

Counsel for the Defender—Salvesen—Younger. Agent—Campbell Faill, S.S.C.

Friday, December 11.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

[Lord Pearson, Ordinary.

FOX AND ANOTHER (CARRUTHERS' TRUSTEES), PETITIONERS.

SYDNEY AND ANOTHER (ALLAN'S TRUSTEES), PETITIONERS.

Trust—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 3—*Jurisdiction—English Trust.*

The Trusts (Scotland) Act 1867 applies only to Scottish trusts. The Court of Session has consequently no jurisdiction, under section 3 of that Act, to grant power to English trustees under an English trust to sell heritage in Scotland which forms a portion of the trust-estate.

On July 17th 1896 William Fox and another, testamentary trustees of the late Archibald Carruthers, solicitor, London, presented an application to the Court, under section 3 of the Trusts Act 1867, for authority to sell certain heritage in Scotland forming part of the trust-estate.

The testator was domiciled in England, and the petitioners, who were also domiciled in England, obtained probate in their favour on 23rd November 1895.

The petition set forth that the portion of the trust-estate situated in England was insufficient to meet the testator's liabilities by £1953.

The statement of the testator's property situated in Scotland showed a free surplus of £19. The petition proceeded—"It is apparent, in view of the smallness of the above margin of free rental, that it is impossible to borrow any further sum on the security of the property, and it is therefore necessary that the estate should be sold in order that the balance of the price may be applied in paying, as far as possible, the personal debts due by the deceased. The truster has not conferred on the petitioners a power of sale; such power, however, is not in the circumstances inconsistent with the purposes of the trust, and is necessary for the execution thereof."

The petitioners accordingly craved the Court to grant power and authority to them as trustees to sell and dispose of the said heritable estate.

The Lord Ordinary (STORMONTH DARLING) refused the petition.

Note.—"The petitioners are English trustees under the will of an English solicitor, and the estate is situated wholly in England, with the exception of a small landed property in Scotland. The beneficiaries are the pupil children of the testator, but the estate is said to be insolvent. If so, the property in Scotland could be attached under bankruptcy proceedings in England. No such proceedings, however, have been taken, and the petitioners apply to this Court to exercise the discretionary powers conferred by section 3 of the Trusts Act of 1867 by authorising them to sell the Scottish property for the benefit of the creditors.

"It seems to me that the Act is inapplicable. Before I could grant the powers craved I should have to inquire whether these were consistent with the purposes of the trust and expedient for its execution. I should also have to be satisfied that the petitioners themselves had no power of sale. All this would require the construction of an English will, and possibly an inquiry into English law. That is not the duty of a Scottish judge under an Act the purpose of which is to 'facilitate the administration of trusts in Scotland.' The exercise of such a discretionary power is for the Court to which the trust itself is subject. If that Court were to grant the desired authority, and any difficulty were to arise in carrying out the sale, then it would be time enough to apply to this Court for its aid."

A similar application was presented to the Court on 24th September 1896 by Henry Sydney and another, the marriage-contract trustees of James Allan and his wife, residing in London.

In this case, too, the trusters and the trustees were domiciled in England, and the bulk of the trust-estate was situated in England. The heritage in Scotland, which the trustees sought power to sell, consisted of certain houses in Penicuik, and the grounds upon which the application was made were that the marriage settlement did not confer a power of sale, and that the property in Scotland required more attention than the trustees were able to give to it.

The Lord Ordinary (PEARSON) reported the case to the Inner House.

Note.— . . . "The Act itself empowers the Court to grant power of sale 'on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof.' The petition does not suggest any method by which the Court is to ascertain whether the statutory conditions exist in the case of an English trust. Nor do I find any sufficient ground for deciding, or rather for assuming, that these English trustees have not already a power of sale either under the trust-deed or at common law.

"It appears from documents produced that in April last year the spouses applied to Mr Justice Stirling in London, under the Settled Land Act 1882, to have the trustees of the marriage settlement appointed trustees under that Act with full power to sell and dispose of the Penicuik subjects, and they lodged an affidavit in that application to the effect that it would cost £150 to put the property in sanitary condition and tenantable repair, and that neither they nor the trustees had the money required; that there were no children of the marriage, and that the settled property was absolutely vested in the survivor of the spouses; that there was no power of sale under the settlement, and that they and the trustees concurred in desiring a sale. On 17th June the English proceedings were stayed by consent, the husband undertaking forthwith to proceed to sell the property, and to account to the trustees for the price. I was informed that this course was adopted because the Judge was of opinion that he could not grant the power, seeing that section 1 (3) of the Settled Land Act provides —'This Act does not extend to Scotland.'

"The petitioners say truly that unless the Scottish Court aids them the trust will be greatly disadvantaged; and they refer to the English proceedings as instructing sufficiently (1) that they have not power to sell the subjects, and cannot obtain it in England; and (2) that a sale is expedient for the execution of the trust, and not inconsistent with the intention thereof. I doubt whether the English proceedings fully make out either proposition, but assuming that they do, or that these conditions can be otherwise established, the larger question remains, namely, whether it is competent for the Court to empower English trustees to sell Scottish heritage belonging to the trust. It was suggested that it was not necessary to decide this question, and that a decree of Court professing to confer the power would be sufficient to satisfy a Scottish purchaser. But I do not think that a

doubt as to the competency of a statutory proceeding can be thus slurred over.

"I am disposed to hold the petition incompetent under the statute, on the ground that the statute does not apply to a purely English trust. The fact that part of the trust assets is heritable property in Scotland may give the Court jurisdiction over the trustees to certain effects, and may enable them to invoke the law of Scotland in matters relating to that property. But the petition, while it relates indirectly to that property, has for its primary purpose, and indeed its only purpose, to ask the Court to confer certain powers upon English trustees. Now, a trustee's powers are measured by the law of what is sometimes called the domicile of the trust, and it is antecedently improbable that the Courts of one country would be authorised, even by a common legislature, to enlarge the powers of trustees who are answerable to the courts of another country. At all events, I should expect it to be done in express terms, and not to be left to inference and construction. But further, I think that, on a sound construction of the statute, this petition by English trustees is not within its scope.

"The decisions which have been pronounced on petitions under the 12th section of the statute (*Hall and Others*, 1869, 7 Macph. 667; *Brockie*, 1875, 2 R. 923) go far to support this conclusion.

"I have, however, assented to the suggestion that I should report the petition on the ground that the general question of competency under the third section has not been authoritatively decided, and that I am informed that a similar petition is now depending in the Inner House."

The petitioners in the first case reclaimed, and the reclaiming-note and Lord Pearson's report were taken together in the Inner House.

The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), section 3, enacts—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts on being satisfied that the same is expedient for the execution of the trust and not inconsistent with the intention thereof . . . (1) To sell the trust-estate or any part of it."

The full title of the said Act is "An Act to Facilitate the Administration of Trusts in Scotland." The preamble affirms that "it is expedient that greater facilities should be given for the administration of trust-estates in Scotland." Sec. 20 enacts —"This Act may be cited for all purposes as 'The Trusts (Scotland) Act 1867.'"

Argued for the petitioners—The Court had jurisdiction to deal with all matters affecting heritage situated in Scotland. The present cases were precisely the converse of *Hewit's Trustees* v. *Lawson*, March 20, 1891, 18 R. 793, where the Scottish Courts had sisted process to enable the English Courts to determine the extent of their jurisdiction over English heritage belonging to a Scottish testator and forming part of a Scottish trust.

At advising—

LORD PRESIDENT — The two petitions which we have now to dispose of—the one under reclaiming-note from Lord Stormonth Darling's interlocutor, and the other on the report of Lord Pearson—have certain features in common, which in my opinion furnish adequate ground for their decision.

Both are petitions under the Trusts (Scotland) Act 1867. In both the trustees are domiciled Englishmen, acting under the trusts of Englishmen.

The trusts are, in every sense of the term, English trusts, except in so far as the estate, in each case, comprehends as part some heritage in Scotland.

Now, the first question is that put and answered by Lord Stormonth Darling—Does the Trusts (Scotland) Act apply to such trustees to any effect, and especially to the effect of enabling them to petition, and us to act under section 3? In my opinion it does not.

This matter may be easily tested. The Act does two sets of things—it confers certain powers on trustees themselves, and it authorises them to apply to the Court of Session for certain other powers. Now, the 1st section tells us what kinds of trusts and trustees are meant and included by these words; and then the second section begins—"In all such trusts the trustees shall have power to do the following acts," so to say, at their own hand. It is an enlargement of the inherent powers of trustees. Now, I do not think that it can seriously be maintained that this section applies to English trustees such as are the petitioners; for this would mean that in a statute with a Scotch title Parliament had altered the common law powers of all English trustees, and had done so in the terminology of the Scotch law. And yet this section says, in so many words, that it applies to all the trusts to which the Act applies. It seems to me to follow that the limitation obviously suggested by the preamble and the short-title section is implied in all the enactments contained in the statute. An examination of the other sections which directly confer powers on trustees confirms the conclusion that they do not apply to English trustees.

Well now, it is, I think, perfectly plain that the trustees who are entitled to apply to the Court of Session are those trustees, and those only, on whom the other sections directly confer the other powers. The sections relating to petitions to the Court give rise of themselves to the same argument against their application to English trustees. For instance, if section 3, the one we have to deal with, applies to the petitioners, it would seem to follow that so would section 7, so that virtually all English trusts would be brought under the control of the Scotch Courts as well as of the English Courts.

I am for adhering to Lord Stormonth Darling's interlocutor, and refusing the prayer of the petition to Lord Pearson.

LORD ADAM concurred.

LORD M'LAREN—I do not doubt that this Court has power to grant authority to trustees to sell a heritable estate in Scotland. That would be so, for example, when a sale was necessary to enable the trustees to pay debts, or if there were any other unavoidable cause of sale. Certainly if this Court has not the power, no other Court could grant a power of sale of heritable estate in Scotland. But then it appears to me that these petitions have been brought without putting the Court in possession of the necessary material for the exercise of its jurisdiction. They are petitions under the Trusts (Scotland) Acts, and I agree with your Lordship in the chair that these Acts postulate the entire jurisdiction of this Court over the subject-matter of the case. We have no authority under the Trust Acts to determine any question of discretion or expediency relating to an English trust by reason of a part of the trust-estate happening to be heritage in Scotland.

I should not wish to suggest that there is any insuperable difficulty in obtaining the necessary powers. If the Court which has jurisdiction over the trust should make an order to the effect that a sale was necessary, and if the parties applied to the Court of Session, I should be disposed to give every facility for explicating the jurisdiction through our intervention.

LORD KINNEAR was absent.

In the case of Fox, the Court adhered to the interlocutor of the Lord Ordinary, and refused the prayer of the petition.

In the case of Sydney, the Court refused the prayer of the petition.

Counsel for the Petitioners Fox and Another—Younger. Agents—Constable & Johnstone, W.S.

Counsel for the Petitioners Sydney and Another—R. Macaulay Smith. Agent—Robert D. Ker, W.S.

HOUSE OF LORDS.

Monday, December 14.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Shand, and Davey).

OGSTON *v.* ABERDEEN DISTRICT TRAMWAYS COMPANY.

(*Ante*, 20th December 1896, vol. xxxiii., p. 282, and 23 R. 480.)

Nuisance—Burgh—Obstruction of Streets—Title to Sue Authors of Nuisance or Local Authority.

A tramway company were in the practice of removing the snow from their track to the sides of the street by means of a snow-plough, and by the use of salt. The effect of this operation was to accumulate at the sides of the street a freezing mixture of snow and salt.

In an action for interdict against the company by a member of the public using the streets for horse traffic, *held* that the practice complained of was proved to be a nuisance, that it was not sanctioned by the local authority vested with the management of the streets, and that the pursuer was accordingly entitled to interdict.

Opinions (by Lords Watson and Shand) that it would not have been a valid defence that the nuisance was sanctioned by the local authority.

Judgment of the Second Division of the Court of Session *reversed.*

This case is reported *ante, ut supra.*

The complainers appealed.

At delivering judgment—

LORD CHANCELLOR—In this case the appellant, who has a place of business in Loch Street, Aberdeen, complains that the Aberdeen District Tramways Company obstruct the highways in the city of Aberdeen and create a nuisance therein whenever a snowstorm occurs in that city. As to the facts which give rise to the complaint there is no serious dispute, and I do not understand that the Lord Ordinary or the Second Division of the Court of Session entertained any doubt that a serious inconvenience to horse traffic was caused by the acts complained of. It appears that the Tramway Company when a snowstorm occurs in Aberdeen are in the habit of clearing the snow off their track and piling it at the side of their rails. The heaps of snow thus piled are left sometimes for as long a period as a week together, and for the purpose of facilitating their own traffic the Tramway Company scatter salt, which causes the snow in the groove of their rails to melt. The mixture thus created flows by gravitation into the heaps of snow already collected at the side and forms a freezing mixture, which I think it cannot be doubted causes injury to the horses and inconvenience to the traffic wherever and whenever the carriage traffic, other than that of the Tramway Company themselves, is compelled to force its way through the freezing mixture of salt and snow. It cannot be doubted that unless this can be justified by some legal authority this does constitute a nuisance to the highway.

If the question had arisen in England, I think some doubt might be entertained whether the obstruction as proved was such that a private person could sue without further proof of peculiar damage to himself, but that question does not arise according to the law of Scotland. Mr Ogston is entitled to sue in respect of an interference with the highway, which is applicable to him in common with the rest of Her Majesty's subjects.

It is sought to justify the proceeding of the Tramway Company, which I have described, by the powers conferred by their Act of Parliament, and if the matters do constitute a nuisance, that is the only justification which is to be found on this record.