Court to make an assumption from a few facts which were of an entirely negative nature. A mere averment of silence, which was equally consistent with life or death, was not in itself sufficient to render a case such as the present one relevant. In all the other cases in addition to silence some circumstances were averred to show that the alleged deceased ran some particular risk. The record here disclosed no such fact or circumstance. The present action was at common law and claims such as this were expressly excluded under the Presumption of Life Limitation (Scotland) Act 1891 (54 and 55 Vict. cap. 29), sec. 11. The following cases were cited:—*Fairholme* v. *Fairholme's Trustees*, 1858, 20 D. 813, and *Garland* v. *Stewart*, 1841, 4 D. 1.

LORD JUSTICE-CLERK—I do not propose to indicate any opinion whatever as to what the result of a proof in this action may be. It may quite well be that, on the evidence submitted, the Lord Ordinary or the Court may come to be of opinion that it is not sufficient to overcome what at one time was a very strong presumption, namely, the presumption of life, and apart from the suggestions that have been made as to the effect of the Presumption of Life Act, and the changes in social circumstances in later years, I think it still remains a strong presumption.

But in all the cases of this sort—and cases raising disputes of this kind have been brought before the courts of law for a period of between two and three hundred years at least—it is agreed by both parties that so far as the recorded decisions show there has never been one which has been disposed of without inquiry. Mr Robertson pointed out some respects in which the averments here are less specific and less precise than what they have been in other cases, but I cannot say that it is impossible that the evidence which the pursuer may bring forward may not be sufficient to justify the Court in coming to the conclusion that the presumption of life—which, after all, is only a presumption—has been overcome and that the man is now dead.

The date at which the man must be presumed to have died must also depend on the evidence. I do not think that the Court would be shut up either to finding that the pursuer's husband died on 31st December 1900 or to assoilzieing the defenders, because the cases appear to show quite clearly that the Court may well say—we cannot accept the date which the pursuer puts forward as the proper or probable date of death, but will substitute a later date as that is disclosed by the evidence. On the whole matter I think we cannot on this record come to the conclusion that the pursuer could not adduce evidence sufficient to justify a decree in her favour to the effect that her husband had died at some date prior to the raising of the action. I do not in the least say that that will necessarily be the result, because the question will be entirely open, but I think it is necessary that before the Court decides the question the evidence, and not merely the averments, of parties should be before us. I am therefore for recalling the Lord Ordinary's interlocutor and remitting to him to allow a proof.

LORD DUNDAS—I agree. My first impression was in favour of the Lord Ordinary's view, but upon consideration I do not think we ought to throw the action out at this stage. It appears that there is no reported case of this kind which has been decided without inquiry into the facts; and I confess that some of the decisions to which we have been referred have gone rather further than I had recollected that they did. How this particular inquiry may end one cannot say, but I agree that the pursuer is entitled to have a proof before answer.

LORD SALVESEN—I am of the same opinion. I think the pursuer discloses a *prima facie* case on record. The main facts that she founds upon are the habits of dissipation into which her husband fell, his consequent poverty, and the circumstance that on two occasions he had suffered from delirium tremens. His state of health, therefore, and his circumstances were such as to indicate that his prospects of life were not good. If he remained in this country, as he appears to have done when he was last known to exist, it is difficult to suppose that, with communications so excellent as they are nowadays, all trace of him should be lost if he had continued in life.

There are other circumstances which were mentioned in the course of the debate, which may very much strengthen the pursuer's case if they are made matter of evidence, as, for instance, the fact that he had children for whom he may or may not have felt affection, for his failure to communicate with them or to make any inquiry regarding them may raise the inference that he was unable to make such inquiry. I should be very slow in circumstances like the present to foreclose the pursuer from having the fullest inquiry into the facts, but, of course, it will be open to the Lord Ordinary to consider the whole proof led before him and to draw such inferences as the circumstances justify.

LORD GUTHRIE was absent.

The Court recalled the interlocutor of the Lord Ordinary and allowed a proof before answer.

Counsel for the Pursuer—Wilton, K.C.—Scott. Agents—Armstrong & Hay, S.S.C.

Counsel for the Defenders—W. J. Robertson. Agent—A. C. Drummond, Solicitor.

Tuesday, March 18.

SECOND DIVISION.

HARRIS'S TRUSTEES, PETITIONERS.

Trust — Nobile Officium — Jurisdiction — English Trust with Scotch Heritage — Petition to Sell Lands in Scotland—Order of English Court.

Trustees under an English trust holding Scotch heritage, having obtained an order of the High Court of Justice in England setting forth that it was

expedient and in the interests of the beneficiaries under the will that a certain estate in Scotland should be sold, and that by the law of England such a sale would be competent under the Settled Land Acts 1882 to 1890, petitioned the Court in virtue of its *nobile officium* for power to sell the estate in question. The testator under his will gave his trustees power to sell and dispose of any part of his estate except the estate in question. The Court (*dis.* Lord Dundas), exercising an auxiliary jurisdiction, and with the view of enabling the order of the English Court to be carried out, *granted* the powers craved.

Allan's Trustees, 1897, 24 R. 718, 34 S.L.R. 532, *followed*.

Percy Cormack Searle, retired lieut.-colonel in His Majesty's Indian Army, residing at Glenalmond, Perthshire, and Florence Ethel Cartier Harris or Searle, his wife, as trustees acting under the will of the late Henry William Harris of the Cairnies, Perthshire, dated 30th July 1892, under a deed of appointment of trustees executed between Thomas Marshall Harris of Collingwood Tower, Camberley, Surrey, the sole trustee then acting in the trust, of the one part, and Colonel and Mrs Searle of the other part, *petitioners*, presented a petition to the Second Division of the Court of Session as an appeal to the *nobile officium* of the Court, in which they craved the Court "to grant power and authority to the petitioners as trustees foresaid to sell and dispose of all and whole the lands of Easter and Wester Cairdneys or Cairneys, with the mill thereof, mill lands," &c.

The petition stated that the testator died on 14th November 1899 domiciled in England, and that by his will he "conveyed his whole estate and effects, heritable and moveable, to his cousin Thomas Marshall Harris, General Alexander Thomson Reid, West Brighton, and Andrew Hunter Ballingal, W.S., Perth, with power of assumption of new trustees.

"The testator gave his trustees power in so far as necessary for payment of his debts or fulfilment of any of the other purposes of the trust to sell and dispose of all or any part of his estate or effects except the said lands and estate of Cairnies.

"After the death of the testator the said will was proved . . . in the Principal Probate Registry of the High Court of Justice, London.

"The testator was survived by his daughters, the petitioner Florence Ethel Cartier Harris or Searle (who married on 10th June 1893 the petitioner Percy Cormack Searle), and Edith Maud Winifred Harris and Hilda Muriel Harris, who are both unmarried, and who now reside at . . . Kensington, London. The petitioner Mrs Florence Ethel Cartier Harris or Searle has had two children, viz., Dorothy Cornelia Searle, who was born on 13th April 1894 and died 28th September 1897, and Reginald Henry Arthur Searle, who was born on 12th December 1901, and who resides at Annfield Cottage, the Cairnies aforesaid.

"The petitioner Mrs Florence Ethel Cartier Harris or Searle by an originating summons, dated 20th February 1918, in which the said Reginald Henry Arthur Searle by Percy Cormack Searle, his guardian *ad litem*, Edith Maud Winifred Harris, Hilda Muriel Harris, and Thomas Marshall Harris were called as defendants, made an application in the High Court of Justice, Chancery Division, with reference to the sale of the said estate of Cairnies, and following thereon Mr Justice Astbury, upon the 22nd day of April 1918, made an order in the following terms:—

"'Upon the application of the plaintiff . . . the Judge doth declare that it is expedient and in the interests of the beneficiaries under the will of the said Henry William Harris that the estate known as the Cairnies in the county of Perth, being part of the heritable and real estate in Scotland settled by the said will, should be sold, and that by the law of England, so far as it controls the said will and the settlement thereby made, a sale thereof might be made under the Settled Land Acts 1882 to 1890, which Acts do not, however, extend to Scotland: And it is ordered that the defendants Thomas Marshall Harris or his successors in office may, as such trustee or trustees as aforesaid, be at liberty to apply to the Court of Session at Edinburgh for all necessary relief to enable effect to be given to the aforesaid declaration, and particularly to obtain power and authority to sell the said Cairnies estate. . . .

"Under the testator's will the petitioner Mrs Florence Ethel Cartier Harris or Searle is entitled during her life to the use and enjoyment of the said estate of Cairnies, and the sole other parties now interested in the trusts concerning the said estate are the said Reginald Henry Arthur Searle, Edith Maud Winifred Harris, Hilda Muriel Harris, and Thomas Marshall Harris."

Argued for the petitioners—The petition was ruled by the case of *Allan's Trustees*, 1897, 24 R. 718, 34 S.L.R. 532, and *Pender's Trustees*, 1907 S.C. 207, 44 S.L.R. 196. The question at issue was the powers and duties of the trustees. This depended on the terms of the trust deed, which must be construed by the domicile of the testator. The Scottish Courts in intervening did no more than exercise an auxiliary jurisdiction, facilitating the administration of the trust, and leaving the whole responsibility with the English Courts—*Allan's Trustees* and *Pender's Trustees* (*cit. sup.*); Story's Conflict of Laws (8th ed.), pp. 651, 661, and 671; M'Laren on Wills and Succession, vol. i, sections 55, 56, 60, and 62. The interpretation of testamentary provisions, which were in their nature personal though affecting heritable estate, fell to be ruled by the law of the domicile—*Studd* v. *Cook*, 1883, 10 R. (H.L.) 53, at p. 59, 20 S.L.R. 566; *Orr Ewing's Trustees* v. *Orr Ewing*, 1885, 9 A.C. 34, 10 A.C. 453, *per* Lord Watson at p. 531, 13 R. (H.L.) 1, 22 S.L.R. 911. In a question between a beneficiary and a trustee the courts of the domicile alone would act—*Orr Ewing's Trustees* v. *Orr Ewing*, *per* Lord Watson at p. 535; Westlake's International Law (5th ed.), p. 228.

At advising—

LORD JUSTICE-CLERK—The point raised by this petition is not without difficulty, and I was at first inclined to the view that we ought not to grant the prayer of the petition. On a more careful consideration of the cases, however, I have come to be of opinion that we ought to adopt the course which was followed in the cases of *Allan*, 24 R. 718, 34 S.L.R. 532, and *Pender*, 1907 S.C. 207, 44 S.L.R. 196, to which we were referred.

The testator was a domiciled Englishman, and he left a will by which his whole estate and effects, heritable and moveable, were conveyed to three trustees, two of whom were English. The will was proved in England. It conveyed by appropriate language, *inter alia*, the estate of Cairnies to his trustees. But with reference to that estate, when granting to his trustees power to sell any part of his estate he excepted Cairnies.

The trust estate is being administered in England, and the trust is an English trust subject to the jurisdiction of the English Courts. Mr Justice Astbury has pronounced an order similar to that which was pronounced in the two cases above referred to. This Court is now asked to intervene so as to make that order effectual as regards the Scottish estate of Cairnies.

The will is quite effective as giving the trustees a good title to the estate, and that being so, I think the opinions in the case of *Leith* (10 D. 1137) justify the conclusion that the powers of the trustees and the purposes of the trust fall to be regulated by the Courts of England to which the trust as an English trust is subject, provided that the Scottish Court gives such ancillary order as may be necessary to explicate the jurisdiction and order of the English tribunal.

In exercising the jurisdiction which is now appealed to we have always been anxious to aid the Courts in England. In the case of *Allan* it was very clearly explained that this was the attitude to be adopted. The Court of Session there refused to give the trustees power to sell under the Trust (Scotland) Act, but they had no difficulty in pronouncing an interlocutor similar to that which we are now asked to pronounce in order to explicate the jurisdiction of the English Court over the trust, so that a good title might be given to the purchaser of Scottish heritable property. In my opinion that case warrants us, and indeed requires us, to grant the prayer of this petition, and I move your Lordships accordingly.

LORD DUNDAS—This petition should, in my judgment, be refused. The testator, a domiciled Englishman, by his will empowered his trustees, in so far as necessary for payment of his debts or fulfilment of any of the other purposes of the trust, to sell and dispose of all or any part of his estate or effects except the lands and estate of Cairnies which are situated in Scotland. Looking to the express exception of Cairnies from the power of sale, it is admitted that a petition to this Court, either under the Trusts Acts or to its *nobile officium* for authority to sell Cairnies, must in present circumstances have failed. On an application, however, to a judge of the High Court of Justice in England (Chancery Division), a declaration has been obtained that it is expedient and in the interests of the beneficiaries under the will that Cairnies should be sold, "and that by the law of England, so far as it controls the said will and the settlement thereby made, a sale thereof might be made under the Settled Land Acts 1882 to 1890, which Acts do not, however, extend to Scotland;" and it was ordered that the trustees be at liberty to apply to the Court of Session at Edinburgh for all necessary relief to enable effect to be given to the aforesaid declaration, and particularly to obtain power and authority to sell the said Cairnies estate. The trustees now petition this Court to exercise what is called its auxiliary jurisdiction, and in respect of the declaration and order above referred to, to authorise the sale of Cairnies, which this Court could not have done in the administration of its ordinary or original jurisdiction. I am unable to see how we can grant such a request.

A question of international law is raised whether the competency of the proposed sale must be judged by the *lex rei sitæ* or by the *lex domicilii* of the trust. If by the former, the sale cannot be authorised. I concede that if the matter were properly one of construction or interpretation of the language of the will or of mere trust administration, the law of England must rule. But there seems to me to be no room for construction or interpretation of the testator's language; he has used no terms of art or of special technical significance, but has in plain and unambiguous words excepted Cairnies from the power of sale. No question of technical construction is here raised—*cf. Thomson's Trustees*, 1851, 14 D. 217; *Griffith's Judicial Factor*, 1905, 7 F. 470, 42 S.L.R. 361. And to authorise the sale of land in a manner contrary to the law of the country in which it is situated appears to me to be a proceeding outside the ordinary limits of trust administration. The *lex situs*, as I understand it, must govern exclusively in regard to all rights and interests—not merely as to forms of title—in or affecting land within the territory. I think the learned editor of Bar (Gillespie's Bar, 2nd ed. p. 832) is quite correct in stating as matter of principle that "the law of the *situs* will determine the powers of trustees of a domiciled foreigner vested with heritable property." The disability of the trustees to sell Cairnies arises, in my judgment, from the law of the *situs*, not of the domicile. I find illustrations of this view in Story's Conflict of Laws (8th ed., p. 600), where it is shown on the authority of American decisions, which appear to me to be sound, that a foreigner, being a married woman, who owned land in England, could not sell it without consent of her husband (which the English law requires), although by the law of her own domicile she could validly convey it without such consent; and again that a foreigner over twenty-one years of age, but (by his *lex domicilii*) still a minor, has capacity to convey lands in England belonging to him,

because the question of capacity must be ruled by the *lex situs* and not by that of his domicile. So in *Whitwham* v. *Piercy*, [1895] 1 Ch. 85, the powers conferred on his trustees by an English testator with reference to land owned by him in Sardinia were determined according to Sardinian (Italian) law.

I should greatly regret that even a semblance of discord should arise between our Courts and those of England; but I do not think the refusal of this petition would involve so untoward a result. We are told that the learned Judge, Astbury, J., was not referred to and did not consider the law of Scotland. He merely affirmed, as I understand, that the sale of Cairnies would be expedient in the interest of the beneficiaries; and that by English law, so far as that controls the will, such sale might be made under Acts which do not extend to Scotland. The learned Judge no doubt proceeded to authorise the trustees to apply to the Scots Court for all necessary relief and for power to sell the said estate; but in so pronouncing I do not suppose that he intended to indicate that this Court is bound, either as matter of law or of comity, to authorise a sale contrary to the law of Scotland, which it is bound to administer.

The cases relied on by the petitioners do not in my judgment rule the present case. In *Pender's Trustees*, 1907 S.C. 207, 44 S.L.R. 196, the matter seems to have been one of proper trust administration. In *Allan's Trustees*, 1897, 24 R. 718, 34 S.L.R. 532, although the estate was not, as in the companion case, *Carruthers' Trustees*, 24 R. 238, 34 S.L.R. 166, actually insolvent, its financial situation seems to have been such as might have warranted the Scots Court in authorising a sale without running counter to the law of Scotland. But if the decision in *Allan's Trustees* was intended to go the full length now claimed, it ought, I humbly think, to be reconsidered.

LORD SALVESEN—In this case I have formed a clear opinion that the prayer of the petition ought to be granted. I hold that the point was decided in the case of *Allan's Trustees*, 24 R. 718, 34 S.L.R. 532, and no reason occurs to me why the soundness of that decision should be doubted. The First Division had already decided in a prior application that if the law of Scotland fell to be applied they would feel themselves compelled to refuse to sanction a sale of the heritable estate. It is true that there was no express prohibition against the sale of the Scottish estate such as occurs under the will of the late Mr Harris, but that distinction appears to me to be quite immaterial. There, as here, the trust was an English trust, and an order had been obtained from the Court of Chancery in England to the effect that it was expedient to sell the Scottish heritage, and authorising the trustees to apply to the Court of Session for authority to enable a sale to be carried out. The First Division, after fully considering the petition, granted the authority asked, holding that in so doing they were merely exercising an auxiliary jurisdiction to make the order of the English Court effectual.

Apart from authority I should have reached the same result on principle. An English testator is presumed by a necessary legal fiction to know the law of the country to which he belongs. He must, therefore, be taken to know that it is within the powers of an English Court notwithstanding a direction by him to the contrary, to authorise the sale of landed property belonging to him in England. He cannot be supposed to know that a different rule applies in Scotland, and that in the present state of our law we are bound to give effect to an express direction by a Scottish testator that his landed property in Scotland should not be sold. Even in Scotland such a direction is of no value where it has become necessary to sell the landed property in order to meet debts, but an English testator must be taken to submit to the administration which English law authorises or imposes upon his trustees. The domicile of the testator and of the trust being English, the law of England alone settles the due administration of his estate by the trustees whom he has appointed.

It is conceded that the law of England applies in all matters relating to the construction of an English trust deed. But it is suggested that what we are here dealing with is not a matter of construction, for the prohibition against a sale of the Scottish estate is clear and unambiguous. I agree that there is no question of construction in the narrow sense, but, on the other hand, I think that the effect of a direction must be determined by the law of the domicile of the trust, which is not, as I conceive, a question of the capacity of the trustees. Nor do I, as at present advised, hold that even if it were so the *lex loci rei sitæ* would necessarily apply. My impression is the other way. The sole reason why it is necessary to obtain the authority of the Scottish Court to the sale of the estate is to obviate an objection which would appear on the face of the title if the domicile of the trust were in Scotland. That objection is removed if we grant the prayer of this petition, as I agree that we ought to do.

LORD GUTHRIE concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioners—R. C. Henderson. Agents—Melville & Lindesay, W.S.