one head than under another. It is equally clear under all.

Lord Craighill—I concur. If the document founded on is anything it is a bequest. It is not a donation *inter vivos*, because no money was delivered. The cheque no doubt was given, but that, as it was to be payable only after the granter's death, was delivery of nothing by him. His estate remained what it would have been had the document in question been neither made nor delivered. Further, there was not the condition of a *donatio mortis causa*, for Mr Grant was in perfect health at the time, and thus a necessary condition of *donatio mortis causa* was not fulfilled. If anything, therefore, the document was a testamentary bequest, and as such, whatever was intended, it was inefficacious, because the document is neither holograph nor tested. A cheque is inhabile for the constitution of a legacy. Were it otherwise, a man's estate might, though in his power and possession at his death, be carried to a stranger after his death though he left neither will nor testamentary disposition.

Lord Rutherfurd Clark—I also concur. I think there could be no donation in this case. There is certainly no donation of money, for there could be nothing given except the cheque which is said to have transferred the money from the deceased to the donee. But it is certain that no money passed from the deceased during his lifetime; and this document could not operate any transference of money from the deceased during his lifetime. It was not intended that it should do so, because in effect, according to its expression, it was only intended to operate in his succession. Hence I think it is a document in accordance with its true character testamentary, and not being a legally sufficient testamentary document, I think it fails.

The Court pronounced this interlocutor:—

"Find that the pursuer has failed to prove that the late John Grant made a *donatio mortis causa* or a bequest to her of the sum sued for: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute of 24th October 1883; assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for Pursuer (Appellant)—Campbell Smith — Strachan. Agent—William Officer, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, June 5.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WILSON *v.* ROBERTSON.

Jurisdiction — Foreign — Extension of Foreign Judgment—A. S., 21st June 1883—*Prorogation.*

An application made in the Court of Bankruptcy in England by "D. H. & T. W.," a firm of law-agents in Edinburgh, having been unsuccessful, an order for costs was pronounced in that Court, which bore to be against "D. H. W. & T. W." That order having been registered in the Bill Chamber in terms of the English Bankruptcy Act 1869 and relative Act of Sederunt of 21st June 1883, the holder charged "D. H. W." individually to pay the amount contained in it. He brought a suspension in the Bill Chamber, in which he alleged that he had been no party to the proceedings in the English Court, not having been at the time of the application a partner of "D. H. & T. W.," and that his individual name had been fraudulently or erroneously inserted into the order for costs. The charger maintained that the Court had no jurisdiction except to enforce the order without inquiry, but the Lord Ordinary having allowed a proof he took part therein without taking the judgment to review. The facts alleged by the suspender were proved, and the Lord Ordinary suspended the charge. The charger reclaimed and argued that the proof was incompetent, since the Court was bound to enforce the order without examination or inquiry into it. *Held*, that having acquiesced in the judgment allowing a proof, and taken a judgment on the facts, the charger was not thereafter entitled to object to the jurisdiction of the Court to examine whether the suspender's name had been erroneously introduced into the decree.

Opinion (*per* Lord Justice-Clerk and Lord Young) that it was competent for the Court, when its jurisdiction was invoked by the charger for the purpose of enforcing the decree as a decree of the Court of Session, to examine into the allegation that the name of a person not a party to the proceedings had been by fraud or error introduced into the order, and on this being proved to give the remedy of suspension of the charge.

Opinion (*per* Lord Rutherfurd Clark), that the Court could only stay execution to enable the party wronged to apply for a remedy to the English Court which granted the order.

In July 1881 Andrew Ross Robertson filed a petition in the Court of Bankruptcy in London for liquidation under the English Bankruptcy Act 1869. In that petition he was designed as of 12 Calthorpe Street, Gray's Inn Road, in the county of Middlesex, agent. In his affidavit the petitioner swore that he had resided in England since 1876, and had had no residence or domicile in Scotland or elsewhere other than in England since that date, and had no intention of residing in Scotland. He obtained his discharge, and after he had obtained it an application was filed in the same Court on behalf of "D. H. & T. Wilson, law-agents and conveyancers, Edinburgh," for an order to annul and vacate the said discharge and other proceedings in the liquidation, on the ground that the English Court had no jurisdiction to entertain the proceedings, as the petitioner was then, and had been since 1876, domiciled in Scotland, and that no notice of the proceedings had been given to them as creditors. This application was, after sundry proceedings, dismissed with costs (which were afterwards, on 4th August 1882, taxed at £75, 3s. 5d.), to be paid by the applicants to Robertson, the petitioner.

The order finding these costs to be due bore to be against "David Hay Wilson, S.S.C., and Thomas Wilson, law-agents, of 4 Maitland Street, Edinburgh." Robertson had this order registered in the Bill Chamber in Edinburgh on 12th July 1883, under the Judgments Extension Act 1868, and Act of Sederunt of 21st June 1883, and then charged David Hay Wilson personally on the registered order and certificate.

David Hay Wilson thereupon presented in the Bill Chamber a note of suspension of the charge. In his condescendence he averred that he and his brother Thomas Wilson had at one time carried on business as law-agents in Edinburgh under the firm of "D. H. & T. Wilson;" that on 3d June 1879 his estates were sequestrated, and in consequence the firm dissolved as at 31st December 1878, the dissolution being duly intimated in the *Gazette;* that since that time he had ceased to be a partner of the firm, the business of which had been carried on under the same firm by his brother Thomas Wilson till Whitsunday 1882; that in 1879, when the business was being carried on by Thomas Wilson as sole partner, the respondent had incurred debt to it for business accounts; that Thomas Wilson as sole partner, had in 1881 obtained decree against him for the amount thereof, and charged thereon; that he (the suspender) was no party to the application made by the firm of D. H. & T. Wilson to the Bankruptcy Court in England, which was at the instance of Thomas Wilson only as then sole partner of that firm; that he had no interest therein beyond having been called as a witness; that his name did not appear at any stage of the proceedings, and that if it did appear in the order and certificate founded on, it was without his knowledge, and without his having had any opportunity of defending himself. He also averred that the respondent was well aware of his sequestration and retirement from the firm.

The respondent averred—"Under the said [English] Bankruptcy Act, particularly sections 72 and 73 thereof, and the Judgments Extension Act 1868, and the Act of Sederunt of 21st June 1883, the Courts of Scotland have no jurisdiction, and are not entitled to entertain and challenge the said order and certificate, but are bound to enforce the same. The terms of the said order and certificate were, under the general rules, made in pursuance of the said Bankruptcy Act, adjusted on behalf of the complainer and Thomas Wilson, by their solicitors, Messrs Kepping & Co., before the registrar in attendance on the Chief Judge in bankruptcy. The said order and certificate are in the terms so adjusted." He further averred that the registered order and certificate were directed against the complainer David Hay Wilson, and also against his brother Thomas Wilson, and formed a legal and valid warrant of charge and other diligence against both and each of them.

The Act of Sederunt (21st June 1883), to regulate procedure for the enforcement in Scotland of orders under the Companies Act 1862 and the Bankruptcy Act 1869, provides (by sec. 1) that on production to the Clerk of the Bills of an office copy of any order made by a Court having jurisdiction in bankruptcy in England in terms of the English Bankruptcy Act 1869, the same shall be registered *in extenso* in a register to be kept for that purpose in the office of the Bill Chamber Clerk, on payment of a fee, and that the register shall be open to all concerned; sec. (2) provides that after such registration the Clerk shall append to such office copy a certificate subscribed by him of the registration thereof, "and the same being so registered and certified, shall be a sufficient warrant to officers of Court to charge for payment of the sums recoverable under such order, and of the expenses of registering the same, and to use any further diligence that may be competent, in the same manner as if such order had been originally pronounced in the Court of Session on the date of such registration as aforesaid."

The note having been passed, Lord M'Laren, to whom the process had been marked, on 4th March 1884 allowed a proof.

On 17th April following, proof having been led, the Lord Ordinary pronounced this interlocutor—"Finds that the complainer was not a party to the application in which the order of Mr Registrar Pepys libelled was made, and that the complainer was not liable for costs in such application: Finds that the said order was registered for execution in the office of the Clerk of the Bills without an opportunity being given to the complainer to apply to the Court of Bankruptcy in England to amend said order: Therefore suspends the charge complained of, and whole grounds and warrants thereof, and decerns."

"*Note.*—The complainer has been charged on a registered order of the English Court of Bankruptcy to make payment of £75, 3s. 5d. to the respondent, being costs incurred in certain proceedings in that Court. The order of the Court of Bankruptcy is dated 4th August 1882, but it was not registered in the Bill Chamber for execution until eleven months thereafter, viz., on 12th July 1883; and as soon as the complainer was charged thereon he instituted this process of suspension.

"Now, the costs in question were occasioned by the unsuccessful application of Messrs D. H. & T. Wilson, solicitors, Edinburgh, to set aside the proceedings in Robertson's liquidation, and the ground of suspension is that the complainer David Hay Wilson was not a party to the application in the Court of Bankruptcy, and was not a partner of the firm of D. H. & T. Wilson, the proper applicants.

"I thought that the facts should be inquired into, and accordingly allowed a proof. At the proof the suspender gave evidence to the effect that he ceased to be responsible as a partner of D. H. & T. Wilson on 6th June 1879, on which day notice of the dissolution of partnership was advertised in the *Gazette.* He also produced the original application or notice of motion for setting aside the proceeding in liquidation, which application was made in the name of D. H. & T. Wilson, and was accompanied by an affidavit of Mr Thomas Wilson, in which he states that he is the sole partner of the applicants' firm. The complainer also depones that he never instructed the proceedings in question, and so far as copies of the proceedings are in process they support his statement, because the complainer's name does not appear in any of the papers, except as subscriber of an affidavit to certain facts of which he was an eyewitness.

"No evidence was offered to prove that the suspender instructed or maintained the proceedings instituted by D. H. & T. Wilson, or that he was in fact a partner of or person using that firm during the period of the dependence of the proceedings in bankruptcy, and I therefore hold that the facts set forth in the note of suspension, so far as material, are proved.

"On the other hand, the order of the Court of Bankruptcy upon which the charge was given describes the application as the application of David Hay Wilson, S.S.C., and Thomas Wilson, law agents, of No. 4 Maitland Street, Edinburgh, and directs that the said application by the applicants be dismissed with costs, to be paid to the debtor, the said Andrew Ross Robertson. It was contended by the respondent that it was thus ascertained by a decree of the proper Court that Mr David Hay Wilson was one of the applicants. It appears to me that this contention involves too strict a view of the obligatory character of the decree. The decree is no doubt a valid decree as between the parties concerned. But the application did not describe who were the partners of the firm of D. H. & T. Wilson, and when it came to be necessary to insert the proper names in the decree, the Court of Bankruptcy was necessarily dependent on the information which might be furnished to it by the counsel or solicitors for the parties. But the parties or their solicitors could not by giving the name of a person unconnected with the cause render that person responsible for costs. And it must be open to the complainer in the circumstances to have the execution of the order suspended as regards its effect upon himself.

"The only question is, whether I ought to suspend the charge *simpliciter*, or merely to sist process in order that an application may be made to the Court of Bankruptcy to have the order amended? Now, of the jurisdiction of this Court to give redress by suspension I entertain no doubt. Although, where there is any convenience in the other course, this Court will no doubt grant a sist, and leave the party to apply for relief to the Court by which the decree or order was granted, yet in the present case I see no reasons of convenience for sending the complainer to the Court of Bankruptcy. In the first place, it is more than eighteen months since the order was made, and I have an impression that the time has expired within which it would be possible to have the order amended. Secondly, execution has not been issued against the suspender in England, and it is not clear that he is in a position to seek relief there in a form analogous to our process of suspension. Thirdly, evidence has been taken here, and in a case which appears to me so clear I should be unwilling to put the parties to the expense of a second trial. Lastly, the Act of Sederunt under which this order is registered declares that the registered order shall be a warrant for diligence in the same manner as if such order had been a decree originally pronounced in the Court of Session on the date of such registration as aforesaid.

"It therefore appears that diligence on order of the Court of Bankruptcy is assimilated in legal effect to a diligence on registered bonds or bills, the order being enforcible as an order or decree of the Court of Session.

"Now, if the error which is here in question had crept into a decree of the Court of Session, I apprehend that suspension would be the proper mode of giving redress, and so on this ground also I think the prayer of the note ought to be granted forthwith."

Robertson reclaimed, and argued—No proof ought to have been allowed, and it could not competently be looked at. It was taken by a Judge having no jurisdiction. Whoever might have made the application, the order of the Court of Bankruptcy clearly was against the complainer individually, and as such it was registered here, and the Court could not competently look behind that. An English decree was here merely for execution, and could not be inquired into in any way. Any application to stay diligence under it on the ground of error or otherwise must be made, and could only be made, in the Court in which the decree was pronounced. *i.e.*, in England—32 and 33 Vict. c. 71, (English Bankruptcy Act), sec. 73; Judgments Extension Act 1868 (31 and 32 Vict c. 54); A.S., 21st January 1883.

The suspender replied—He had shown on the proof that he was not a partner of the firm, and not a party to the English application. The registration and execution of the English decree in the Court here made it a Scottish process, and gave the Court jurisdiction to order inquiry into the facts on an allegation of error in the order or injustice in its execution, and this the Court could do without in any way reviewing the merits of the English judgment. Besides, the respondent had submitted to a proof and taken the Lord Ordinary's judgment thereon, and could not now be heard on a plea of no jurisdiction.

At advising—

Lord Justice-Clerk—I shall assume in this case, and I cannot do otherwise, that the facts alleged on the part of the suspender are true, that he was not a party to the proceedings in England, and was not a partner of the firm of D. & H. Wilson during any part of them. If this be so, it follows that this order or judgment of the English Court which we are asked to carry out proceeds on a mistake, and one, I am satisfied, which was known to the party who obtained it. We are thus asked to interpose the authority of this Court to operate a fraud, of which we have proof before us. I am of opinion that when our jurisdiction is invoked under the existing law, in aid of an order of the English Courts, the proceeding for that purpose becomes a suit in the Scottish Court to that end and effect; and that although we may not examine the English order on its merits, we are entitled and bound to take cognizance of such facts as these now before us, which would make our interposition an aid and assistance in the perpetration of a fraud.

Such is my opinion on the general question; but in the present case I think the question is foreclosed. The Lord Ordinary allowed a proof, and this is a reclaiming-note against his judgment on that proof. The reclaimer joined issue with the suspender in that proof, and I think he cannot now maintain that we have no jurisdiction to consider it.

Lord Young—I am of that opinion also; and I desire to express my distinct concurrence in the

Lord Ordinary's opinion—in the Lord Ordinary's own words—that "of the jurisdiction of this Court to give redress by suspension I entertain no doubt." I also entertain no doubt whatever of our power to give redress, not by way of reviewing the judgment, but by way of preventing the judgment from being put into execution against a wrong party. This is a pure question of the execution of a judgment which is no longer examinable or reviewable on its merits. It is just like a case in which extract has gone out. Even a judgment of the House of Lords comes back to this Court in order that we may interpose to give execution, and although the decree is not examinable at all by us on the merits, is it doubtful that if an extract or certificate copy of the judgment of the House of Lords against "Messrs D. H. & T. Wilson, of 4 Maitland Street, Edinburgh, and Thomas Wilson, sole partner thereof," was expanded, in an order for costs, into "David Hay Wilson, S.S.C., and Thomas Wilson, law-agents, of 4 Maitland Street, Edinburgh," that we could—without examining or reviewing the judgment at all on the merits—prevent the unjust execution of that judgment against one who admittedly had no concern with the firm against which the judgment is directed? Now, this question of jurisdiction does not depend on a question of taking evidence or not; it relates to the power of this Court to give a remedy, whether the facts have been ascertained by admission or by proof. Jurisdiction exists or does not exist according to the nature of the allegations made by the party seeking our interposition, for we must have jurisdiction to ascertain the truth of these allegations. I must therefore determine this question exactly as I should have done if the party had frankly said, "I admit that D. H. Wilson was no party to these proceedings, which were in name of the firm of D. H. & T. Wilson, and of which D. Wilson was sole partner, and his name was erroneously introduced into an order for costs." Can it be doubted that in such a case this Court would give a remedy if the order had been pronounced by themselves?—not by examining or reviewing the decree, but in the interests of justice, and in the simplest and most expeditious manner preventing injustice being done. But we are told that we must enforce the English order exactly as if we had ourselves pronounced it. It is inconceivable that we should refuse to give the remedy if we have it in our power to give. Therefore I have no doubt of the jurisdiction, not to review or examine the decree, but to prevent an unexamined decree from being erroneously put into execution, or to order an inquiry as to the facts if error be alleged. It is therefore my opinion that the Court has jurisdiction, and the facts have been ascertained by the Lord Ordinary to his satisfaction. I am for adhering to his interlocutor.

Lord Craighill—I concur in thinking that we should refuse this reclaiming-note. I do not think it necessary to form an opinion on the question, whether had there been no proceedings here, or at least proof in the Outer House, we should have had jurisdiction to interfere and suspend this decree? I rather think there is more doubt and difficulty in the matter than Lord Young seems to find, but I do not wish to hint even an idea that there is any conflict between his Lordship and myself; on that point I prefer to take the more satisfactory ground that it is unnecessary to determine the larger and more difficult question. Proof was allowed before the Lord Ordinary—against the interlocutor allowing that proof a reclaiming-note has not been presented. It might have been presented, and might have been expected to have been presented, when the defender was urging a plea of no jurisdiction. He did not take that course, but joined issue with respect to the question of fact, and so took his chance that the proof would turn out in his favour. He must in doing so be held to have acquiesced in the jurisdiction of this Court, and is not now entitled to come to us to have the Lord Ordinary's interlocutor reversed, not upon its merits, but on another plea which must be held to have been finally repelled.

Lord Rutherfurd Clark—We have here a decree pronounced by the Bankruptcy Court in England, by which David Hay Wilson and Thomas Wilson, law agents, of 4 Maitland Street, Edinburgh, are ordered to pay the costs of an application said to have been made by them in that Court. The decree was duly registered for execution in Scotland, in the manner prescribed by the statute and Act of Sederunt, and a suspension of the registered decree has been brought by David Hay Wilson in order to have execution as against him stopped on the ground that he was not a party to the proceedings in England, and consequently that the decree was improperly pronounced against him. He does not say that he is not the David Hay Wilson whose name appears in the decree; he merely says that the decree is an improper one, because he was not a party to the proceedings. I confess I have great doubt whether that is a question into which we can inquire. I do not doubt the jurisdiction of this Court to interfere by way of suspension to stay the execution of an English decree; the question is, on what ground and to what effect that can be done? I have grave doubts whether we can stay execution absolutely. We can only do so by deciding that the English decree was not properly pronounced. In this case there may be no difficulty, but I hesitate to sanction the principle that we can in any case or to any effect examine an English decree. I therefore incline to think, that while we have undoubted jurisdiction to interfere by way of suspension to stay execution until the complainer has had an opportunity of bringing under the consideration of an English Court the question whether this is a good decree or not, we cannot go further.

But I agree with Lord Craighill in thinking that we have a perfectly satisfactory ground of judgment apart from the general question to which I have referred. The objection to this decree is that David Hay Wilson was not a party to the English proceedings in which it was pronounced; if he were not, it is conceded that the claim cannot be enforced. The Lord Ordinary, after hearing parties, allowed a proof on that objection. A proof was taken, and the reclaimer asked for a judgment from the Lord Ordinary on his objection to the decree. That judgment was adverse to him, and there can be no doubt that the judgment is right. I think that he is not now entitled to raise any question as to the jurisdiction of the Court. On that ground

I am for adhering.

The Court adhered.

Counsel for Complainer (Respondent)—Lang. Agent—Robert Broatch, L.A.

Counsel for Respondent (Reclaimer)—Mackintosh—Low. Agent—James Barton, S.S.C.

Friday, June 6.

FIRST DIVISION.

[Lord Fraser, Ordinary.

HOEY *v.* HOEY AND OTHERS.

Process — Husband and Wife — Divorce — Wife's Expenses of Reclaiming-Note.

In an action of divorce by a husband the Lord Ordinary pronounced decree of divorce, and the wife reclaimed. The Court *adhered*, but, on the ground that the wife had reasonable grounds for reclaiming, *allowed* her the expenses of the reclaiming-note against the pursuer.

This was an action of divorce at the instance of a husband against his wife, in which the Lord Ordinary (FRASER) pronounced decree against the defender. On a reclaiming-note the First Division adhered after hearing counsel for the pursuer, defender, and two co-defenders.

The defender's counsel moved for expenses. —Fraser on Husband and Wife, ii. 1235; *Kirk* v. *Kirk*, November 12, 1875, 3 R. 128; *Montgomery* v. *Montgomery*, January 21, 1881, 8 R. 403.

The pursuer opposed the motion.

At advising—

LORD PRESIDENT—. . . As regards the defender, I am of opinion that this is not a case in which the defender was bound to be satisfied with the judgment of the Lord Ordinary, for it is one the decision in which depends upon a very careful examination of the evidence. It is not said by the Lord Ordinary that he was entirely clear in his opinion against the defender, though he came confidently to the conclusion at last, and I must say that such is the state of mind of the Judges in this Court. Therefore I think that the question falls under the rule that where the wife who is defender has a judgment of the Lord Ordinary against her, but has fair and reasonable grounds for reclaiming, the expenses in the Inner House are awarded her equally with the expenses in the Outer House.

LORD MURE and LORD ADAM concurred.

LORD DEAS and LORD SHAND were absent.

Counsel for Pursuer and Respondent—Party. Agents—Stewart Gellatly & Campbell, S.S.C.

Counsel for Defender and Reclaimer—R. Johnstone—Ure. Agents—Ronald & Ritchie, S.S.C.

Wednesday, June 11.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

OKELL *v.* COCHRANE & CO. AND OTHERS.

OKELL *v.* SHAW & CO. AND OTHERS

Foreign—Jurisdiction—Forum non conveniens.

A person domiciled in England and carrying on business there filed in England a petition for liquidation of his affairs under the English Bankruptcy Statutes, and joint trustees, one of whom was a Scotsman, were appointed on the estate. By instructions of the creditors the Scottish trustee went to America and wound up the affairs of firms in which the bankrupt was interested there, and obtained possession of certain funds. These funds he brought to Scotland, and, on the ground that they had been obtained under special arrangements with the American creditors, lodged in bank in Scotland in his own name for behoof of these creditors. A Scottish creditor of these firms then raised a multiplepoinding to have the funds distributed in Court of Session. The other trustee objected to the competency of the process, and pleaded *forum non conveniens*, in respect of the proceedings in bankruptcy in the English Court. *Held* that the estate of the bankrupt being in process of distribution in the Court of the domicile, and the fund *in medio* having come into the hands of the trustee in the discharge of his duty as trustee, no separate administration ought to be allowed, and that the plea of *forum non conveniens* ought to be sustained.

John Baldwin, whose domicile was in Burnley, Lancashire, carried on business as a fancy goods dealer there. He also, in partnership with Harry Christopher Preedy of Halifax, Nova Scotia, did business as a glass and crockery-ware-dealer in Barrington Street, Halifax, under the firm of Baldwin & Company. He also, under the name of John Baldwin & Company, carried on business as a dry-goods, hardware, and general merchant at Water Street, Halifax, and he had as partners in this last business, down to 15th December 1880, James de Blois and James Fraser. On that date the copartnership was dissolved.

On 4th January 1881 Baldwin filed a petition in the County Court of Lancaster at Burnley for the liquidation of his affairs, in accordance with the provisions of the English Bankruptcy Act of 1869. In the petition he was designed as follows: —"John Baldwin, of No 7 Willow Street, in the burgh of Burnley, in the county of Lancaster, carrying on business as a fancy goods dealer at No. 2 Hammerton Street, Burnley, aforesaid, and also carrying on business as a glass and crockery-ware dealer at Nos. 223, 225, and 227 Barrington Street, at Halifax, Nova Scotia, in the dominion of Canada, in copartnership with Harry Christopher Preedy of Chestnut Place, Halifax aforesaid, under the style or firm of 'Baldwin & Company;' and also carrying on business as dry goods, hardware, and general merchant at Water Street in Halifax, Nova Scotia aforesaid, under the style or firm of 'John Baldwin & Company,' which