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

said business of 'John Baldwin & Company' was, until the 15th day of December last (1880), carried on by the said John Baldwin in copartnership with William James de Blois and James Fraser at Water Street, in Halifax aforesaid, under the style or firm of 'John Baldwin & Company,' and which last-named copartnership was dissolved on the said 15th day of December last."

On 3d February 1881, at a general meeting of the bankrupt's creditors held under the provisions of the Bankruptcy Act, it was, *inter alia*, determined that the estates should be liquidated by arrangement, and that Arthur Okell, chartered accountant, 22 Renfield Street, Glasgow, and Edward Foden, accountant, Manchester Road, Burnley, be appointed trustees, and that all necessary acts might be done by one or both trustees. Certain creditors of the bankrupt were also appointed a committee of inspection.

At a meeting of this committee of inspection held at Manchester upon the 11th of March 1881, it was arranged that Mr Okell should proceed to Halifax along with the bankrupt Baldwin, and investigate the affairs of the two concerns "Baldwin & Co." and "John Baldwin & Co.," and "report as soon as possible what the exact value of the estates may be; "also that Mr Okell in the meantime have power to make such arrangements in Halifax as he may deem necessary for the benefit of creditors, until he shall have time to send home a thorough report, and to do his utmost to protect the interest of the creditors in this country." He accordingly went out to Canada along with the bankrupt, and he was there advised that his office of joint-trustee under the liquidation proceedings in England did not give him a title to deal with the estates of the firms there. As a result of negotiation, however, which need not here be detailed, he obtained, in connection with the hardware business of "John Baldwin & Co.," and brought to this country, a sum of £603, which he lodged in bank in Glasgow under the title "Arthur Okell, for the creditors of John Baldwin & Co.;" and he obtained in connection with the glass and crockery business carried on along with Preedy, under the firm of Baldwin & Co., the sum of £1004, 3s. 3d. These funds he also brought to this country, and lodged in bank at Glasgow under an account titled—"Arthur Okell, for the creditors of Baldwin & Company."

Actions of multiplepoinding relating the one to the £603, the other to the £1004, were thereafter raised in the Court of Session by Okell & Company, warehousemen, Glasgow, creditors of John Baldwin & Co. and of Baldwin & Co. (the two Halifax firms), in name of Mr Okell, the trustee, as holder of the funds, against, in the one case, the creditors of John Baldwin & Co., in the other of Baldwin & Co., and also in both cases against Mr Foden and the nominal raiser as joint-trustee. In both cases it was averred that the funds deposited in bank were insufficient to meet the claims of the creditors of the respective firms John Baldwin & Co. and Baldwin & Co.

Appearance was entered for Foden in both actions, and on 11th December 1883 the Lord Ordinary found the nominal raiser (Mr Okell) liable only in once and single payment, and ordered claims. On 8th January, the Lord Ordinary having heard counsel on a motion for an order on the nominal raiser (Okell) to consign the fund *in medio* in the usual form, refused the motion in *hoc statu*.

Note.—[*In the action against the creditors of Baldwin & Co., relating to the* £1004. *After stating the facts above detailed*]—"In these circumstances the question which has arisen, and which this action is brought to determine, is whether the moneys received by Mr Okell under the arrangement described are to be distributed by him and his co-trustee among the creditors of John Baldwin, or whether they are to be distributed among the creditors of Baldwin & Co.? The jurisdiction of this Court is not disputed, because the holder of the fund is resident in Scotland, and the moneys are deposited in his name in a bank in Scotland. But it is said that this is not a convenient *forum* for trying the question, and that proceedings have been taken in the Court of Liquidation in England, which is the proper *forum*. I do not decide that question at present. It has not been argued, and I express no opinion upon it. But it is evident that there are grounds upon which the plea that Mr Lorimer says he meant to take may reasonably be maintained; and if it should turn out that the question is truly a question in the liquidation, or that it would be more expedient that the questions should be tried in England, by reason of there being questions of English law, implicated with the administration of an insolvent estate which is in course of liquidation under the English Bankruptcy Act, there would be ground, according to our practice, for sustaining a plea of *forum non competens*, which, as the Lord President pointed out in *Martin* v. *Stopford Blair*, Dec. 4, 1879, 7 R. 329, 'really means that of two Courts having jurisdiction to try a question, it is more expedient to try it in one than in the other.'

"No doubt the plea should have been taken by way of defence, and before the usual interlocutor was pronounced. But I do not think the parties are precluded from raising it, and that being so, it would be premature to order the fund to be consigned in name of the Clerk of Court. It would be premature for another reason, because the condescendence of the fund has not been approved of. But even if there be no question as to the amount, I think it inexpedient to order the consignation asked until it has been determined that this Court is the proper and convenient *forum*. If the money were in improper hands, or if there were any risk of its being lost, it would be a different matter. But nothing of the kind is suggested. It is said that the fund may be taken out of the jurisdiction by an order which the Court of Liquidation may or may not pronounce in the exercise of its discretion. But I must assume that any order which that Court may pronounce, and which is not taken to appeal, will be a proper order, and within its jurisdiction —*Wilkie* v. *Cathcart*, 9 Macph. 171."

In the other action the Lord Ordinary pronounced the same judgment.

On 1st February 1884 the Lord Ordinary again, the circumstances not having materially altered, refused the motion for an order on the pursuer and nominal raiser to consign the fund *in medio*.

On 26th February 1884 the Lord Ordinary allowed defences against the competency of the actions of multiplepoinding for Foden, Okell's

co-trustee, to be received, under reservation of all questions of competency. In these defences it was maintained that the money recovered by Mr Okell in Canada, and forming the funds *in medio* in the respective actions, fell to be distributed in the proceedings in the Lancashire County Court, and it was stated that that Court had issued an order on Mr Okell to pay them into the bank at Burnley.

Foden pleaded *forum non conveniens.*

A record was then made up in each case on the summons and these defences, and on 20th March 1884 the Lord Ordinary (in each of the actions), "in respect of the interlocutor of 11th December 1883 finding the pursuer liable in once and single payment," repelled the defences, granting leave to reclaim.

"*Opinion.*—The questions in controversy in this action, and in the action with reference to the assets of Messrs Baldwin & Company, in the hands of the same trustee, appear to me to be questions in the liquidation which may be proper for the consideration of the English Court of Bankruptcy, but with which this Court ought not to interfere. It is maintained that by virtue of the Bankruptcy Act the whole moveable estate of the bankrupt, wherever situated, is vested in the trustees appointed under the liquidation proceedings; and it is equally clear that it was in his character of trustee that the nominal raiser was instructed to proceed to Canada to investigate the affairs of the bankrupt's Canadian firms, and to make such arrangements as he could for the benefit of the English creditors of these firms. If his title had been recognised, and the assets of these firms had been at once handed over to him, there can be no question that they would have been in the same position as any other assets of the bankrupt's estate in the hands of the trustees for creditors; and in that case the English Court of Bankruptcy would undoubtedly have had an exclusive jurisdiction to regulate their distribution, on the ground explained by the Lord President in the case of the *Phosphate Sewage Company* v. *Lawson*, July 5, 1878, 5 R. 1138, viz. that 'Whenever the Court of the domicile has by proceedings in bankruptcy vested the moveable estate of the bankrupt in a trustee or assignee for the purpose of equal distribution among his creditors, no part of the moveable estate, wherever situated, can be touched or affected except through the bankruptcy proceedings, and by the orders of the Court of that country in which those proceedings took place.' His Lordship adds that this proposition is fully supported by the case of *Struthers* v. *Reid*, M., *v. Forum Competens*, App. 4; *Maitland* v. *Hoffman*, M., *v.* Bankrupt, App. 26; and *Poetze* v. *Aders & Company*, 2 R. 150; and that the principle is still applicable where the bankrupt is a trader having two trading domiciles, as appears from the *Royal Bank* v. *Scott, Smith, & Company*, 20th January 1813, F.C.; *Selkrig* v. *Davies & Salt*, 2 Dow 230; and also from the case of the *Phosphate Sewage Company* v. *Lawson.*

"It is said that the rule is excluded because the assets in question were obtained, and are now held, by the trustee under a special contract for the benefit of particular creditors—the creditors of the two Canadian firms respectively—in preference to any other creditors of the bankrupt. It does not appear to me that this consideration makes any difference. It was still in the character of trustee appointed in the English bankruptcy proceedings, and in the execution of the trust so committed to him, that the nominal raiser obtained the moneys in question; and it is to the English Court of Bankruptcy that he must account for them. It is said that if the funds are paid into the English Bankruptcy Court the assets of the Canadian firms will be made available for the personal creditors of Mr Baldwin to the prejudice of the firm's creditors. But that is plainly a misapprehension. The trustees in bankruptcy are trustees for the creditors of the two firms, as well as for the personal creditors. If there is a question of preference between the firm's creditors and the personal creditors, it will be determined by the Court of Bankruptcy; and the estates will be distributed according to the rights of parties, whether these are based upon special contract or on the general rules of law. But the mere statement that such a question may be raised is sufficient to show that these actions ought not to have been brought in Scotland. For this Court cannot undertake to distribute the insolvent estate of a domiciled Englishman when proceedings in bankruptcy have been already instituted in England for that purpose.

"It is said that the Court has undoubted jurisdiction. But I conceive that it has no jurisdiction for the special purpose of this action. In the case already cited, the Lord President says—'The trustee in a Scotch sequestration may be subject to the jurisdiction of the English Court, or the assignees in an English bankruptcy may be subject to that of a Scotch Court personally, but I am of opinion that in their character of trustee and assignees respectively they can be subject to the jurisdiction of no Court except the Court of the country within which the bankruptcy proceedings have been instituted and the *concursus creditorum* has been established.'

"For these reasons I should have sustained the defences which have been lodged, and dismissed the action. But unfortunately the defences have not been lodged in time, and the interlocutor of 11th December 1883 was therefore pronounced in ordinary course, the competency of the action not being disputed. I cannot now dismiss the action without recalling that interlocutor, which I have no power to do, except of consent of parties. There is no alternative, therefore, except to repel the defences as incompetent at this stage of the proceedings. But in the special circumstances of the case I have thought it right to express my opinion upon the merits, and I shall grant leave to reclaim.

Foden reclaimed.

The argument was taken in the action in which the creditors of Baldwin & Co. were called, and in which the fund *in medio* was the £1004, 3s. 3d.

Foden argued—The plea of *forum non conveniens* should be sustained, and the Lord Ordinary would have given effect to it as stated in his note but for the technical difficulty of the defences not having been received until after the interlocutor of 11th December 1883 had been pronounced.

Argued for respondents—The English liquidation dealt entirely with the estates of John Baldwin, whereas the sums recovered by Okell and lodged by him in bank were proceeds ingathered for behoof of creditors of the two

Canadian firms of which John Baldwin was a partner, and they could not, therefore be made available in the English liquidation. These estates which had been obtained under special contracts with the Canadian creditors of Baldwin's businesses there ought not to be administered by the English Bankruptcy Court but according to Canadian law.

Authorities in addition to those quoted by the Lord Ordinary—*Clements* v. *M'Auley*, March 16, 1866, 4 Macph. 583; Lindley on Partnership, p. 101.

At advising—

Lord President—I so entirely agree with the Lord Ordinary in the note to his interlocutor of 1st February, and also in his note to the interlocutor immediately under review, that it will be unnecessary to say much further.

The facts may shortly be stated thus :— A person called John Baldwin, who carried on business at Burnley, in the county of Lancaster, became bankrupt in January 1881, and filed a petition for the liquidation of his affairs in accordance with the provisions of the English Bankruptcy Acts, and from his description we learn that he was not only a dealer in fancy goods at Burnley, but he was also a crockery-ware dealer in Canada in partnership with Harry Christopher Preedy, of Chestnut Place, Halifax, under the firm of Baldwin & Company, and also carried on business as a dry goods merchant in Halifax under the firm of John Baldwin & Company. This last partnership was dissolved on the 15th December 1880, but the partnership with Preedy was still in existence when John Baldwin's bankruptcy took place. At a general meeting of the creditors held on 3rd February 1881 it was agreed (1) that the affairs of the said John Baldwin should be liquidated by arrangement and not in bankruptcy, and (2) that Arthur Okell and Edward Foden should be appointed trustees, and that any act required or authorised to be done by the trustees might be done by one or both of them. A committee of inspection was also appointed. This committee then held a meeting on 11th March at which all members of the committee were apparently present, and at which it was arranged that Mr Okell should proceed to Halifax along with Mr Baldwin for the purpose of making a thorough investigation into the affairs of John Baldwin & Co. and Baldwin & Co., and should report as soon as possible to the committee what the exact value of the estate might be, and also "that Mr Okell in the meantime have power to make such arrangements in Halifax as he may deem necesary for the benefit of the creditors until he shall have time to send home a thorough report, and to do his utmost to protect the interests of the English creditors." Now, Mr Okell and Mr Baldwin proceeded under these instructions to Halifax and there entered into arrangements with which we have no concern except that the result was that Mr Okell brought to this country a sum of £1004, 3s. 3d. This was the result of Mr Okell's going to Canada as one of the trustees appointed under bankrupt proceedings going on in Lancashire, and it is this which forms the fund *in medio*. Now, whether that sum belongs to the creditors of Baldwin & Co. or of John Baldwin, or falls to be administered by the County Court in Lancashire, it is clear that the duty of Mr Okell was to obey the orders of the County Court of Lancashire, where the bankruptcy proceedings are going on, and from which we see an order has been issued directing Mr Okell to pay into bank the said sum of £1004, 3s. 3d. in the joint names of the said Edward Foden and himself, as joint trustees of the liquidation estate. The immediate effect of going on with this multiplepoinding has been to prevent the fulfilment of this order which Mr Okell was bound to obey, and which I am unable to understand how he can escape obeying as trustee for the creditors. What he had done had been done in the first instance for them, and the sum he had recovered fell to be distributed in the process of liquidation going on in Lancashire. It may be—I give no opinion—that this sum belongs to one class of creditors rather than another, but that depends on the decision of the Court under which the bankruptcy proceedings are being conducted. It has been clearly settled that where in the Court of the domicile of the trader bankruptcy proceedings have been once instituted and his estate been vested in a trustee for equal division among the creditors, all persons having claims against him must make them in that distribution, and no separate distribution of them can go on elsewhere. The authorities for this rule are numerous, and have been collected by the Lord Ordinary in his note, and I say no more about them. It would be against all rule to entertain this case, though I do not say there is no jurisdiction. I certainly do not go so far as to say that because we have here a domiciled Scotchman, a fund in Scotland, and double distress, and wherever these things occur there is jurisdiction for a multiplepoinding, but I do say this is the clearest case I ever saw for sustaining the plea of *forum non conveniens*, and therefore without going into the American proceedings, with which we have nothing to do, I think we should do what the Lord Ordinary desired to do, but had not the power to do, that is, to recal the interlocutor of 11th December 1883, and to sustain the defences against the competency of the action.

Lords Mure and Adam concurred.

The Court in both actions recalled the interlocutors of 11th December 1883 and 20th March 1884, sustained the defences for Foden, and dismissed the actions.

Counsel for Foden—Graham Murray—Grierson. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for Okell—Gloag—Lorimer. Agent—W. B. Rainnie, S.S.C.

Friday, June 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SMITH AND OTHERS *v.* STEWART.

Property — Servitude — Faculty — Negative Prescription.

In 1825 the proprietors of land intended to be used for building purposes, which was bounded on the east by a wall running north and south, built on the land of the adjoin-