that he is entitled to absolvitor, with expenses."

The pursuers reclaimed.

At advising—

LORD JUSTICE-CLERK—I think that this is a slender ground of action even at the best. The action is one against a whisky dealer in Dundee by a blender of whisky in Ireland for selling whisky over his counter on the plea falsely stated that it had been blended by the pursuer. It is at anyrate not a very large-hearted ground of action. Dealers in such articles often give names to articles which probably do not altogether deserve them, and their customers do not much rely on the existence of the qualities which the names might imply. There might be instances given of such names being applied, as the name of Bass' or Allsopp's beer being given to liquors which really did not merit these designations. But at the same time I think that it should be a very clear and flagrant case which would lead the Court to entertain such an action as this.

Apparently the case is this—That the pursuer between the months of July and October last—for the complaint and the evidence were limited to that time—had sold over the counter in the course of his business whisky which was represented as whisky blended by Henry Thomson & Company, when it was really the whisky of someone else. Some witnesses have averred that he really did sell whisky over the counter as blended by Henry Thomson & Company when in fact he knew that it was not whisky so blended, and if we were to take that evidence as true, even then we should not, I think, be prepared to find for the pursuer in the action. But, on the other hand, I am not sure that we can hold that evidence to be credible in all its details. The Lord Ordinary did not believe it.

On the whole matter I am of opinion that the pursuer has not shown that there was a systematic course of fraud on the part of the defender, for that is really the main thing to be looked to; and that being so, I think that we should adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—I am entirely of the same opinion. I agree with the Lord Ordinary, and with what I understand to be your Lordship's opinion, that the pursuer has not proved in point of fact that the defender held himself out as a dealer in Henry Thomson & Company's whisky, and that there is no fraudulent intention attributable to him. It may be the fact that someone entering the defender's whisky-shop, and asking for Henry Thomson & Company's whisky, may have casually been supplied with Kirker, Green, & Company's whisky without being informed that such was the fact, although I do not think that even that is proved. But I do not think that such a case as that, even if proved, would establish ground for such an action as this, such as would warrant us in granting interdict against the defender. I think that the Lord Ordinary's interlocutor deals with the case with great propriety.

A case of this kind cannot be safely founded upon a few petty instances of alleged wrongous dealing with the pursuers' commodity, but upon a continued course of fraudulent representation and dealing. The defender says in his own evidence that he only gets his whisky from Kirker, Green, & Company, and that he does not sell any other kind. Suppose, then, that upon the evidence that has been brought out in this case, Messrs Kirker, Green, & Company were to bring an action of damages against the defender, and to say—"You get your whisky solely from me, and have no other in your shop, but you have sold some of our whisky over the counter as being Henry Thomson & Company's whisky. Ours is a much better whisky, and by selling our whisky in their name you have given their name such an increase of reputation that will greatly enhance their business, and cause a loss to ours." Could such an action be successful? I am clearly of opinion that here there has been no case of fraudulent representation at all made out by the evidence, and that the Lord Ordinary's interlocutor ought to stand.

LORD RUTHERFURD CLARK—I do not think that the pursuer has proved his case at all.

LORD CRAIGHILL was absent from illness.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Sir C. Pearson—Ure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defender and Respondent—Asher, Q.C.—Shaw. Agents—Boyd, Jameson, & Kelly, W.S.

Friday, July 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.

GALBRAITH (ROBERTSON'S TRUSTEE) *v.* NICHOLSON AND ANOTHER.

Foreign — Jurisdiction — Trust — Forum conveniens.

The trustee on a sequestrated estate brought an action of accounting against the two trustees under a voluntary trust-deed for behoof of creditors which had been granted by the bankrupt shortly before his sequestration. The trust was Scottish, but one of the trustees was a domiciled Englishman, and pleaded no jurisdiction. *Held* that he was liable to the jurisdiction of the Court of Session in an action of accounting for the trust funds.

The affairs of James Robertson, tailor and clothier, Glasgow, who traded under the name of James Robertson & Company, became embarrassed in the beginning of 1885, and in June 1886 he granted a trust-deed in favour of Benjamin Nicholson, accountant, London, who acted on behalf of certain of his English creditors; on 16th July following he granted a second trust-deed for behoof of all his creditors in favour of Nicholson and Robert Kedie, warehouseman, Glasgow. Nicholson, as a professional accountant, acted under these trust-deeds, and took the chief part in the realisation of Robertson's estate. In May 1887 Robertson's estates were sequestrated on the petition of a Glasgow creditor, and Walter Galbraith, accountant, Glasgow, was appointed trustee. Nicholson appeared by counsel and opposed the granting of sequestration.

Galbraith, as trustee on Robertson's estate, raised the present action of count, reckoning, and payment against Kedie and Nicholson, concluding that they should be ordained to produce an account of their whole intromissions with Robertson's estate.

The pursuer averred that the trust-deeds were executed in Glasgow, and that the whole trust-estate was situated in Scotland; that on his requesting delivery from Nicholson of the trust papers these had been refused him, and that great expense and delay were thus being caused. The pursuer further averred that Nicholson, after the present action was raised, lodged £500 in the Court of Chancery in England in order to prevent or impede the present accounting, and that in this English proceeding an order for service on Kedie was asked by Nicholson, but refused, after hearing parties, by the Court.

The defender Kedie averred that he left the management of Robertson's trust practically in Nicholson's hands, but that he never approved of or sanctioned proceedings being taken in the Courts in England.

The defender Nicholson averred that the £500 had been paid into the Court of Chancery to abide the orders of Court in an action against him by one of Robertson's English creditors; that this money was part of the funds realised by him under the trust-deeds already referred to, and that it was paid into Court prior to the raising of the present action.

The defender Nicholson pleaded, *inter alia*, no jurisdiction.

On 20th March 1888 the Lord Ordinary (Fraser) pronounced the following interlocutor:—"Repels the first plea-in-law for the defender Nicholson, and appoints the case to be put to the roll for further procedure: Finds the defender Nicholson liable in the expenses of the discussion on the plea now repelled; modifies the same to six guineas, and decerns.

"*Opinion.*—The estates of James Robertson, a tailor and clothier in Glasgow, now deceased, were sequestrated by the Court of Session in May 1887, and the pursuer was appointed trustee upon the estate. It is averred on behalf of the pursuer that the whole estate is situated in Scotland. No counter averment is made by the defender Nicholson. He admits 'that the said James Robertson was a domiciled Scotchman, and lived and carried on business in Glasgow.'

"Robertson, before the sequestration, executed two deeds conveying over his property to the defenders in this action in trust for the benefit of his creditors. The defenders accepted the office of trustees under these deeds, and proceeded to ingather the estate. No dividend was paid by the trustees to the creditors. The defender Kedie intromitted with it only to a very small extent (£27, 10s.), which he has paid over to the pursuer, the other defender Nicholson having taken the chief management, which Kedie says he allowed him to do, as being an accountant, and therefore better fitted to discharge the duty as trustee. The pursuer now asks an accounting with these persons for their intromissions, and this upon the footing that the sequestration put an end to the trust in their favour. One of the trustees is resident in Scotland, where the estate is situated, and the other, Nicholson, is resident in England, and no arrestment to found jurisdiction has been used against him. The first plea-in-law for the defender Nicholson which falls now to be disposed of is that this Court has no jurisdiction to entertain the action as regards him. If this plea be sustained the alternatives would be that the pursuer must sue the defenders in an English Court, when the plea of Kedie would be that he is not subject to the jurisdiction, or that the pursuer must proceed with this action against Kedie in the Court of Session, letting Nicholson out of it; to which Kedie's answer would be, that he cannot be sued without calling his co-trustee; and in like manner the same answer would be open to Nicholson in an English Court if he was sued there alone without Kedie. Nicholson, after this action was in Court, instituted a suit in the Chancery Division of the High Court of Justice in England in name of Kearsley & Company (creditors for whom he is acting), to have the trusts under the two deeds carried into execution under the direction of that Court, and to have an account taken of the moneys received by the defenders. This proceeding was taken against the protest of the defender Mr Kedie. An order for service of the writ upon Kedie and the pursuer was obtained, but upon 21st December 1887 this order was discharged with costs by Mr Justice North, who said—'It seems to me that on the grounds of both convenience and expense it is very much better that the matter should be litigated in Scotland.' His Lordship referred to the present action, and said—'There is a proceeding going on in Scotland by Galbraith, as trustee representing the estate of the debtor, against the other two persons who are the trustees of these deeds, in which proceeding Nicholson, the English trustee, has entered an appearance. He therefore is properly before the Court with respect to those deeds. . . . It seems to me that every question between these parties can be fairly and conveniently dealt with there. . . . Under these circumstances it seems to me that the cost and convenience are both in favour of their being tried in Scotland, and there is nothing in them in any way to prevent their being so tried, because, although the two deeds are said to be in English form, they are in a form which is perfectly intelligible. . . . I do not see anything in them whatever to prevent their being equally well administered by the Court in Scotland as by the Court in England. Further than that, there are questions which it appears to me must necessarily arise relating to Scotch law, with respect to which it is far more convenient and far better as regards the evidence that they should be dealt with by a Scotch Court which knows what the Scotch law is, than that they should be dealt with by an English Court which is not at any rate familiar with Scotch law, and which cannot know anything whatever of it except as a matter to be proved by the attendance here of experts to state what the Scotch law is. Convenience and expense in my opinion require that I should not allow the two defendants who are resident in Scotland to be brought here to litigate the question in dispute, though, as I have said, I can conceive a state of things possible hereafter—though I do not think it likely to arise—in which some proceedings might be necessary in England

in which these persons might be served and made defendants here, so as to litigate the matter here.'

"Thus, then, so far as regards the English Court, there is no action pending as against Kedie, and the question now arises whether the present action against both defenders can be allowed to proceed. It would certainly be a case of great hardship if the pursuer were obliged to raise two actions—one against Kedie in Scotland, and another against Nicholson in England—in regard to an accounting for intromissions with an estate of which both parties were trustees, and this all the more that, as pointed out by Mr Justice North, the first question to be determined is one of Scotch law, as to the effect of a Scotch sequestration on the prior trust-deeds. The case of the *Magistrates of Wick* v. *Forbes, &c.*, December 11, 1849, 12 D. 299, shows that an action may be competent in the Scottish Courts against executors, although a number of them may be resident abroad, and no arrestment to found jurisdiction be used. On the other hand, the case of *Gillon & Co.*, v. *Dunlop and Collett*, February 27, 1864, 2 Macph. 776, is an illustration of the rule that the Court will not entertain an action against an executor resident abroad where a more convenient *forum* for trying the case exists in England. But in that case no part of the executry estate was situated in Scotland; it was under distribution in terms of a will executed in India, and under the authority of the foreign court. This distinguishes that case from the present one.

"According to the practice of the Court of Chancery the objection to the jurisdiction in such a case as this would be repelled, as is illustrated by the case of *Seymour* v. *Seymour*, January 27, 1888, 84 Law Times, 242, and 4 Times Law Reports, 250, before Mr Justice Chitty. There were there several defendants, some residing in England and some residing in Ireland. Two parties in Ireland, interested in the matter as sub-mortgagees, moved to discharge the order for service out of the jurisdiction, on two grounds—(1) That the cause of action against them was one in which no parties within the jurisdiction were interested, and that consequently there was no jurisdiction to make the order; and (2) that any question, so far as they were concerned, might effectually be raised in proceedings pending for sale of the mortgaged estates in the Land Court in Ireland, and consequently that the Court ought not to exercise the jurisdiction, even if it possessed it. Mr Justice Chitty, in delivering judgment, said that, 'with regard to the defendant's first ground of objection, in his opinion all the defendants were necessary parties to the action, wherever it might be tried. The cause of action was the same against all, although the remedies against and the liabilities of the different defendants were different. With regard to the second objection, if he were to uphold it, either the parties resident in England would have to be served with the proceedings in Ireland, or two sets of proceedings would have to be carried on, one in England and the other in Ireland. In the first alternative the parties resident in England would raise exactly the same objection in the Irish courts, to be taken to Ireland, and the result would be a deadlock. In the second alternative there would also be two sets of proceedings, one in England and the other in Ireland, in each of which all the same evidence would have to be gone through. Therefore on the ground of comparative cost and convenience he came to the conclusion that the action in this Court should continue as at present constituted, and that the defendants were properly served.' Upon the whole matter, the Lord Ordinary is satisfied that this Court has jurisdiction to try this case, and that it is immaterial to say that the defender Nicholson had taken the chief part in the management with the concurrence of the other defender."

The defender Nicholson reclaimed, and argued —The Lord Ordinary had dealt with this matter, and sustained the jurisdiction of the Scottish Courts substantially on the ground of *forum conveniens*, but in such cases an important question was, where was the estate situated? Here £500 of it was in England, and had been ingathered by the English trustee, and was lodged in the English Court for the purpose of division among the English creditors, who thought it unreasonable that money ingathered for their special behoof should be allowed to fall into the Scotch sequestration—*Black* v. *Duncan*, December 18, 1827, 6 S. 261; Goudy on Bankruptcy, pp. 477–78; *Charles* v. *Charles' Trustees*, May 19, 1868, 6 Macph. 772; *Mackenzie* v. *Drummond's Executors*, June 19, 1868, 6 Macph. 932; *Kyd* v. *Waterson*, June 5, 1880, 7 R. 884; *Thomson* v. *Tough's Trustees*, June 26, 1880, 7 R. 1035. There could be no doubt that ultimately these two trustees would require to be convened before one court, the only question being which court. It was by no means certain, as stated by the Lord Ordinary, that the questions involved in this case would fall ultimately to be determined by Scots law, as there were certain large questions involved both of English and international law. On the question of reconvention—All that Nicholson did was to appear to oppose the sequestration, and then he disappeared from the proceedings. He was liable to be called to account in England by Kearsley & Company, and so if he gave up the money he had ingathered he might be called upon to pay it twice—*Gillon & Company* v. *Dunlop*, February 27, 1864, 2 Macph. 776; *Magistrates of Wick* v. *Forbes*, December 11, 1849, 12 D. 299; *Orr Ewing* v. *Orr Ewing's Trustees*, July 24, 1881, 13 R. (H. of L.) 1; *Haliday's Executor*, December 17, 1886, 14 R. 257; *Richmond*, Guthrie's Sheriff Court Cases, 241; Snow's Practice, p. 192.

Argued for the respondent—All considerations of convenience pointed to this question being tried in the Scottish Courts. The bankrupt was a domiciled Scotsman; his estate (except the portion which had been wrongously carried into England) was in Scotland; and one of the trustees was subject to the jurisdiction of this Court. In such circumstances the Scottish Court had jurisdiction over the other trustee—*Magistrates of Wick*, *supra cit.* The sequestration superseded both the trust-deeds, and thereafter the proper *forum* for the determination of all matters in dispute was in the first place the mind of the trustee, and after that the courts of law might interfere. The present question could only be determined by the law of Scotland. With reference to the alleged proceedings in England, two of the three English creditors had disclaimed all

benefit from the trust-deed, while the third creditor, Kearsley, was a friend of the defender Nicholson. The pursuer was hampered in his duties by the actings of Nicholson, who appeared in the Bill Chamber as mandatary for Kearsley. Besides, Nicholson had submitted himself to the jurisdiction of this Court (1) by appearing to oppose the granting of sequestration, and (2) because Kearsley & Company were claimants in the sequestration, and Nicholson was clearly their agent. The Court had jurisdiction over Nicholson *ex reconventione—Ord* v. *Barton*, January 22, 1847, 9 D. 541; *White* v. *Spottiswoode*, June 30, 1846, 8 D. 952; *Barr* v. *Smith and Chamberlain*, November 18, 1879, 7 R. 247; *Kennedy* v. *Kennedy*, December 9, 1884, 12 R. 275; *California Redwood Company* v. *Merchant Banking Company*, July 20, 1886, 13 R. 1202.

At advising—

Lord President—The pursuer of this action is the trustee on the sequestrated estates of the deceased James Robertson, who carried on the business of a tailor and clothier in Glasgow.

Robertson's business seems to have been very much confined to Glasgow and the neighbourhood, although he had one or two creditors in England. His assets were all in Scotland, and his debts were, with a trifling exception, in this country also. The estate therefore was essentially a Scottish estate, while the assets were to be distributed among Scottish creditors. It appears, however, that on account of the difficulties in which Robertson found himself very soon before his death he executed two trust-deeds in favour of Mr Kedie, a Glasgow merchant, and the reclaimer Mr Nicholson, an accountant in London. The first of these deeds is dated June 1886, and it looks very like an attempt to create a preference in favour of a certain class of creditors. I give no opinion upon that, but undoubtedly, as appears upon the face of the deed itself, the granter was at the time insolvent. This was followed by another trust-deed, granted in the following month in favour of the same trustees, conveying to them his entire estate for behoof of the whole body of creditors; it is needless, however, to say that these trusts were superseded by the sequestration.

The object of the present action is to call the trustees under these two deeds to account for their intromissions. As to the title of the trustee in the sequestration to do this there can be no doubt, but Nicholson pleads that he is not subject to the jurisdiction of this Court in consequence of his being a domiciled Englishman, carrying on business in London, and he contends that this action cannot be maintained against him in this Court. The result of this would be that if an action cannot be maintained against Nicholson in this Court, then an action in the English Courts cannot be maintained against the other trustee, for he is a domiciled Scotsman. There would thus require to be two actions, one against one trustee in one country, and another against the other trustee in the other country. One cannot but feel that that would be a state of matters which could not be permitted, and it appears to me that there is good ground for holding that where trustees are liable conjointly to account for their intromissions, as they undoubtedly are here, the proper *forum* to try the question is the *forum* of the country in which the trust subsists and has to be executed, and that in the present case is Scotland. As this is a Scottish trust the liability of the trustees to account is indivisible, and the jurisdiction of the Court is founded not on the domicile of those who act as trustees but on the domicile of the trust. I am very much disposed to take the view taken by Lord M'Laren in the case of *Kennedy*, in 12 R. 275, where he says—"Where a trust is constituted in Scotland, and is to be executed in Scotland, the Supreme Court of this Division of the United Kingdom has jurisdiction over the whole subject-matter of the trust, including in that expression not only the interpretation of the trust, but the duty of making due provision for its continuance, and the power in cases of negligent administration of calling the trustees or trustee to account. It is a matter of frequent occurrence that a body of marriage trustees, having originally the domicile of the spouses, become in some degree scattered before the necessity for administering the trust arises, and it would be mischievous in the extreme if it were necessary to take separate action against the different members of the trust in the various parts of Her Majesty's dominions or elsewhere in which they might be resident for the time. The obligation of trustees to account for their administration is one and indivisible, and is in general to be enforced by an appeal to the courts of the country in which that obligation is to be fulfilled and where the trust is to be executed."

That judgment sustaining the jurisdiction of this Court in a case against the trustee, who was an Englishman, was not taken to review, and therefore, so far as that case was concerned, it rested only on the authority of Lord M'Laren, but adopting, as I do, the opinion then expressed by his Lordship I think it is distinctly applicable to the present case.

I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Mure concurred

Lord Shand—If the argument for the reclaimer was sustained two actions would be required to call these trustees to account, and various nice and difficult questions would arise for settlement. The only possible mode of extrication from these difficulties is to hold that both trustees are subject to the jurisdiction of this Court. As regards Kedie no difficulty arises, as he is a domiciled Scotsman, while as to Nicholson this Court undoubtedly has jurisdiction over him from the circumstance of this being a Scottish trust, while the facts of the case make it very clear that Scotland is the convenient *forum* for the determination of all questions that may arise regarding its management. Besides, all this becomes more apparent when we keep in mind the proceedings which Nicholson attempted to carry through in England, but unsucessfully, as Mr Justice North refused to entertain the action there on the ground that this Court was the more convenient *forum* to try the questions which had arisen between the parties.

Lord Adam concurred.

The Court adhered.

Counsel for the Pursuer and Respondent—Shaw—Graham Stewart. Agents—Cairns, Mackintosh, & Morton, W.S.

Counsel for the Defender and Reclaimer—(Nicholson)—Sir C. Pearson—C. S. Dickson. Agents—J. A. Campbell & Lamond, C.S.

Saturday, July 14.

FIRST DIVISION.

MARKEY *v.* COLSTON AND OTHERS.

Parent and Child—Custody of Child—Father's Right to Custody of Child.

A father voluntarily handed over his child to the care of the directors of a charitable institution in this country. The directors of that institution, without obtaining his consent, sent the child to a branch of their institution in Nova Scotia. The father having applied to them without success for restoration of his child, presented a petition praying the Court to order them to restore the child. Before considering the merits of the case the Court ordered that the child should be brought back to this country. This having been done, and a report having been obtained as to the facts of the case, the result of which was to show that there would be danger to the life and health of the child in restoring it to its father, the Court *refused* the prayer of the petition.

John Markey, residing at No. 5 Queen Street, Leith, presented this petition praying for the custody of his infant son, who in February 1887 had been received into one of the homes of the Edinburgh and Leith Children's Aid and Refuge. The petitioner stated that his application to the directors of the institution was only for the temporary admission of his child to the Home, and that he now desired to resume the custody of the child.

Answers were lodged for James Colston and others, the directors of the Children's Refuge, which contained the following statement:—

"1. Early in the month of February 1887 the petitioner applied at the respondents' Shelter for Children at 150 High Street, Edinburgh, for the admission into the respondents' said Shelter of his infant son John Markey, stated by him to be fourteen months old. The petitioner stated to the nurse to whom he applied that the child had been much neglected, and that it had been fed on whisky. The respondent Mr Young went to see the child to ascertain if it was a fit subject for admission to the Refuge. He found it had been shockingly neglected, and he reported that it seemed to be in a dying state. In consequence of this report, and in the absence of suitable accommodation for such cases, the petitioner's application was refused, but the said nurse was sent to the City Poorhouse to endeavour to arrange for the admission of the child into the poorhouse. The nurse was told that the father must apply. This was communicated to the petitioner; but the respondents do not know whether any application was subsequently made by him.

"2. Later in February the petitioner again applied for the child's admission. He stated that he had made no previous application when it was pointed out to him that the child had been already refused admission, and he at last confessed that he was the same man who had previously applied. He then urged that the case was even more necessitous than it had been before. He said that his wife was behaving worse than ever; that she had sold her children's clothes for drink; that she had been seven days in prison for assault and breach of the peace, and that after coming out of prison she had deserted him. He also stated that owing to his employment on the Forth Bridge he was obliged to be away from his house from early morning till evening, and that the child was left all day on the floor of the house to look after itself. This account was substantially confirmed by a neighbour, Mrs Murray, who also pled for the child being taken into the Home. According to her account the mother of the child was sometimes out all night in the streets carrying the child with her, and she stated that the child at such times had hardly any clothing to protect it from the severe winter weather prevailing at the time.

"3. In these circumstances the respondents agreed to receive the child into the Shelter for Children, 150 High Street, Edinburgh. Before the child was received a form of application for its admission was signed by the petitioner. The information contained in the said form was obtained from the petitioner. These entries are referred to, and in particular the eleventh entry, which is as follows:—'11. State circumstances connected with child causing this application: Mother in prison, and father goes out all day, and has no one to look after the child.'

"4. The respondents had no means of ascertaining whether the statements made by the petitioner and the said Mrs Murray were correct. They believed them to be true, and they were amply corroborated by the appearance and conduct of the child when admitted. It bore all the appearances of the grossest neglect. The certificate of the nurse who received it, written at the time, is as follows:—'I hereby certify that I have stripped and examined the child referred to above, and find it very delicate, and sore on arm through neglect.—C. MALLOCH, Nurse.' She now states 'that it was a perfect skeleton, bones nearly through, and that it was ravenous for food.' When admitted it had absolutely no clothing whatever, and was covered only by an old dirty shawl lent by the said Mrs Murray, which was returned to her when the child was left under the respondents' charge.

"5. The petitioner subsequently signed a form of applicaton for the child's admission to the respondents' Homes. The Shelter above referred to is intended for the temporary relief of urgent cases. The Homes are for the reception of children for lengthened periods. Of this the petitioner was well aware when he signed the form of application last above mentioned, which is produced and referred to. The petitioner's application was acceded to by the respondents, and the child was sent to the respondents' Home at Merleton, Wardie, on 25th February 1887.

"6. When the petitioner first applied to the respondents, and all through his subsequent dealings with them, he led them to believe that