

4th and 7th May, when the slander was uttered; and it was said to be "in presence of one or more," not all, of the persons named. It is not within the authority of the cases of *Innes v. Swanston*, and *Sutherland v. Robertson*, referred to; for it does not refer to a slander repeated in one place, such as a village, in which the special cases of defamation set forth in other issues have occurred. It is a matter for reconsideration whether, in granting such issues ("general issues") in future cases of slander, the issue should not embody a reference to the former special instance.

The other judges concurred.

The Court accordingly allowed the first three issues, and refused the fourth.

Expenses reserved.

Agent for Pursuer—L. Mackersy, W.S.

Agent for Defender—R. Menzies, S.S.C.

Saturday, February 1.

#### THE NORTH BRITISH AND MERCANTILE INSURANCE CO. v. THOMSON AND OTHERS.

*Jurisdiction—Forum Competens—Forum Conveniens—Domicile—Sist—International Law—English Court.* (1) Jurisdiction of Court of Session sustained in an action for payment of a policy of insurance directed against the company that were the debtors in the policy, in respect they were domiciled in Scotland. (2) Held that the Court of Session being a *forum competens*, the action could neither be dismissed nor sisted on the ground merely that proceedings were contemplated or had been instituted in England, it being a rule of international comity that the courts of one country must abide the result of proceedings in another country raising the same issue. But (3) right reserved to renew the objection that the Court of Session was not a *forum conveniens* if it should appear in the course of the proceedings that the questions raised were more suitable to be disposed of by an English Court.

This was a multiplepounding brought in the name of the North British and Mercantile Insurance Company to determine the rights of parties in a policy of insurance for £500 on the life of the late John Fleming, accountant in Glasgow. The policy in question was claimed by two parties—(1) the trustee on Mr Fleming's sequestrated estate, who was the real raiser; and (2) the marriage-contract trustees of Mr Fleming's daughter, who reside in England, and who claim under an alleged assignment contained in the said marriage-contract. The nominal raiser objected to the competency of the multiplepounding on the ground that the English Court was the only *forum competens* to try the question, or at least it was the *forum conveniens*, and that an action had been intimated at the instance of the marriage-contract trustees against the nominal raisers in the English Courts.

In support of this contention, the nominal raisers made the following averments:—

"The policy of insurance in respect of which this action has been brought was effected by the said John Fleming with the United Kingdom Insurance Company. The said Company was domiciled and carried on business in England. In 1862, while the said policy was in force, the business and funds of the United Kingdom Insurance Company were

transferred to the objectors, who are now liable to pay the sums arising under the said policy; but this obligation does not relieve the United Kingdom Insurance Company so far as the parties entitled to the sums in the policy are concerned. On the 14th December 1866, the objectors received at their office in London, from Mr W. K. Clay, solicitor, Dublin, a copy of a deed of assignment of the said policy of insurance in an English form, alleged to have been granted by the said John Fleming on the 10th March 1864, to Alfred Acheson and David Gilkison, the parties called in the third place as defenders in the present action. The said Alfred Acheson and David Gilkison have lodged no claim, and have intimated to the objectors that they decline to lodge a claim in this process, on the ground that they are advised that they are not bound to submit their right to hold the policy in question, and to obtain payment of the sums due under the same, to the law of Scotland. They have further intimated to the objectors that they are about to institute an action against them for payment of the policy in the English Courts. The objectors carry on business as an insurance company in England, and are subject to the jurisdiction of the English Courts. They are ready and willing to pay the whole sums due under the policy to the party or parties entitled thereto. But they are not in safety to make any payment under any decree which might be pronounced in this action, in the absence of the actual holders of the policy, and of the parties said to be interested in the alleged assignment above-mentioned, who are not subject to the jurisdiction of this Court. The policy libelled on has not been produced in process."

And they pleaded—

"In the circumstances stated, the present action ought to be dismissed, or at least to be sisted, leaving to the real raiser to take such proceedings in England as he may think proper. The proper *forum* for trial of the question of right to the said policy of insurance is in England. The holders of the alleged assignment above-mentioned being about to institute a suit against the objectors in the English Courts, the present action is incompetent, or at least inexpedient and inequitable; and no decree for payment or consignment ought to be pronounced in this process until the result of the proceedings taken in England shall appear."

The Lord Ordinary (BARCAPLE) repelled the objections, and sustained the jurisdiction of the Court of Session.

The nominal raisers reclaimed.

LORD ADVOCATE and KINNEAR for them.

SOLICITOR-GENERAL and JOHN MARSHALL in answer.

At advising—

LORD JUSTICE-CLERK.—This case comes before us on a reclaiming note from the judgment of Lord Barcaple, repelling objections of the nominal raisers, the North British Insurance Company, as stated by them to the multiplepounding instituted in their name by the real raiser, the trustee on the sequestrated estate of the deceased John Fleming, merchant in Glasgow.

The ground on which the action proceeds is, that the nominal raisers are liable in payment of the contents of a policy on the life of the deceased, and that the right to the proceeds is matter of contest between him, as trustee on the estate, and the marriage-contract trustees of the marriage of the deceased's daughter. These trustees are two in number, one resident in Ireland and the other resident and domiciled in this country. The marriage-con-

tract trustees, as such, and the trustee living beyond the jurisdiction of the Court, are cited edictally.

The objections of the nominal raisers are embodied in three pleas—the first of which asks for the dismissal of the present action, or that it shall be sisted that the nominal raiser may institute proceedings in England for the purpose of establishing any right that he may possess; the second affirms that the proper *forum* for the trial of any such question as is attempted to be tried here is in England; and the third is, that the proceedings, being incompetent, and at all events inexpedient to be prosecuted in the Court of Scotland, no decree for consignation should be pronounced in the case—[reads pleas.]

We have first to consider the plea that the action should be dismissed, and one basis of the proposed judgment, the alleged incompetency of the action in this Court. The plea implies that England is not only a proper *forum*, but the exclusive *forum* in which such a process can be brought. This is a strong proposition. I am prepared to negative that plea. It appears to me that, however we may deal with the process, it is perfectly competent, and that it cannot be dismissed.

The objectors are certainly subject to the jurisdiction of this Court by domicile. They are said to have a domicile also in England. Unlike the personal domicile which affects succession, there may be many domiciles which shall have jurisdiction over individuals or companies in the trial of suits. The nominal raiser brings his process in the *forum* of a domicile of the debtor. The case of a direct action for payment of that debt is very clear. If the trustee had brought his action to recover payment he would justify the proceeding would be properly instituted. The peculiarity is that we have here a process for distribution of a sum said to be due by the objectors, and not a direct action against them for payment of that sum.

The action is brought in the name of the company. It would be precisely the same, so far as relates to completion, if the action in this Court had been first brought by the company. If they had come into Court averring readiness to pay the sum in the policy, but the existence of competing claims by which they were distressed, it is very difficult to see how an objection to competency could be pleaded. It could not affect the right to bring the action that one of the parties having claims resided within the jurisdiction of the Court. We deal with multiplepointings every day, and have done so for centuries where parties under our jurisdiction admit debt and plead that they are distressed from claims maintained by foreign creditors. The very first case in the books—a case decided in 1624—regulates to some extent the practice at that period in reference to claims in which parties are absent from the jurisdiction who are said to be claimants upon the fund. I think they have a right to say to the Court of the country in which they are domiciled—there are competing claims against us by parties, who say “we are entitled to maintain payment of the debt, and we shall appeal to the courts of the country in which we are domiciled, consigning the debt and invoking the protection of the court to the extent of having the debt consigned, and the parties called on to compete for it.” It is a new doctrine to me that if a claimant who may compete is a foreigner, the Court cannot be invoked for his protection in the form of a multiplepointing. We have a form of

citation expressly adapted to the case of foreign claimants; and we are daily in the use of causing intimation to be made in such forms as will convey information to the foreign parties of the dependency of such actions.

Suppose the competing claimant for the sum in this policy to appear and contest the matter in this process, the validity of a decree to be pronounced in the competition is plain. The validity of a decree which could not be rested on the mere fact of a party regularly called appearing or not appearing tests the question of alleged incompetency. It is quite a different matter whether, there being a better process competent elsewhere, process should be stayed here. If there be here, as I think there is, a *forum competens*, the dismissal of the action would not be justified even if we were satisfied that a better *forum* existed in England, by which the questions agitated here might be determined, provided the *forum* which we have is a competent *forum*, exercising legitimate jurisdiction in entering upon the consideration of the question. That would introduce the different element of convenient *forum*, and lead to the consideration of the alternative view of a proposed *sist*. That proposal is rested upon the footing that England is either the proper *forum*, or that it is the more proper or more convenient *forum* for the determination of the question which is now raised. Now, is it clear that the *forum* of England is more proper or convenient, assuming that both *forums* are competent?

The Lord Ordinary has repelled the plea of the objectors out and out. Whatever view I may be disposed to entertain of the merits of that plea, it is perhaps going too far to repel the plea absolutely. In repelling it absolutely the possibility of reviving that plea in some possible condition of the question is probably not sufficiently guarded. The case which has been presented to us in argument, though perhaps not very consistent with the statements upon record, so far as we have a record here (though we have no closed record), affirm that the parties may not be found to be directly, but only ultimately, liable for the payment of this particular debt: and further, it seems to be affirmed and contended for that in as much as the contract itself is to be regarded as an English contract, and having the *locus solutionis* of that contract in England, there is evident propriety in England being made the place where the proceedings, with a view to investigate the claim, should take place. Now, we are not in a situation in which I think the objectors can call upon us to give effect to those pleas to the effect of sisting the proceedings in this process any more than to the effect of dismissing the cause. The full facts are not before us even in statement. We are not very well informed as to the true place of contract, or as to the facts and circumstances in which that question may be decided. The question with respect to the *locus solutionis* is left in very vague statements and conjectures, and in reference to the matter of liability, as contrasted with the ultimate liability which may be said to exist as in a question of relief between the North British Company and the Company who originally contracted, we have statements made of some materiality in the cause, and which probably may be considered as conclusive; but, in reference to the case stated upon the part of the nominal raiser, as to the successive receipts that have been given by the Company as coming in place of the former Company, which would be material in his view of the case; but we have no case presented to

us which gives us any reason, so far as the statement on the part of the objectors is concerned, to hold that that must be the result. Now, in this case we are asked to sist the process not as matter of advantage, so far as the case consists in the power of disposal of it, but rather as it appears upon grounds which would require to be substantiated, and which, if they are to be substantiated, would come rather in the form of objections to the condescendence of the fund *in medio*, or in some other form, and at some other stage of the cause than the present. So far as the plea is rested on the threatened institution of proceedings in England, as to which an action has been subsequently brought, it appears to me that that of itself affords no ground for sisting the process at all. If we have jurisdiction in the matter of the suit, it is not a ground for the Court in which the proceedings originated to sist; it is a ground for the Court, if of equal jurisdiction, in which a second and unnecessary suit has been instituted, to stay proceedings till the issue of the first. If the question has been fairly and properly brought before a Court of competent jurisdiction, another Court of no higher jurisdiction, and having a similar authority, will, according to the principles of international law, not proceed in the case, but will sist the cause in order that the first originated process may be followed to its proper conclusion. We cannot, on the mere suggestion that this well recognised principle of international law will be violated, or that the courts of England will refuse a remedy to parties against the injustice which would follow from giving decree in the courts there in the face of proceedings competently instituted for a distribution of the very fund in the competent Court. We cannot anticipate such a result as that.

I am unable to see any expediency otherwise in the sist, unless I were prepared to find that there was something to be gained by the institution of proceedings in England, by which the raiser should be driven to institute these proceedings. I don't see how it is that the raiser is under such an obligation. I rather think that the party who may be anticipated to remedy any inconvenience should rather be the party who, by coming here and claiming, could obtain a speedy, an economical, and a satisfactory adjustment of the case,—I mean the marriage-contract trustees, who, by claiming in this proceeding, may accomplish that result, rather than that the nominal raiser shall be driven to institute proceedings in England in reference to a matter which he has brought before the courts of his own country in a question with which they are competent to deal. But I am unable to perceive the contemplated benefit of the sist, unless we were prepared to hold that the real raiser was bound to take these proceedings in England. I don't see that we could sist in order that he might have the opportunity of taking them. I don't apprehend that such a state of the matter exists; and therefore it appears to me that we are not in a condition to do otherwise than to refuse the present application in so far as it rests upon a dismissal of this action, or a sisting upon the footing embodied in the plea. I think we are in a condition to dispose of that; and, in reference to the ulterior question as to another possible *forum*, I think we may make such a variation in the interlocutor as may keep that question open for a stage at which it may be more competently and properly introduced.

LORD COWAN—This is a multiplepointing brought in name of the Insurance Company, as the holders of a fund for which they are bound to account. It is brought by a raiser who certainly has stated an interest to claim the amount of the fund. He brings it in a *forum* in which the Insurance Company are indisputably bound to answer. Another party have a claim upon this fund, it would seem, under a certain marriage-contract, and these trustees are called for their interest, and to make their claim if they see fit in this multiplepointing. How far there is jurisdiction in this Court as against these marriage-contract trustees, we are not in a situation here absolutely to determine; but, certainly, it is a remarkably speciality that one of these trustees is domiciled in Scotland, and that the interest which is claimed here is an interest in a policy of insurance, the amount of which, when it comes to be exigible, must be paid by this Company, the nominal raisers here, who have a domicile in Scotland. In that situation, the nominal raisers, under the Act of Sederunt, put in, or ought to have put in,—I don't know whether that is the title of the paper or not—"Objections as in defence against the summons served as a claim upon him." Now, what are these objections? The objections, I presume, are intended to be embodied in the plea-in-law. The Lord Ordinary has repelled the objections, and therefore the course that would be taken would be this,—that when it goes back to his Lordship, the process would take its usual form; there would be an order probably for consignation, and there would be an order for claims, and then there will be a record prepared, I presume, either on the condescendence of the *fund in medio*, which the nominal raiser may put in, or between the competing claimants if both appear, and then we will have the whole case before us. But meanwhile, the North British Insurance Company put in these objections to the summons, and we must consider whether they can be disposed of at this stage, or upon such statements as those that we have in these papers. Now, let us see what these objections are. The first plea is "In the circumstances stated, the present action ought to be dismissed." I concur with your Lordship in thinking that such a proposition is out of the question, unless it could be held that we have no jurisdiction, which, certainly, I am not in a situation to hold. "Or at least to be sisted, leaving to the real raiser to take such proceedings, in England, as he may think proper." That is the purpose for which the sist is asked—that the real raiser, the party having an undoubted claim against the North British Co., and entitled to bring this multiplepointing into this *forum*—must go to England to raise proceedings there, and for that purpose, and with that view, that this action ought to be sisted. I take that plea along with the 3d, which is, that "the holders of the alleged assignment above-mentioned [*i. e.* the marriage-contract trustees] being about to institute a suit against the objectors in the English courts, the present action is incompetent, or at least inexpedient and inequitable; and no decree for payment or consignation ought to be pronounced in this process until the result of the proceedings taken in England shall appear." Now that goes to challenge our jurisdiction—which I presume none of your Lordships are prepared to hold to be at all questionable in a case like this. At all events I must say that in my opinion the jurisdiction of this Court in this matter is altogether beyond question. But the next question is, whether

there is to be a sisting upon a different footing altogether, and that is embodied in the 2d plea—at least so I read the 2d plea. It is said that the proper *forum* for trial of the question of right to the policy is in England, and we are called upon to entertain that motion upon such a statement of facts as we have here. All I shall say as to that is, that where there are questions of English law, or questions raised by parties who are domiciled in England, and where there are depending suits in the English Courts and in the Scotch Courts, motions of the kind that this plea seems to contemplate have been made and have been entertained by this Court, not because of there being any doubt of the jurisdiction of this Court, but because of its being an expedient and right and convenient course for getting at the justice of the case as between the parties claiming the fund and the holder of the fund *in medio*. The last case of that kind which I find in the books is the case of *Wilmot*. No doubt it was different from the present because there the multiplepounding was brought by the holder of the fund; but the parties went to issue there and the fund was consigned in bank, and, therefore, there was judicial consignation. There was no doubt of the fund being available to one or other of the parties. Then one of them came forward, produced his claim, and said “I insist upon having a decree of preference in the Court of Session.” The other parties appeared and said “No, we are at issue in an accounting between us, the two *Wilmots*, in the courts in England, and it will depend on the issue of that, whether this person who now makes the claim for a decree of preference shall get the decree or not—whether he has an interest in the funds, or whether we are not entitled to them; and the Court, after hearing all parties, pronounced this interlocutor—(3 D. 815, 6th March 1841), “In respect it at present appears that Robert Duncan *Wilmot* the factor, and his creditors, will have a preferable claim over the fund *in medio* in virtue of his lien over the policy, if they shall succeed in proving the balance by them in the pending suit in Chancery; and, in respect the fund *in medio* is consigned in a public bank to abide the issue of this process, supersedes further consideration of the claims of the parties till the true state of the balance between the parties is ascertained in the said suit, or otherwise; reserving, in the meantime, any decree or finding of preference in favour of either party, and all questions of expenses.” Now it does humbly appear to me that that is a precedent which ought to regulate our course of proceeding here, so far, at all events, as the present stage of this case is concerned. I see nothing in the statements that have been made by the North British Insurance Co. to justify us in sisting at this stage a process properly brought in name of the Insurance Co., who are bound to account in this Court, by a party who has certainly a claim and an interest over the fund which these parties hold. But after this process has gone on so far, and the true state of matters is ascertained, it may be that the North British Insurance Co., finding themselves attacked in England as well as attacked here with reference to this fund, may enter into the courts of England and get an interpleader, or they may apply to the Court of Chancery and get an injunction against the parties in England who have brought the suit of posterior date to the suit in this country, to get the party in England suing them there, enjoined not to proceed with their action in England till the proceedings are concluded in Scotland, and to compel the mar-

riage-contract trustees to appear here for their interest; and if they succeed in any of these applications then our course will be plain. If they don't succeed in that, but have an interpleader in England, and put themselves in a position really to account for this to one or other of the parties, I could understand a motion of the kind which was made in *Wilmot's* case, that as parties are at issue in England, and will have their respective rights to the fund determined by the English Courts, we ought to sist further procedure in this country, at all events to the effect of allowing the money to be taken out of the bank when consigned, in order that justice may be done to the North British Insurance Co.; but to say that, at this stage of the proceedings, we are now to sist, and to tie up the hands of this party who has brought the first action into a court of competent jurisdiction, because of another action, not instituted at the time that these papers were prepared, but instituted since in the Courts of Law in England, because that action has been instituted against the North British Insurance Co.—to say that we are *hoc statu* to sist this proceeding, and prevent the party from going on and getting the money consigned in bank, which is the next step, I suppose, to be taken in a multiplepounding like this—I for one cannot understand, and I cannot see any grounds to justify me in following that course. If your Lordships think that there should be a reservation—that we should adhere without prejudice to any motion being hereafter made to the effect set forth in the 2d plea in law, I certainly shall not object to it, but I don't see its necessity, and I think it right to say so, because the motion for sisting, though it may be refused *hoc statu* in the state of the pleadings, may be renewed at any subsequent period in the course of the process.

LORD BENHOLME—I think it is impossible to doubt that we have jurisdiction here; and upon that point I must say I differ least from what your Lordships have stated. I have much greater doubt as to the second plea. Lord Cowan has mentioned that a motion may be made at any time in the course of a process to sist proceedings, and that is true; but if that motion is to be made at any future time upon the footing of this plea, I think it very desirable that we should not altogether dispose of the plea, because that would seem to preclude that such motion should ever be based upon the footing of this plea. Now, whilst the question of jurisdiction is very clear, I think it is equally clear that cases may occur in which there is jurisdiction in two separate courts,—I mean to say in the courts both of England and Scotland. That is the case here. This Insurance Company is liable to the jurisdiction of both countries, and may be attacked in both. The ordinary case of *forum non competens*, or rather it should be stated *non conveniens*, is, that the place where the matter is to be tried, or is proposed to be tried is, under the circumstances, not the most convenient for the party attacked, a noted instance of which was, where trustees were attacked in a country where they did not possess all their vouchers, and where the accounting would be carried on at very great disadvantage, and, indeed, with very great cruelty to them if it was taken in that country. Jurisdiction not being denied, it was still said that the other *forum* was the better *forum*, the more equitable *forum* for trying the question. Now, that is not at all the shape of the case here. I don't suppose that in point of convenience there is any preference in the one court

over the other. But the difficulty that the objectors interpose is this,—we cannot force those other claimants to come into this jurisdiction and contest the only question that this multiplepointing raises; the multiplepointing is intended to solve a competition, but we cannot have the competition fairly tried here, because the parties who are entitled to compete will not compete before your Lordships. Now, it certainly is a great inconvenience if the matter at issue is to solve the conflicting claims of two competitors and there is only one of them in the field. How a multiplepointing could ever proceed to any effect it is difficult to see, if there is only one party in the field. Surely the competing claim can be maintained by the raisers. The nominal raisers of the multiplepointing have no interest in it at all. Nor do I see how the matter can be at all forwarded in the condescendence of the fund *in medio*. The condescendence of the fund *in medio* is merely the amount, I suppose, of the insurance about which there can be no doubt, and there cannot be introduced in that condescendence any such question as embarrasses us here. But what makes me very much agree to what your Lordship has proposed, viz., that we should not at present decide this plea at all or determine it, is this, that the real difficulty here after all may be removed. In the course of this process parties may find that they may be advised to come and claim and compete. We have no certainty that they wont; and until we ascertain that that is really the case, I don't think there is any difficulty at all. I do not think that the basis of the plea or the opportunity for trying it occurs, because if these parties do come forward in this multiplepointing and compete with the real raisers, then there is an end of the whole difficulty. This *forum* is just as convenient as the English *forum* for trying the matter, and though there may be questions of English law, they can be very well tried in this Court if there is proper jurisdiction. I should therefore suggest that what your Lordships propose should be adopted,—that while we repel the first plea as resting upon a supposed want of jurisdiction, on the one hand, or an immediate ascertainment that there is no jurisdiction, on the other, which I don't at present see (and which calls on us to sist),—I think we should still leave it open, by a reservation of the second plea, for a motion to be made based upon that plea, provided we find, in the progress of the case, that on the one hand it is such a question as might be well tried in England, and cannot be advantageously tried, or tried at all as a competition, when the parties are not here to compete, so that although I don't see my way to anticipate at what stage this plea shall either be acceded to or finally repelled, I think we should make a reservation in regard to this plea in order that the party may not suppose that the thing is finally settled, and that we are in every contingency to decide this question of competition when the competitors are not here before us.

**LORD NEAVES**—In the able argument which we heard in this case, some questions have been raised which appear to me of very great importance, and upon which it is difficult to avoid giving an opinion. The question of *forum competens*, arising, as it does, in reference not to mere bare jurisdiction, but to the inquiry as to the most just and expedient tribunal, where there is a choice of tribunals, is often attended with nicety, and requires the exercise of our best discretion, but it is particularly

important in the case of a multiplepointing, which is a peculiar process. A multiplepointing is a congeries of actions—a phrase often misapplied and extended far beyond its proper meaning; but it is true, in this sense, that a multiplepointing includes in itself a cluster of actions by each of the claimants against the raisers. That is one of the congeries. The next is, that it includes an action by the raiser against the several claimants for putting to silence all those that may be unsuccessful in the competition, in so far as he is concerned. So that it is a reciprocal action by the claimants, who are called as apparent defenders, against the raiser, and by the raiser against the claimants. If I come into Court and litigate with you in a proper multiplepointing as to a fund *in medio* which may be in my hands, whichever of the parties claimants succeeds in getting it, I am to be safe, and the rest of you are never to trouble me any more about the matter. That is the object of the action. That was finally fixed by the Act of Parliament 1684, which provides for the safety of the raiser against contumacious claimants not appearing; that is to say, those who ought to have appeared and do not appear. Now it appears to me that, in the exercise of our discretion and sense of justice, such a process ought not to be allowed except where there is both a good jurisdiction against the raiser—particularly if he is only the nominal raiser—and such a jurisdiction against the several proposed competitors as entitles us to say that this is the proper *forum* in which they should appear to make their claim, and in which, if they do not appear, they will be held contumacious, and excluded from all further claim, so that the raiser may be protected. In many cases all that is quite plain sailing, and if that is the case that is here stated, I think it comes under the ordinary case. Of our right in a multiplepointing against foreigners there cannot be the slightest doubt. We can treat that process against a foreigner just as we can treat any other process against a foreigner, supposing that there is jurisdiction in reference to the competition. But I very greatly doubt whether you could bring in a set of foreigners, both raiser and claimants, upon an arrestment founding jurisdiction. To say that I can arrest £10 as due to the Bank of England, and then bring into court a multiplepointing in name of the Bank of England, and call various claimants of some particular fund in question there, is, I think, very doubtful. The fictitious mode in which we sometimes bring in parties, does not appear to me to be applicable to this kind of case at all. Therefore, if there were a set of foreign parties, or a foreign debt—that is to say a debt which had a locality in a foreign country, and which was naturally to be sought in that foreign country by all the claimants who sought for it—I should have the very greatest difficulty in entertaining, on a mere fictitious ground or artificial basis of jurisdiction, any multiplepointing; because that, in a question of international law, ought to afford protection to the raiser, and ought to exclude the foreign competitors, who had no business to come here, and could not be compelled to come here. But these questions appear to me to be theoretical questions. Whether they may be ultimately raised or not I don't know. But the view I take of this case is, that they are not raised by the objections here. They are not raised by the pleas. It is admitted that this is a competent *forum*. There is no doubt that it is a competent *forum* as regards the competency of bringing an action, but I do not always admit that

it will make a competent multiplepointing, because it is one thing to bring an action, and another thing to institute a multiplepointing: for this reason, that if you bring a petitory action against a man, he can state all possible defences. He can state an objection to your title. I have great doubt whether the raiser of a multiplepointing can do that. If he is brought into Court as having a fund to pay, and is assured that he may pay safely, he is not entitled to raise objections to the party's title, saying "You are not the proper claimant, but the other party is." That is *ius tertii* to him in a proper multiplepointing. But in a petitory action he could raise that objection, and that is the reason why a multiplepointing is a more delicate proceeding than any other. But do we see any reason to believe that this is not only the proper, but the competent *forum* for trying this question? The defenders are a Scotch company—eminently so, for they carry their nationality on their very face—they are the *North British* and *Mercantile Insurance Company*. They admit their liability for the policy of insurance in question; they admit their liability since the year 1862, when they acquired right to the business of the *United Kingdom Insurance Company*. Nothing is said to show that the debt has in its own nature such a thing as a locality. If it is a mere personal claim against a debtor, the locality of that debt is the home of the debtor. That is perfectly plain. The locality of a personal debt is the *forum rei*. The defender against whom a debt is to be asked, wherever is his proper domicile that is the domicile of the debt due by him. There may be debts that have a locality, but it is not suggested here that this debt has a locality different from the place of business of the defenders who have to pay the debt. That being so, how is it possible for us to sist this action at present? It is said that one of the competitors whose claim must be set aside will not appear. If this is the proper *forum* for him to sue his action, he ought to appear; and if this is the proper *forum* of the debtor and of the debt, he ought to appear here when he is called. With reference to his not choosing to appear, what difference does that make? If an action was raised in the other Court, the party here might not choose to appear there. No doubt each has the law of his own country, he thinks, in his favour, and each wishes to choose the most favourable battle-field. The question is not that, but it is this, whether there is a fairer battle-field in the one case than in the other, which does not at first sight appear to me; or whether, if they are equal, the priority of the action is not to determine it; for if both are equally fair and equally competent, I think priority has a great deal to do with it; because if the action began here first, and if this is a proper place to sue, and there is no better place to sue, I think the other party is as much bound to come here as the Scotch claimant is to go there. It is said there is a point of English law to determine. There is also a point of Scotch law to determine, viz., whether an assignation is bad that is not intimated. It is good perhaps by the law of England without intimation, but it is bad by the law of Scotland without intimation. The question is, whether the law of Scotland or England is to prevail? Now what is the best *forum* for determining that? Is the law of the one country better than that of the other in determining that? Each is perfectly competent to determine it, and each is bound to do that on international principles, and I am convinced that each

will do so. Now this being, so far as appears, a competent action against a Scotch debtor, who may have a domicile in London too, but whose principal and proper domicile is undoubtedly here, as is not disputed, and there being no preference that I can see in this record by the one domicile over the other, I think we cannot throw out or stop this action. If the other competitors appear, it will be all right, and there will not be the smallest difficulty in determining the case. If they do not appear, so that we are reduced to what we may call a one-horse race, which is not a very interesting or exciting thing no doubt, though such a thing has happened, then Mr Thomson will walk the course; and that is the way the action will end. But, firstly, this is not the place to say that there is no fund; in the next place, it is perfectly competent to state in the condescendence of the fund *in medio*, "My obligation is qualified; I am not bound to pay except to a party who can produce the policy." I do not say that is a good plea; but if it is a good plea, it can be stated in the condescendence of the fund *in medio* as a right of lien or retention. Or the parties may say, "The circumstances are such that you should not, in the absence of others interested, give this sum without the party finding caution to repeat in a certain event." That I think one of the parties offered to do in the case of *Wilmot*. But all that is open. If the parties do not appear, we shall then hear what is to be said. At present I see no reason for throwing out or stopping this action. At the same time I am rather favourable to the view thrown out by Lord Benholme and by your Lordship, and perhaps the best course will be to repel these pleas without prejudice to the second plea being revived at a future stage, if any ground shall be stated for it.

SOLICITOR-GENERAL asked additional expenses.

LORD COWAN thought expenses should be given.

LORD BENHOLME—I am inclined to say, reserve the expenses.

LORD NEAVES—I have no objection to reserve rather than divide the Court equally.

LORD JUSTICE-CLERK—I am rather for reserving.

SOLICITOR-GENERAL—Are the expenses given in the interlocutor recalled?

LORD JUSTICE-CLERK—No; certainly not.

Agents for the Nominal Raisers—Davidson & Syme, W.S.

Agent for the Real Raiser—Alexander Cassels, W.S.

Tuesday, February 4.

## FIRST DIVISION.

BRIDGE OF ALLAN WATER COMPANY v.

ALEXANDER.

(Ante p. 174.)

*Statute—Lands Clauses Consolidation Act—Interdict*  
—Notarial instrument. Interdict having been granted against a company which had consigned money under sections 75 and 76 of the Lands Clauses Act, but had not expedite a notarial instrument—on the Company expediting such instrument, interdict recalled. *Question*, on construction of 76th section, as to distinction between vesting of the right in the Company on expediting the notarial instrument and recording of the instrument.