it will make a competent multiplepoinding, because it is one thing to bring an action, and another thing to institute a multiplepoinding: 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 multiplepoinding 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 *jus tertii* to him in a proper multiplepoinding. But in a petitory action he could raise that objection, and that is the reason why a multiplepoinding 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 expede a notarial instrument—on the Company expeding such instrument, interdict *recalled. Question,* on construction of 76th section, as to distinction between vesting of the right in the Company on expeding the notarial instrument and recording of the instrument.

The advocators now tendered a minute, stating that they had expede a notarial instrument in terms of the 76th section of the Lands Clauses Act, and craved the Court to recall the interdict.

Young and Burnet for advocators.

Gifford and Macdonald, for respondents, objected to the interdict being recalled absolutely, but were willing that it should be recalled to the effect of entitling the Company to make a new application for possession to the Sheriff under section 89 of the Lands Clauses Act.

Lord President—When this case was last before us we pronounced an interlocutor repelling all the pleas of the advocators, except the second plea stated by them in the inferior court, and continued the cause in order that parties might state how the disputed matters of fact, on which that plea depended, were to be cleared up. That second plea, which was founded on an allegation that the respondent had consented to the advocators entering upon the works, is now abandoned, and will fall to be repelled. The natural result of this would have been to grant the prayer of the petition for interdict; but new matter is introduced by this minute, which represents the position of this Company to have been materially altered, and we are now to consider the effect of that on the question whether this interdict, granted *ad interim*, should be continued, or made perpetual, or recalled. It appears to me that we must consider whether, under the state of circumstances as they are now presented to us, this interdict ought to be granted, because, if in the present condition of matters the interdict ought not to be granted, it follows that it ought not to stand. What is the position of the Company? Under the 28th section of the special Act, the property of the respondent's works is transferred, as on a contract of sale, to the Company, and the 29th section, along with the 28th, provides for the manner in which the price of these subjects shall be ascertained and paid, and a conveyance granted. The Lands Clauses Act being incorporated with the Special Act, the proceedings taken by the Company are entirely under the Lands Clauses Act, and the parties entered into an arbitration for ascertaining the amount of the price to be paid. The arbiter issued an award, and the Company demanded a conveyance. Sir James Alexander refused to convey the land, and his reason for that was that he was not satisfied with the award, and he intimated his intention of challenging it in an action of reduction, which has now been instituted. The Company consigned the price, under the 76th section of the Lands Clauses Act, and having consigned the price, they have also, in terms of that section, expede a notarial instrument for the purpose of transferring the property of the works from Sir James Alexander to themselves. It is important to observe what, under the statute, is the effect of that instrument. It is stated in these words, "and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase money or compensation shall have been deposited, shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands." The statute goes on to say that "such instrument, being registered in the register of sasines in manner hereinafter directed, in regard to conveyances of lands, shall have the same effect as a conveyance so registered." Now that conveyance has not yet been registered, so it has not that effect; but it has this effect, that it vests this estate in the Company, and entitles them, as in a question with Sir James Alexander, to immediate possession of the subjects. Now, when this interdict was granted, the Company had no such title. They had no title at all. They had deposited the price, but they had no title of any kind, nothing which had the effect, like this, of vesting the subjects in them, and entitling them to immediate possession. It is said that the advocators ought not to have this interdict recalled, because it is not intended to maintain it to the effect of preventing them from going to the Sheriff under the 89th section, and asking for possession in the altered circumstances of the case, and the respondent offers his consent to qualify the interdict so as to enable them to go to the Sheriff. But, in my opinion, there should be no qualification in the recal of this interdict. The promoters are now in a position in which the statute declares that they shall be entitled to immediate possession, and I do not think any Court is entitled to interfere between a party in that position and the subjects of which he claims possession, by an interdict. I give no opinion as to the proper step for the Company to take to obtain possession. We are not here to consider whether they must go to the Sheriff under section 89, or proceed *via facti*, or by any other judicial warrant; but I am sure of this, that no Court is entitled to interpose the obstacle of an interdict between such parties and the subjects of which they claim possession. I am therefore for recalling the interdict. The form will be to repell the second plea stated by the advocators, to recall the interdict in consequence of this minute, and to dismiss the petition.

Lord Curriehill—I concur in the opinion which your Lordship has delivered, and in the grounds of that opinion. I shall only say, that there is another element in the case which influences me in forming my opinion, and that is, that the interdict was an interim interdict. It was first granted on 17th August. The case was again before the Sheriff on 27th August, when the Sheriff-substitute ordered parties to give in condescendence and answers in terms of the Act, and meantime continued the interim interdict, *in hoc statu*. In that state of matters the process has been advocated, and when the case is before us matters are brought into that state in which the statute declares that the Company is entitled to be put into possession, for they are to be put into possession on such an instrument as this, though to a complete right registration is necessary. Parties now being in that position, what we have to do is to remove the obstacle by recalling the interim interdict.

Lord Deas—If I rightly understand the effect of the interlocutor to be pronounced, it is simply to remove the interim interdict so far as it might be an obstacle to this Company following out what may be their legal rights, but not to determine what these rights are. We are not to determine that here, without any record, but it is plain that we must put an end to this case in some way, and to do that must recall the interdict or declare it perpetual. We are not in a position to do the latter, for there is a change of circumstances, upon which the party making the change is entitled to found. I think there is a great deal in what Lord Curriehill says, that this is a mere interim interdict that cannot stand, for the effect might be that, suppos-

ing the Company had a perfect right to apply to the Sheriff, the interdict would stand in the way. I give no opinion what the rights of the Company are. I give no opinion on the question whether the expeding a notarial instrument entitles them to go into possession. I can see very important questions that may be raised as to the construction of the statute, and the apparent distinction in the statute between the vesting of the right in the Company and the recording of the instrument. It is only in the latter case that it is to have the effect of a conveyance. I say nothing as to that question, whether recording is necessary before they take possession, only observing that it does not follow that expeding a notarial instrument retained in the possession of the party, and which he may at any time destroy, is the same as recording it, whereby the real rights of the owner will be made apparent on the face of the public register. And I give no opinion on the regularity of the tender and consignation.

Lord Ardmillan—I have no difficulty in recalling this interdict *simpliciter*, but what may be the effect of that I shall not say. I have some views on the matter, but I do not at present give any opinion as to how far the Company may found on the provision of the statute, as giving them an immediate right of possession on expeding a notarial instrument, or whether they must wait until recording it. That question, arising on the construction of the statute, is not now before us. The objections stated to the notarial instrument now produced by the Company are so feeble as to be hardly stateable in argument. I think the justice of the case is to remove the obstacle which is at present in the way of the Company. But for the want of the notarial instrument the Company would have got immediate possession formerly. They have now got it, and I am for removing the obstacle.

The Court accordingly recalled the interdict, and found neither party entitled to expenses since 16th January, the date of the last interlocutor.

Agent for Advocators—A. J. Dickson, S.S.C.

Agents for Respondent—H. & A. Inglis, W.S.

Wednesday, February 5.

WILSON'S EXECUTORS *v.* SOCIETY FOR CONVERSION OF THE JEWS, AND OTHERS.

Proof—Propinquity—Title to sue—Expenses. Claims as next of kin in a multiplepoinding *repelled*, in respect of failure in the proof of propinquity. In the circumstances expenses given to the respondent in a reclaiming note, although his title to appear and claim was objected to, and had not yet been made matter of proof, and the reclaimer objected that he might thus be paying to a party who ought never to have appeared in the action.

Isabella Wilson died in 1868. By her settlement she directed her executors, after deducting all her lawful debts and legacies, "when my whole subjects and effects are recovered, and the preferable claims paid, to divide the same (with the exceptions after mentioned) equally among the four following charitable societies, viz., one-fourth to the London Missionary Society; one-fourth to the British and Foreign Bible Society; one-fourth to the Home Missionary Society, and the remaining one-fourth to the Society for the Conversion of the Jews." This action of multiplepoinding was now raised, in the name of Isabella Wilson's executors, by Mrs Wilson or Walker or Ogg and her husband, the parties called being "the Society for the Conversion of the Jews, if any such there be," and Mrs Ogg, "the next of kin or one of the next of kin of the deceased," and her husband, and others. The fund *in medio* was the one-fourth destined to he Society for the Conversion of the Jews.

A claim was lodged for Mrs Ogg and other parties, claiming as next of kin. They alleged that the bequest to the "Society for the Conversion of the Jews" was void in respect of uncertainty, there being no society in existence bearing that designation, and it being impossible to determine what society the testatrix intended to benefit.

James Wilson compeared and lodged a claim as next of kin, making the same allegation in regard to the "Society for the Conversion of the Jews," as was made by Mrs Ogg.

The "Scottish Society for the Conversion of Israel" claimed the fund *in medio*. The Society, they alleged, had existed for upwards of twenty years. The congregation at Huntly, in which the testatrix had been a member, was visited by the Society's agent, and made collections on its behalf. The testatrix was a subscriber to the Society, and to a periodical issued by it, and the testatrix intended by her bequest to leave, and had validly left, one-fourth of the residue of her estate to the Society.

The Lord Ordinary (Ormidale), on 28th Nov. 1866, pronounced an interlocutor finding "that the claimants, Mrs Ogg and others, and the claimant James Wilson, ought, before the case is farther proceeded with, to have an opportunity of establishing their title as next of kin to the deceased Isabella Wilson, as averred by them respectively."

"*Note*—The competition here is betwixt the claimants, the Society for the Conversion of Israel, on one hand, and the claimants referred to in the interlocutor, who respectively allege that they are the next of kin of the deceased Mrs Wilson, whose succession is in dispute on the other hand. It appears to the Lord Ordinary to be proper, if not indispensable, that it should be determined, in the first instance, which of the two parties referred to in the interlocutor is truly the next of kin of the deceased, as it is clear that only one of them can be so."

A proof was thereafter taken partly before the Lord Ordinary and partly by commission, and on 12th February 1867, the Lord Ordinary pronounced an interlocutor finding that the claimants had failed to establish their propinquity to the testatrix, and rejecting their claims; finding no expenses due to or by either of these claimants *inter se*, but finding said claimants respectively liable in expenses to the claimants, the Society for the Conversion of Israel, since the date of the interlocutor allowing the proof; and before farther procedure as to the claim for the Society for the Conversion of Israel, ordaining intimation to the Officers of State in order that they might, if so advised, make appearance for the interests of the Crown.

Wilson acquiesced, but Ogg and others reclaimed.

Maclean for reclaimers.

Dean of Faculty (Moncreiff) and W. A. O. Paterson for the Society.

Lord President—I think it is very much to be regretted that there has been so much expense in