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

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

At advising—

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

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

Lords Mure and Adam concurred.

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

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

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

Friday, June 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SMITH AND OTHERS *v.* STEWART.

Property — Servitude — Faculty — Negative Prescription.

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

ing proprietor, granted in his favour a bond of servitude by which they bound themselves not to build within 20 feet of the wall, and reserved the right to use this space as a road or street, with full power and liberty to the grantee in the bond to "use the said space of 20 feet in breadth as a road or entry for carts, carriages, and others, and to open up a passage or entry, not exceeding 10 feet wide in said dike, but said passage or entry last mentioned not to be further north than the north line of the southmost street to be formed on the ground" of the grantors. In 1827 a street was formed over the northern portion of the space of ground 20 feet wide, the southern portion remaining enclosed, and being used as a washing green. In 1883 the successor of the grantee proposed to demolish the wall so far as it formed the boundary of the southern portion, and to erect on its site the west wall of a new warehouse with a door opening into the washing green. The successors of the grantors presented a note of suspension and interdict to have him prohibited from using the washing green as a road or entry to his property, on the ground that he had acquired only a right of servitude by the bond, which had been lost *non utendo*. Interdict *refused*, and *held* that the right conferred by the bond was a *res meræ facultatis*, which could not be lost *non utendo*.

In 1824 the Weaver Incorporation of Dundee feued to the Dundee Joint-Stock Company certain subjects in Dundee described as—"All and Whole that croft of land called Donaldsdale or Donaldson's Croft, with the houses thereon, and dike built on the north side thereof, which whole croft was sometime ago converted into a yard enclosed with a stone dike, excepting always therefrom part thereof on the east side disponed by John Pattullo, father of James Pattullo, presently residing at Broughty-Ferry, to John Baxter, merchant in Dundee . . . . Bounded the foresaid subjects hereby disponed by a stone dike built by the said John Baxter, dividing the subjects hereby disponed from the said piece of ground disponed to him on the east . . . . . Together with a liberty and servitude in all time coming to rear and keep fruit trees upon the west side of the foresaid dike built by the said John Baxter." This stone dike was built on the ground which belonged to John Baxter.

In 1825 the Dundee Joint-Stock Company granted a bond of servitude in favour of John Baxter, by which, in consideration of the sum of £114, 5s., the said company bound and obliged themselves and their successors in the subjects feued to them by the Weaver Incorporation of Dundee, in the following terms:—"That we shall not at any time build or erect any house or other fabric or building whatever within 20 feet of the said John Baxter's said garden-wall, nor upon all or any part of the said piece of ground lying within the said space, reserving always to us, our feuars, tenants, and successors in said subjects the right and privilege to make and use the said piece of ground as a road or street, and also reserving to us and our successors in said subjects, the liberty and servitude in all time coming to rear and keep fruit trees upon the west side of the foresaid dike built by the said John Baxter; and farther, we, with consent foresaid, hereby grant to the said John Baxter and his foresaids full power and liberty to use the said space of 20 feet in breadth as a road or entry for carts, carriages, and others, and to open up a passage or entry, not exceeding 10 feet wide in said dike, but said passage or entry last mentioned not to be further north than the north line of the southmost street to be formed on the ground belonging to the said company as aforesaid."

About the year 1827 a street called George's Place was formed by the Joint-Stock Company on their property to the west of the boundary dike It formed the southmost street in that property. This street ran at right angles to and was terminated towards the east by the dike. Shortly afterwards that portion of the space of ground 20 feet in breadth above mentioned running northward from and at right angles to the eastern extremity of George's Place was formed into a street called Idvies Street. The south portion of this space of ground remained enclosed, and was used as a washing green.

In 1883 Mr Shiell's successor in the subjects to the east of the dike, proposed to demolish the wall forming the boundary between his property and the washing green, and on its site to erect the wall of a new warehouse, with a door in it opening upon the washing green.

This note of suspension and interdict was presented by Charles Smith and others, as representing the Dundee Joint Stock Company, to have Mr Stewart interdicted from "entering upon, passing along, interfering with, or using in any way" the washing green.

The Lord Ordinary (Fraser) on 12th January 1884 granted interdict.

The respondent reclaimed, and argued—The right conferred by the bond of servitude was a *res meræ facultatis* which could be lost *non utendo* —*Gellatly* v. *Arrol*, March 13, 1863, 1 Macph. 592. If the right conferred was a complex one, partly a servitude and partly a faculty, then even a limited exercise of the right will keep it open to the full extent—Ersk. Inst. ii. 9, 36; Stair, ii, 12, 26; Bell's Prin, sec. 999; *Monro* v. *Mackenzie*, 1760, M. 14,533; *Skene* v. *Simpson*, 1774, M. 10,746; *Haigues* v. *Halyburton*, 1704, M. 10,726; *Leck* v. *Chalmers*, Feb. 3, 1859, 21 D. 408.

The complainers replied—This was a servitude right which had been lost *non utendo*.

At advising—

Lord President—. . . The precise effect of the bond of servitude appears to me to be that, with a certain limitation to the north, Mr Baxter had power and liberty to use the strip of ground 20 feet in breadth as a "road or entry for carts, carriages, and others" to his property, and that he was further empowered to open up a passage or entry, not more than 10 feet wide, in the dyke. This was the dyke over which the servitude of rearing fruit-trees was reserved. It appears to me that this provision in favour of Mr Baxter enabled him to use the space 20 feet in breadth as an entry to his property whether the same was made into a street or not. There is no restriction as to the time within which the privilege is to be exercised. No street had then been formed on that space, and when Idvies Street was formed, it was only to a certain point, whilst the

space to the south remained enclosed. I think that the privilege in favour of Mr Baxter extends to the southmost point, that the two properties are alongside of each other, and that it is only to the north that there is any limitation. . . . It was maintained, however, by the complainers that the right conferred by the bond of servitude was one which might be lost by the negative prescription, and that it had been so lost, since the constitution of the servitude was in 1825, and the right conferred was only exercised the other day. Now, if under the bond of servitude the right conferred on Mr Stewart had been a right of access by an existing road or street, and if that right was not exercised for forty years, then this plea would probably have been well founded, and the negative prescription would apply. But that is not the nature of the right; it is one of a different description. No doubt a right of access is given, but it is plainly in contemplation that it is a right which is not to be immediately exercised. Then other things have to be done, and when the necessity arises for an access from the east to the west side, then the privilege is to be exercised. The first thing the respondent required to do was to demolish the dyke over which the Joint-Stock Company had their servitude right of rearing fruit-trees. Therefore, if it was by the act of demolishing the wall that access was to be obtained, then until Mr Baxter or his successors should find occasion for access from that side it was not to be expected that the privilege would be used. If they had done anything mischievously or maliciously under their right of servitude, when no advantage was to be gained, and when there might have been mischief, then probably an application for interdict might have been made in more promising circumstances. I fail to see how it can be said that such a privilege as this may be lost by the negative description. It falls clearly under the description of a *res meræ facultatis*—a right which is to be used hereafter when occasion arises—which has never been held to fall under the negative prescription.

I am therefore for repelling the reasons of suspension and refusing the interdict.

Lord Mure and Lord Adam concurred.

Lord Deas and Lord Shand were absent.

The Court recalled the interlocutor of the Lord Ordinary and refused the interdict.

Counsel for Complainers—Scott—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for Respondent—Sol.-Gen. Asher, Q.C. —J. A. Reid. Agent—J. Smith Clark, S.S.C.

Thursday, June 12.

SECOND DIVISION.

BURNETT AND OTHERS, PETITIONERS (WINDING-UP OF OREGONIAN RAILWAY COMPANY, LIMITED).

Public Company—Winding-up—Inability to Pay Debts—Title of Creditor to Petition—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 79 *and* 80.

The Companies Act 1862 provides, by sec. 79, that a company may be wound up by the Court . . . "whenever the company is unable to pay its debts." The 80th section provides "that a company shall be deemed to be unable to pay its debts when it has neglected for the space of three weeks, after demand by a creditor, in a sum exceeding £50 then due, to make payment thereof, or secure or compound the same, or . . . (4) whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

Certain holders of bonds of a public company presented, as creditors, a petition for the winding-up of the company on the ground that the interest on their bonds was unpaid, and that they believed and averred that the company was unable to pay its debts. The capital of their bonds was not due. When an order for intimation was moved for in the Single Bills the company objected to the order on the ground that the petitioners' interest had been paid within twenty-one days from the date of their demand. It appeared from the admissions of parties that the cause of the company's difficulties had been the refusal of a debtor to pay them a large sum of which they were proceeding to enforce payment; that the company were raising money to meet the interest to other bondholders; and that the object of the petition was, in the event of a liquidation being found necessary, to give the petitioners an influence therein and to fix the date of its commencement. The petitioners maintained that though their own interest had now been paid they were creditors of the company in respect of the capital of their bonds, and were entitled to the order craved, because they averred that the company was unable to pay its debts, and because the interest of other bondholders had admittedly not been paid. The Court *refused* to order intimation, and *dismissed* the petition on the ground that (1) the petitioners' own interest being admittedly paid, and the other bondholders not themselves taking action, there was nothing to show that any existing debt was due and unpaid; and (2) that there remained only the statement that the company was unable to pay its debts, which was not sufficiently specific.

Question, Whether the petitioners were "creditors" in the sense of the Companies Act 1862?

By the 79th section of the Companies Act 1862 (25 and 26 Vict. cap. 89), it is, *inter alia*, enacted—"A company under this Act may be wound up by the Court . . . . under the