The petitioner referred to the case of *Symington* v. *Symington*, March 18, 1875, 2 R. (H. of L.) 41.

The respondent argued—In England the rule founded on good reason and on statute was to the effect that where a marriage is dissolved on the ground of the wife's adultery, the Court will not grant her the custody of or access to the children of the marriage—*Bent* v. *Bent and Footman*, July 11, 1861, 30 Matr. Cases, 175. As far as the law of Scotland was concerned there were no instances recorded in which the Court had followed a different rule. Any cases which could be cited were cases where the husband had been in fault.

At advising—

LORD JUSTICE-CLERK—No authority or precedent has been cited to us in support of this application, and I am very clearly of opinion that unless in very exceptional cases access by the wife to her children where the husband has divorced her on the ground of adultery must be left in his own hands. I am of opinion that we are not entitled to interfere with him.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court refused the petition.

Counsel for Petitioner — M'Kechnie — Maclennan. Agents—T. & W. A. M'Laren, W.S.

Counsel for Respondent — Trayner — A. J. Young. Agents—Duncan & Black, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Lord Lee, Ordinary.

NEILSON *v.* THE MOSSEND IRON COMPANY AND OTHERS.

Process—Title to Sue—Trust—Quorum of Trustees.

In an action at the instance of a widow, as one of the executors under her deceased husband's trust-settlement, with concurrence of several of the beneficiaries, against a company in which her husband had been a partner, and against the other executors, to have it declared, *inter alia*, that the executors were entitled to take advantage of the company's provisions of the contract of copartnery, and become partners in place of the deceased, and that by a resolution of a quorum of the trustees, and intimation following thereon, they had become partners—the Court *allowed* a proof before answer, reserving the question of the pursuer's title to sue.

The following narrative of the facts giving rise to this action is from the opinion of the Lord Ordinary:—"The late William Neilson was a partner of the Mossend Iron Company. He died on 24th May 1882. At that date the other partners were the defenders Walter Neilson, Hugh Neilson, James Neilson, and Hugh Neilson junior. The last named partner was admitted in 1875. Prior to that date the partnership had been carried on under a written contract of 1867, the stipulated duration of which expired at May 31st 1873. Subsequently to 1875 it is alleged that the partnership was continued under that contract so far as applicable, or otherwise was carried on under a draft new contract adjusted in 1876, but never executed. The stipulated duration of this contract expired on 31st May 1882.

"By the terms of either contract it appears to have been agreed that on the death of any partner his executors should be entitled to become partners until the final expiry of the contract upon giving a certain notice in writing within two months after his decease, and if they failed to give such notice that they should 'forfeit their right to become partners.' If they declined to become partners, and elected to have the deceased's share paid out, it was provided that they should be paid out according to the 'immediately preceding balance.'

"The deceased William Neilson, by his trust-disposition and settlement, appointed as his trustees and executors (1) his wife, the leading pursuer of this action; (2) his brother Hugh, one of his partners; (3) his son James, another partner; (4) his son-in-law James Thomson; and (5) James M'Creath, mining engineer, Glasgow, and the acceptors and survivors of them, 'the major number of them accepting and surviving and resident in the United Kingdom from time to time being a quorum.' He provided, however, that in all matters in regard to which the interests of any of his trustees as an individual should be in conflict with the interest of any beneficiary, 'and in transactions with partnerships or companies in which they are partners or shareholders,' the vote of such trustee should not be counted, but that the adverse interest of such trustee should not otherwise affect his power to act."

This action was raised by Mrs Neilson, with consent of her children (except Hugh Neilson, a partner of the company, and Mrs Thomson), for declarator that at the date of her husband's death he and his partners in the Mossend Co. were carrying on business under the contract of copartnery of 1867, or otherwise the draft contract of 1875, and in either event for declarator that the pursuer and James Thomson and James M'Creath (as the only trustees qualified to act in question with the Mossend Co.) were entitled under either of these deeds to become partners of the company by intimating their intention in writing to that effect within two months of Mr Neilson's death, and that such notice had been given on 21st July 1882 by authority of the pursuer and Mr M'Creath, a majority of trustees entitled to act, and that in consequence thereof the pursuer and the other trustees and executors became as such partners in the company, and had continued to be so since that date; or otherwise, the action concluded for declarator that the copartnery came to an end with Mr Neilson's death, and should be wound up. There were also conclusions for accounting to the pursuer and other trustees by the partners of the company.

The Mossend Co. pleaded, *inter alia*, no title to sue.

The Lord Ordinary (LEE) before answer allowed a proof of their statements on record to the pursuers and the defenders the Mossend Co.

"*Opinion.*—[*After narrative given above*]—"The present action is founded on a resolution

of the trustees, alleged to have been arrived at by the pursuer Mrs Neilson and the said James M'Creath, being a majority of the persons entitled to vote in questions relating to the Mossend Iron Company. The copy minute produced bears to be dated 21st July 1882, and if it is correct would seem to indicate that Messrs Hugh Neilson and James Neilson were not present, having intimated that they 'did not think it necessary, not having a vote on this question, and having said all that they intended to say.' It further bears to have been 'resolved, after full discussion (Mr Thomson, who desired to be neutral, not voting), to take advantage of the provisions of the contract of copartnery of the Mossend Iron Company, and become partners in the late Mr William Neilson's stead.' The resolution appears to have been passed in compliance with a requisition by Mr Neilson's family, the beneficiaries under his settlement. The notice quoted in the condescendence is said to have been given the same day, viz., 21st July 1882.

"The defenders Hugh Neilson, Walter Neilson, and James Neilson dispute the right of the executors to become partners, and say that they will pay out Mr Neilson's interest upon the balance of 31st May 1881, and the present action has been raised by Mrs Neilson (Mr M'Creath having resigned office), with the concurrence of all her children, with the exception of Hugh Neilson junior, one of the partners, and Mrs Thomson. Defences have been lodged in name of the Mossend Iron Company, and Walter Neilson, Hugh Neilson, and James Neilson as partners and as individuals. Defences have also been lodged for Hugh Neilson, James Thomson, and James Neilson, as trustees of the deceased William Neilson, explaining the grounds on which they do not concur in the proposal to make these executors partners.

"It is pleaded for the principal defenders that the pursuer has no title to sue, and that the statements are irrelevant to support the action. The contention of the defenders is (1) that the pursuer does not represent a quorum of the executors; (2) that the contract in no view of it authorised the executors of a deceased partner to exercise the option of coming in as partners after the stipulated duration of the contract had expired; and (3) that the contracts of partnership libelled did not authorise a mere quorum of executors to become partners, but required that they should be unanimous.

"My opinion is that it would be premature to decide either of the two points last mentioned until it is ascertained what was the contract under which the company was carrying on business at the date of Mr Neilson's death. I also think it premature to decide as to the effect to which the executors (supposing them to have validly elected to become partners) could become partners on 21st July 1882. It may be that they could only become partners for the remainder of the stipulated period, viz., down to 31st May 1882. But it was explained that that would give them the benefit of being paid out upon the balance of 1882 instead of upon the balance of 1881. All this, however, is in my view for after consideration. The first question is, Whether the pursuer is entitled to proceed with the action?

"Upon this point I think that the pursuer is entitled to have it assumed that she may be able to establish the accuracy of the minute produced, and therefore that the resolution was passed by two out of the three accepting trustees qualified to act in this matter. In this view I think that the principle recognised by the Court in the case of *Shanks* v. *Aitken*, 8 S. 639, and approved in the case of *Blisset's Trustees*, 16 D. 482, entitles the pursuer to have the action proceeded with. She represents not only a majority of the acting trustees, but also the interests of beneficiaries who are entitled to found upon the resolution of that majority.

"I therefore allow the pursuer a proof of her averments on record, and the defenders a conjunct probation."

The Mossend Iron Company reclaimed, and argued that the pursuer had no title to sue.

Authorities—*Morrison* v. *Gowans*, November 1, 1873, 1 R. 116; *Shanks* v. *Aitken*, March 4, 1830, 8 S. 639; *Blisset's Trustees* v. *Hope's Trustees*, February 7, 1854, 16 D. 482.

At advising—

Lord President—I see no reason in this case to interfere with the judgment of the Lord Ordinary. On the contrary, it appears to me that the judgment on the merits will depend upon facts which have not yet been ascertained. If the defenders had been able to show upon record that Mrs Neilson had no title to sue, then they might have got the action thrown out, but they have failed to do so, and I will explain very shortly the grounds upon which I have come to that conclusion. In the contract of copartnery of the Mossend Iron Company (which I take on the defender's statement to be contained in the draft of 1875) this provision is contained in the tenth article—"Upon the death of any partner his executors shall be entitled, if they see fit, to become partners of the concern until the expiry of the first five years of the contract, or, in their option, until the final expiry of this contract, they always being bound to continue the deceaser's capital in the concern down to the time when they shall cease to be partners, and having a voice in the management thereof." And then it is provided that one of the executors shall exercise that influence and voice in the partnership affairs. It is further provided that "in case such executors shall decline becoming partners, and elect to have the deceased's share and interest in the concern paid out," in a certain manner, and that "if the executors fail to intimate in writing to the surviving partners their intention to become partners as aforesaid, within the period of two months after the day of decease, they shall forfeit their right to become partners." Now, under that clause, when Mr William Neilson died on 24th May 1882, his executors were entitled to assume his place from that day—the 24th of May—unless they either intimated that they declined to become partners, and that they wished to have their share paid out, or unless they failed within two months to intimate to the surviving partners their intention. About that head of the contract there appears to be no doubt; its purpose is to provide that if the executors elect to become partners they are just to take the place of the deceased.

It appears, then, that Mr Neilson died on the 24th of May 1882, and in the condescendence we are told that a resolution was arrived at by the pursuer and Mr M'Creath,

"being a majority of the persons entitled to vote in questions relating to the Mossend Iron Company," that intimation should be given of the intention of the executors to become partners. That minute is referred to, but it is not admitted, and perhaps it is not quite regular to notice its terms, but for the purposes of illustration it is not immaterial to observe that at the first meeting there were present Mrs Neilson, Messrs Hugh Neilson, James Neilson, and J. R. Thomson, and at that meeting a letter was read from the law-agents who were acting for the children of the deceased, urging the trustees to avail themselves of the option and become partners. Mr M'Creath was not present at that meeting, which was therefore adjourned until a later hour of the same day. Mr M'Creath was again unable to attend, and accordingly the meeting was again adjourned. Then at the adjourned meeting there were present Mrs Neilson, Messrs J. R. Thomson, and James M'Creath. These were the trustees who were entitled to decide on this question, because the absentees were not entitled to vote on any question in regard to the Mossend Iron Company. At that meeting it was resolved (Mr Thomson—who desired to be neutral—not voting) to take advantage of the provisions of the contract of copartnery, and the law-agent was instructed to give the necessary notices to the surviving partners. It seems to follow from that that they became, by reason of the resolution and the intimation which followed, partners of the Mossend Iron Company from 24th May 1882. Since then Mr Thomson, who was then neutral, as the minute bears, became more adverse to the resolution, and Mr M'Creath has resigned, but neither of these facts derogates from the authority of the resolution passed, if it was passed. That binds the executors and the company, and the beneficiaries under Mr Neilson's settlement have a vested interest in what was then done. By the operation of the resolution they have become partners of the company, and the beneficiaries, if they stood alone, would be entitled to insist that that resolution shall receive its legal effect. Mrs Neilson, as one of the executors, with the concurrence of the beneficiaries, comes into Court, not as a quorum of the executors—for the number of executors is reduced to two, and Mr Thomson would not concur—but with the consent of the beneficiaries, and brings this action to have it declared that the resolution and intimation have the effect of making the executors partners of the company. Now, that being the state of the facts, my impression is that the pursuer has a good title to sue, but I do not intend to decide that question just now, for I agree with the Lord Ordinary that it would be better to deal with that question when the facts have been ascertained. I agree with the Lord Ordinary.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuer — Pearson — Guthrie. Agents—J. & J. Ross, W.S.

Counsel for the Mossend Iron Company and Others (Defenders and Reclaimers)—Mackintosh—Dickson. Agents—Webster, Will, & Ritchie, W.S.

Counsel for the Defenders Hugh Neilson and Others — Low. Agents — Morton, Neilson, & Smart, W.S.

Tuesday, July 17.

SECOND DIVISION.

BROWN *v.* CARTWRIGHT AND OTHERS (SIR W. STIRLING MAXWELL'S EXECUTORS).

Process—Jurisdiction—Forum non conveniens—*Action against the Estate of a Domiciled Scotsman which has been made the subject of an Administration Suit in England.*

A domiciled Scotsman died possessed of large property, heritable and moveable, in Scotland, and of a house in London, and leaving a will, the executors under which were duly confirmed in Scotland. In an administration suit in Chancery at the instance of his infant children suing by their next friend, his moveable estate was ordered to be administered under control of the Court of Chancery. In an action brought in the Court of Session against the executors by a person claiming a legacy under the will, the executors pleaded (1) "no jurisdiction," and (2) "*forum non conveniens*," in respect of the proceedings in the English Courts. The Court *held* that the Scotch Courts had jurisdiction, and *repelled* these pleas.

Sir William Stirling Maxwell of Pollok and Keir died on 15th January 1878, leaving a holograph will and codicil in which he appointed Thomas Melville Cartwright of Melville, John Glencairn Carter Hamilton of Dalzell, Lanarkshire, the Hon. Ronald Leslie Melville of 75 Lombard Street, London, Sir Michael Shaw Stewart of Greenock and Blackhall (along with William Stuart Stirling Crawford, since deceased, and Alexander Young, who declined to act), as his executors. After leaving certain legacies to relatives and servants, including his butlers, coachmen, and housekeeper, he made a bequest in the following terms:—"To each of my other servants who shall be in my service at the time of my death, and who shall have been with me four years—one year's wages." He was a Scotsman, and died domiciled in Scotland. The executors (other than those who declined office as above stated) were confirmed executors by the Sheriff of Perthshire. At the time of his death his income from heritable estates in different parts of Scotland amounted to £40,000, and his moveable property amounted to £200,000. His only property situated in England consisted of his house in London. After his death an administration suit was raised in the Chancery Division of the High Court of Justice in England at the instance of his two infant children and their "next friend" Mr Stirling Crawford, in which the Vice-Chancellor (HALL) pronounced an order that the testator's personal estate (not specially bequeathed) be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities, if any, given by his will and codicil, and adjourned further consideration of the action. In an appeal to the Court of Appeal this order was not varied.

This was an action raised by Thomas Brown, who had been an assistant blacksmith at Keir for more than four years before Sir William's death, against the executors, for payment of a year's wages as the legacy falling to him under the above-quoted provision in the will.