onus of displacing it by evidence that the full quantity of the goods was not in fact shipped, and without saying that there was no evidence, I concur with your Lordships in thinking that the burthen has not been discharged by the respondents.

The House reversed the judgment appealed from, and restored the judgment of the Lord Ordinary, with costs against the respondents both in the House and in the Court below.

Counsel for the Appellants—Cohen, Q.C. —Aitken—Alexander Robertson. Agents—Downing, Holman, & Co., for Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondents—Bingham, Q.C.—Boyd. Agents—W. A. Crump & Son, for Lindsay & Wallace, W.S.

Friday, November 8.

OUTER HOUSE.

[Lord Moncreiff.

HUMPHREY *v.* HUMPHREY'S TRUSTEES.

Husband and Wife—Divorce—Foreign—Jurisdiction—Domicile—Recognition of Foreign Decree—Lex fori.

A decree of divorce duly obtained in the courts of the country in which the spouses are domiciled at the time, is valid elsewhere, and is entitled to recognition in this country, even although the causes for which it was granted may not be such as would entitle spouses domiciled in Scotland to obtain decree of divorce in the Scottish courts.

Where spouses, whose domicile of origin was Scottish, afterwards acquired, *bona fide*, and without collusion, a domicile in an American State, by the laws of which divorce *a vinculo matrimonii* was permitted on the ground of cruelty alone, and where the wife (who had accompanied and had resided with her husband) appealed to the courts of the State to dissolve the marriage on the ground of her husband's cruelty, and obtained decree in absence against him—*held* that the marriage had been validly dissolved by the foreign decree.

Observed that the application of the *lex fori* will be admitted and receive effect in other states so far as not repugnant to the public policy and standard of morality of such states.

In 1881 Miss Sarah Humphrey, daughter of the late Thomas Humphrey, spirit merchant, Kilmarnock, was married to David Neal Boyle, who at that time resided in Kilmarnock. Both parties were domiciled in Scotland. In 1887 Boyle and his wife, who had previously resided there for three years (from 1882 to 1885), went to America, with the intention of settling permanently there. On 26th October 1888 Boyle executed an oath and filed a declaration of his intention to become a citizen of the United States. From 1887 till the beginning of the present year the parties, with short intervals, resided in the United States, and in particular in the State of Illinois.

Thomas Humphrey died on 6th August 1894, leaving a trust-settlement and codicil. By the settlement he directed his trustees to divide the free proceeds among his children, share and share alike. By the codicil he provided as follows—"But in regard to the share therein provided to my daughter Mrs Sarah Humphrey or Boyle, wife of David Boyle, therein designed, I do hereby declare, whether I may have sold said Cross property or not, that in the event of her surviving me, the said share falling to her shall be held and retained by my said trustees during her lifetime, or at least so long as she remains married to the said David Boyle, and the free income or proceeds arising therefrom shall be paid over to her during that period, but not the principal sum; and upon her death, or the dissolution of her said marriage (whichever of these events shall first happen), the said principal sum shall be paid over and divided equally among her children, share and share alike, should she have died, or to herself should the said marriage have been otherwise dissolved."

In the beginning of 1895 Miss Humphrey (Mrs Boyle) called upon the defenders to pay her personally her share of her father's estate, in respect that her marriage with the said David Neal Boyle had been dissolved, decree of divorce in absence having been granted on 19th January 1895 in the Chancery Court of the State of Illinois, in a suit at her instance against her husband on the ground of cruelty.

The trustees resisted payment of this claim, and this action was thereafter raised by Miss Humphrey (Mrs Boyle) against the trustees for an accounting and for payment of the principal sum of the provision in her favour.

The defenders' pleas were as follows—"(1) The decree founded upon being pronounced in absence, and proceeding upon the ground of cruelty alone, is not entitled to recognition in Scotland as a divorce *a vinculo matrimonii*, and does not, on a sound construction of the said trust-disposition and settlement and codicil, constitute a dissolution of the pursuer's marriage within the meaning thereof. (2) The spouses having retained their domicile of origin at the date of the decree of divorce libelled, the said decree is not validly pronounced and is not entitled to recognition in Scotland. (3) The spouses having raised the action and obtained the decree of divorce libelled in concert with one another, and for the purpose of evading the restriction in the codicil libelled, the defenders are entitled to have the validity of these proceedings judicially ascertained before parting with the trust-estate. (4) The dissolution of the pursuer's marriage, contemplated by the testator in his said trust-disposition and settlement and codicil, being a dissolution thereof according to the

law of Scotland, the defenders are not in safety to pay the pursuer her share of his estate until the validity of the decree of divorce founded on has been established by decree of this Court, and are entitled to their expenses in this action."

On 8th November 1895 the Lord Ordinary (MONCREIFF) pronounced the following interlocutor:—"In respect that the marriage of the pursuer with David Neal Boyle has been dissolved by the decree of divorce condescended on, finds that she is entitled to payment to herself personally of the share of her father's estate destined to her by his trust-disposition and relative codicil. . . ."

Note.—[*After stating the facts above given*]—"The trustees resist payment of this claim upon a great variety of grounds; but the defence is now practically narrowed to one question of law.

"It is not now disputed that the decree of divorce is *ex facie* regular according to the law of the State in which it was pronounced.

"Secondly, the defenders do not now insist on their arguments of collusion.

"Thirdly, they do not now dispute that the domicile of the pursuer and her husband was in the United States of America at the date of the decree of divorce. Taking the length of residence in the United States in connection with the declaration of naturalisation, I think there is *prima facie* evidence of an effectual change of domicile; and as no evidence to the contrary is offered, it must be held sufficient to support the jurisdiction of the American Court.

"That disposes of the second and third pleas-in-law for the defenders.

"The fourth plea for the defenders is as follows—[*His Lordship read the fourth plea*]. That plea is also in my opinion ill-founded. The only thing which the testator had in view was that before the share destined to the pursuer was paid over to her she should have ceased to be the wife of David Neal Boyle, and if the marriage has been dissolved in a way which the courts of this country will recognise, that satisfies the condition in the will.

"The only remaining defence is contained in the first branch of the defenders' first plea-in-law. This plea raises an interesting question in private international law. The defenders chiefly rely on a statement of the law by Lord Fraser in his book on Husband and Wife, vol. ii. p. 1331, to the following effect:—'The Scottish courts will not recognise as valid the decree of a foreign court unless the ground of divorce be adultery or desertion.' His Lordship quotes as authorities certain *dicta* of Lord Justice-Clerk Boyle in the case of *Edmonstone*, June 1st, 1816, F.C. pp. 161 and 162; and the case of *Birt* v. *Boutinez*, L.R., 1 P. & D. 487.

"But it appears to me that Lord Fraser's statement of the law and the authorities referred to by him are not consistent with the cases of *Harvey* v. *Farnie*, 1882, L.R. 8 App. Ca. 43; and the Scotch case of *Carswell* v. *Carswell*, 6th July 1881, 8 R. 901, which were decided after the second edition of Lord Fraser's work was published in 1876. The import of the case of *Harvey* is thus correctly stated in the rubric—'The English courts will recognise as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud; and this although the marriage may have been solemnised in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

"'When an English woman marries a domiciled foreigner, the marriage is constituted according to the *lex loci contractus*, but she takes his domicile and is subject to his law.

"'A domiciled Scotchman married in England an English woman. Immediately after the ceremony the married couple went to Scotland and resided there as their matrimonial home. Two years after, the wife obtained in Scotland a divorce *a vinculo matrimonii* on the ground of the husband's adultery only. The husband came to England and married there another English woman, the first wife being still alive. In a suit for a declaration of the nullity of the second marriage at the instance of the second wife—*held* (*affirming* the decision of the court below) that the divorce in Scotland was a sentence of a court of competent jurisdiction, not only effectual within the jurisdiction, but entitled to recognition in the courts of this country also.'

"In the case of *Carswell* this Court sustained its jurisdiction and granted divorce in the following circumstances:—A Canadian married a Canadian wife in Canada. She deserted her husband in Canada in 1873 and remained in desertion. The husband came alone to Scotland in 1879, and in 1880 raised an action of divorce against his wife on the ground of wilful and malicious desertion. Desertion was not a ground upon which he could have obtained a divorce in Canada. After full and careful consideration, the Court held that the pursuer had proved a permanent domicile in Scotland, that his new domicile was that of his wife, and that the Court had jurisdiction to pronounce decree of divorce, which it did.

"These two cases seem to me practically to cover the whole ground. *Birt* v. *Boutinez* cannot stand with *Harvey* v. *Farnie*, and the *dicta* of Lord Justice-Clerk Boyle in the case of *Edmonstone* conflict with the ratio of both decisions. I have been referred to no other authority to show that Scotland occupies a unique position in this matter. I therefore take it to be established that where the parties have been throughout domiciled abroad, the courts of this country will give effect to a decree of divorce pronounced by the court of the foreign domicile although it may be granted upon a ground on which the courts of this country would not grant decree to persons domiciled here, provided always that the ground of divorce

is not repugnant to the standard of morality recognised by a civilised and Christian state.

"But the more difficult question remains, Does it not in this case make a difference that the domicile of the parties divorced was originally Scottish? I believe that to be a moot point. It has not been decided in terms; but I think it follows from the considerations which underlie the decisions to which I have referred, that, at least in the circumstances of this case, that fact is immaterial.

"Indeed, the case of *Carswell* could not have been decided as it was if that circumstance had been held to affect the question. The Court there granted divorce to a man who, not accompanied by his wife, changed his residence from Canada to Scotland for the avowed purpose of obtaining divorce on a ground which was not recognised by the laws of Canada, which was the matrimonial domicile of himself and his wife. The Court did not ignore the question how far a husband by changing his domicile can affect the incidents of the marriage and the wife's rights and status under the law of the domicile at the time of the marriage, because I find that the Lord Justice-Clerk Moncreiff guarded his opinion as follows (8 R. p. 909):—'Now, the authorities quoted to us at the debate certainly prove this, that in such a matter as that of divorce it is not in every case, or to every effect, that the wife's domicile follows that of the husband. If the wife were here resisting the action, if she were here complaining that Toronto was her domicile, and that she was compelled to assume a new domicile because her husband had gone away to Scotland, and in that way had obliged her to follow him to a foreign country and a foreign court—foreign so far as she was concerned—and a country not the country of her marriage, grave difficulties might present themselves; there might be a hardship and a want of expediency, also perhaps a want of principle in following the course which now suggests itself to us. But I want to save my opinion on that matter. I am of opinion that it is not in every case that we should hold that the wife's domicile follows that of her husband.'

"But holding that in the case before it the pursuer had *bona fide* acquired a domicile in Scotland, and was not acting in fraud of the rights of the wife under the contract of marriage, it sustained its jurisdiction and granted decree of divorce, whereby deciding that the husband's newly acquired domicile became that of the wife for the purpose of divorce. Now, if that decision is sound—and I must take it to be so—how on the barest principles of reciprocity can this Court refuse to recognise a decree of divorce of a foreign court competently pronounced in circumstances much more favourable to the party who obtained it than those in the case of *Carswell?*

"It is not disputed that as a general rule a wife takes and follows her husband's domicile. He may change it if he pleases, and if he does so *bona fide* and effectually, especially if the wife accompanies him, his new domicile will regulate not only the succession to the personal estate of the spouses, but also in my opinion the incidents of marriage and the status of the spouses. I am aware that there has been much discussion and difference of opinion among jurists on this subject, but I prefer the opinion of those who hold that the rights, duties, and obligations arising out of the contract of marriage must be regulated by the law of existing domicile. Admittedly the law of the country in which the marriage was celebrated, if not the domicile, does not necessarily rule, and there seems to be no greater reason why the law of the husband's domicile at the time of the marriage, which he may immediately change at his pleasure, should for ever regulate the status and rights of the spouses to the extent even of precluding any change by consent.

"Even on the score of expediency the law of the existing domicile is, I think, to be preferred. A domicile of origin is not easily lost, and if it is lost, that implies that there has been long residence abroad, or that it has been deliberately and unequivocably abandoned. In either case it would seem to be fairer to the spouses that, if disputes arise as to their conjugal relations, they should be decided by the law of the domicile to which they have submitted themselves, and in which perhaps they have resided the greater part of their married life, and not by that of the country their connection with which they have severed.

"There may perhaps be exceptions to the general rule (although it would be difficult to formulate them), as, for instance, where the apparent change of domicile on the part of the husband is not real, but in substance a fraud on the rights of the wife. But when the change of domicile is free from suspicion, and where the wife not only accompanies her husband, but appeals to the law of the new domicile for redress of matrimonial wrongs, there seems to be no room for an exception.

"I am aware that several learned Judges have reserved their opinion on the point, but they have done so in a very guarded manner. I have already quoted a passage from the opinion of Lord Justice-Clerk (Moncreiff) in the case of *Carswell.* Again, Lord Deas says in *Jack* v. *Jack*—'I do not look upon the rule that the wife follows the domicile of the husband as so absolute that there can be no exception to it, however palpably the husband may be attempting to turn the rule for purposes of injustice.'

"Other judicial expressions of doubt similarly qualified might be quoted. But after giving careful consideration to them I do not think that they apply or were intended to apply to a case like the present, where (1) the foreign domicile was not acquired for a collusive or fraudulent purpose; (2) where the wife voluntarily accompanied and resided with her husband in the new domicile; and (3) where the law of the new domicile is appealed to by the wife herself. There is here an absence of those features of *mala fides* and injustice which the learned Judges had in view when they reserved their opinion.

"The result therefore is, that in my opinion the pursuer is entitled to recover payment of the share of her father's estate which falls to her, and for the purpose of ascertaining its amount the trustees are bound to hold count and reckoning with her."

Counsel for the Pursuer—John Wilson—W. E. Mackintosh. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders — Burnet. Agents—Carmichael & Miller, W.S.

Wednesday, November 20.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'LACHLAN *v.* BELL AND ANOTHER.

Reparation—Relevancy—Interim Judicial Factor on Bankrupt Estate—Breaking Open Lockfast Room.

In an action of damages at the instance of a bankrupt's wife against the *interim* judicial factor on the bankrupt's estate, appointed under the Bankruptcy Act 1856, sec. 16, the pursuer averred that the judicial factor visited the farm-house occupied by the bankrupt to take an inventory of his effects; that one of the rooms contained effects belonging entirely to the pursuer; that the defender was informed of this, and that he nevertheless broke open the door of the said room, and that he "rudely meddled with the pursuer's property, and, ransacking a wardrobe, he tossed the contents about the floor of the room."

Held (*rev.* judgment of Lord Kincairney) that the pursuer's averments were irrelevant, and that absolvitor must be pronounced, on the ground (1) that, apart from the allegation as to breaking open the door of the room, there was no relevant averment of damage; (2) that in breaking open the door for the purpose of obtaining an inventory of the bankrupt's estate, the defender was acting in the discharge of his duty; and (3) that assuming any legal wrong to have been done by his doing this, it was the bankrupt and not the pursuer who had suffered that wrong.

On the 13th May 1895 Mrs Jane Borland or M'Lachlan, wife of George M'Lachlan, farmer, Craigthorn Farm, near Strathaven, raised an action for £200 damages against Thomas Bell, sheriff-officer, Hamilton, *interim* judicial factor appointed under the Bankruptcy Act 1856, sec. 16, on the sequestrated estate of the pursuer's husband, and against the said Thomas Bell's cautioner.

Sequestration of the estate of the pursuer's husband was awarded on 17th November 1894, and the defender Thomas Bell was appointed *interim* judicial factor on his estate by the Sheriff-Substitute of Lanarkshire at Hamilton, pending the appointment of a trustee.

Up to Martinmas 1894 the bankrupt had occupied the farm of Kirkland House, Avondale.

The pursuer averred—"(Cond. 3) On or about 28th November 1894 the defender came to Kirkland House Farm about 8 o'clock in the morning, and said he had been sent to inventory the effects in the farm-house. He was asked by the pursuer's husband for his warrant, but refused to show any, and wrongfully proceeded to go through the house, and take a note of the contents of the various rooms. One of the rooms, a parlour, contained effects belonging entirely to the pursuer. The defender was informed that this was the case, and he was refused admittance, the door being locked. (Cond. 4) The defender thereupon left, but shortly afterwards returned. He then wrongfully, and without warrant, reentered the house, and by sheer force violently burst open the door of the said parlour, breaking the lock. There he rudely meddled with the pursuer's property, and ransacking a wardrobe he tossed the contents about the floor of the room. (Cond. 5) All the articles in the said parlour were the property of the pursuer, and had been bought by her previous to her marriage in 1889. The defender was distinctly and emphatically informed of this fact, and although he was made aware of it, and was remonstrated with, he persisted in going on with his high-handed and illegal proceedings. (Cond. 7.) The defender's conduct was not only wrongful and illegal, but injurious to the pursuer, and an invasion of her rights."

The pursuer pleaded—"The defender having acted unwarrantably, wrongfully, and illegally, to the injury of the pursuer, she is entitled to decree as craved with expenses."

The defender pleaded—"(1) The pursuer's statements are irrelevant, and insufficient to support the conclusions of the summons. (3) The pursuer having suffered no damage, the defender should be assoilzied with expenses. (4) The defender having acted in the proper discharge of his duty as judicial factor, is entitled to absolvitor."

On 5th November 1895 the Lord Ordinary pronounced an interlocutor approving of the following issue:—"Whether on or about 28th November 1894, the defender, in Kirkland House Farm-house, Avondale, wrongously and without a legal warrant forced an entrance to a lockfast room, which was solely the repository of the pursuer's property, and interfered with said property, to the loss, injury, and damage of the pursuer. Damages laid at £200 sterling."

The defender Bell reclaimed, and argued—(1) It was part of the judicial factor's duty to take an inventory of the estate. The only reason for the factor being appointed was that loss was apprehended between the date of the sequestration and the appointment of the trustee. The defender therefore was not only entitled but bound to do what it is alleged that he did. (2) If there was a wrong done here, it was a wrong to the bankrupt, and not to the pursuer, his