

Thursday, March 15.

SECOND DIVISION.

SIM v. SIDNEY.

Proof—Loan—Reference to Oath. Terms of an oath on reference in an action for payment of a loan which held negative.

Counsel for the Advocate—Mr Fraser and Mr Scott. Agent—Mr Galletly, S.S.C.

Counsel for the Respondent—Mr Mackenzie and Mr H. J. Moncrieff. Agents—Messrs Murray & Beith, W.S.

This is an advocacy from the Sheriff Court of Perthshire. The respondent, James Sidey, farmer, Cottartown, and John Dewar, wine and spirit merchant, Perth, executors nominated and appointed by the deceased John Gow, farmer, Pittendynie, raised an action in the Sheriff Court against the advocate, John Sim, farmer, Kinvaid, in which they concluded for payment of £220 sterling, being cash advanced by the said deceased John Gow to the defender in loan on or about the 29th November 1860. The money was advanced to the defender by a draft in his favour upon the Central Bank in the following terms:—

“Pittendynie, 29th Nov. 1860.—Debit my account with Central Bank of Scotland two hundred and twenty pounds sterling to the bearer John Sim.

(Signed) “JOHN GOW.”

The defender admitted having got the money, but pleaded that it was given to him in *pro tanto* extinction of counter-claims which he had against Gow for services rendered. The pursuers not being able otherwise to instruct their case, referred it to the defender's oath. In his disposition the defender admitted that Gow (his father-in-law) gave him the bank draft for £220, and that he drew the money from the bank. He further admitted that at the time when the draft was given to him nothing was said either by him or by his father-in-law as to the draft being given in satisfaction or extinction of any debt due by the defender's father-in-law to him, or that it was given by way of donation. The defender added that he understood that the money was given to him in respect of his counter-claim.

The following are the material portions of the oath:—

“I began to assist the deceased John Gow in his business in July 1851, and continued to do so down to about the 28th April 1862. He made an arrangement with me at Birnam on 5th April 1851. He wanted me to come to him at Whitsunday thereafter, but I could not then come. I married a daughter of Mr Gow in July 1851. I never resided at Pittendynie. Went to reside at Kinvaid in July 1851. Mr Gow had both farms at that time. There was a dwelling-house at Kinvaid. I and my wife have ever since resided in part of the dwelling-house. Mr Gow's sister has resided in another part of the same house. When I went to Kinvaid Mr Gow had a foreman on each farm, with the ordinary staff of servants. I took the farm of Kinvaid at Martinmas 1859. Mr Gow continued to have a foreman at Kinvaid down to the time of my becoming the tenant. But I add, I took the management. He also had a foreman on Pittendynie. I did not act the work of a ploughman on Kinvaid, and did not go there with that intention. From the time I so went to Kinvaid I assisted Mr Gow in managing both farms, and in his business both in buying and selling. Sometimes he bought and sold; sometimes he did not. He did not do so generally, and not without my concurrence, and especially in buying and selling stock. This arrangement was made before I went to Kinvaid. There was a bargain as to remuneration. This bargain was made at Birnam on 5th April 1851. My wife was present, and none else. She was not then married to me. I was to get £40 in the year

to assist him. He promised to pay me that sum. At Martinmas 1852 he said he was in straitened circumstances, and he owed sums, and therefore asked me to continue, and he would pay me. All I got from him before the sum sued for was £30 in 1858. After getting the sum sued for Mr Gow never asked me to meet him for the purpose of granting a bill for the sum. We met in Mr Dewar's shop almost every Friday, being the market day. He never on any such occasion spoke of my granting him a voucher for the said sum. I never heard a bill spoken of, and therefore I never objected that I would not be able to meet it when it became payable. I keep no books, and made no entry of the money so got from Mr Gow. When I got the money he never asked any written account of my claim, and I gave him no such account. I applied to him for the money, and he gave me the cheque on the Central Bank. I suppose he wrote the draft at Pittendynie. Of course I went to him to ask the money. I do not mind what passed. I asked money in order to pay something. I suppose he knew I had rent to pay. I was due a sum of rent about equal to the sum I got from him. I could not say what passed, or whether rent was spoken of. Part of the money went to pay my rent. I think I said I wanted £220 from him. He answered—“Would I not want more?” I said that sum would do. I remember nothing more that was said. He then gave me the cheque. He did not ask, and I gave him no receipt for the money. I am not aware that I had any previous conversation with him as to my wanting the money. He was poorly about that time, and not much out of the house; but I saw him there almost every day. He was not in bed, but confined to his room. At his death he was eighty-four years and three months of age. I got no money since my marriage, except the £30 in 1861, and the cheque. The stocking was very little, and he took it away. I got part in remuneration of my services, and part I paid him for, and there was not much altogether. When I got the cheque I cannot say if anything was said as to remuneration of my services, as it is so long ago, and I do not remember what was said; but he knew well enough of my claim for services. We had often talked over this, but I am not aware if we did so about that time. The sum was paid me for my services, and for assisting him in his business. I could not say whether we mentioned the sum due me for my services, but we often talked over the matter, and I have no doubt we did not mention the sum. We spoke of it repeatedly, but I do not know all that passed between us. I did not meddle much about the amount or money matters, but left this to himself.”

The Sheriff-Substitute (Barclay) and the Sheriff (Gordon) held the oath to be affirmative of the reference; but to-day the Court held that it was negative.

Friday, March 16.

CLEMENTS v. MACAULAY.

Forum non competens. In an action of accounting betwixt two Americans, in regard to a contract entered into in America, which was said to be illegal, a plea of *forum non competens* (alt. Lord Barcaple) repelled.

Counsel for Pursuer—The Solicitor-General and Mr A. Moncrieff. Agents—Messrs Wilson, Burn, & Gloag, W.S.

Counsel for Defender—Mr Clark and Mr Lee. Agents—Messrs Hamilton & Kinnear, W.S.

This is an action of count, reckoning, and payment at the instance of Nelson Clements, sometime of Texas, and presently of No. 24 Chester Square, London, against Mr John Macaulay, merchant, carrying on business, and now or lately residing at New Orleans in America. The action arises out of

a joint adventure which was entered into between the pursuer, the defender, and other parties in 1862, the purpose of which was to convey cotton from Texas to the West Indies, and to carry back munitions of war for the use of the Confederate Government. A ship was chartered for that purpose, and made one or two voyages, but was finally destroyed by the Federal cruisers. The adventure was to a certain extent successful. The defender was the manager of it, and the pursuer claims his share of the concern from the defender, in whose hands the proceeds are. The defender pleaded *forum non competens*, that the only proper and competent form for determining the rights of the parties, under the agreement or joint-stock adventure in question, is the appropriate tribunal of the State in which said agreement was entered into, and the action ought to be dismissed in respect this Court is an inconvenient and incompetent *forum*. He further pleaded—"In respect that the joint adventure in question was undertaken by citizens of the United States of America, for the purpose, *inter alia*, of furnishing supplies and munitions of war to be employed by citizens of the said States against the Government thereof, the claim founded on the said joint adventure cannot be enforced in the Courts of this country, and the present action should be dismissed."

The Lord Ordinary (Barca) gave effect to the plea of *forum non competens*, and in the note appended to his interlocutor he observed—

"The defender maintains that he has a good defence against the action upon its merits, on the ground that the contract founded on was illegal, and altogether invalid, according to the law of the country in which it was entered into; and he contends that this is a question of American law which cannot be conveniently or satisfactorily disposed of by the courts of a foreign country. This is undoubtedly a relevant allegation, in support of the plea of *forum non competens*. The question is, whether it is sufficiently borne out by the nature of the case. The defender cannot be deprived of the benefit of his defence—that the contract was illegal, and ought not to be enforced. If the Court undertakes to decide in the cause, it must investigate and dispose of that ground of defence; and if it plainly appears that it cannot do so, except at a great disadvantage, in this case between foreign parties, in relation to a foreign contract and questions of foreign law, it will act consistently with recognised principle by remitting the parties to the courts of their own country. Of course no necessity for doing so in respect of this question as to the legality of the contract would arise if it could be made to appear that its legality is not to be judged of by the law of America. It was attempted to assimilate the case to that of an action on a contract contrary to the fiscal laws of a foreign State of which the Court where the remedy is sought does not take cognisance. But this is not a question of evidence, or of the conditions on which the remedy will be given, such as occurs in the class of cases referred to. It relates to the inherent and original validity of the contract. The Lord Ordinary does not in the slightest degree anticipate the judgment which is to be pronounced on the plea of illegality of the contract; but whether it is given effect to or rejected, he thinks it must be upon grounds which, though necessarily depending on the law of America, should be recognised wherever the parties may be litigating. Reference was made to the principles of public international law, as if the Court might find in them the means of deciding as to the legality of the contract without having recourse to the law of America. But the Lord Ordinary thinks that this case does not involve, even incidentally, any question of public law which regulates the rights and relations of States towards each other, and the resulting rights and relations between a belligerent State and the private citizens of a neutral State. The question which the Court is here asked to entertain and determine is between two private parties, both citizens of the same State.

It relates to a contract of joint adventure into which they entered as mere private traders, and the object of the action is to obtain an accounting by the defender of his whole actings and intrusions under the contract. There is here involved no matter of international right or public law. The defender alleges that the contract is illegal according to the laws of the State within whose territory it was entered into. But the alleged illegality of the contract does not consist in its being inconsistent with the relation between the State of which the contracting parties are citizens and other States, but in the violation of their allegiance to the sovereign power of their own country. This must be exclusively a question of municipal law wherever it may happen to be tried. Any question as to the legality of a contract entered into here by citizens of this or any other neutral country, for running a blockade, or exporting munitions of war to a belligerent State, is, of course, proper for the jurisdiction of our courts—the question being whether it is illegal by the law of this country. In determining this question, reference will be made to the relation of the sovereign, by treaty or general public law, to the belligerent powers, in order to ascertain whether such a contract entered into in this country is inconsistent with the duty of citizens, and therefore illegal by our municipal law. The way in which such a question may arise is well illustrated by two very recent English cases—*Ex parte Chavasse in re Grazebrook*, 22d April 1865, 34 L. J. Bkr. 17, and the *Helen*, 7th November 1865, 1 Law Rep., Ad. and Ecc. 1. In both of these cases a plea founded on the alleged illegality of a contract similar to that which is now in question, but entered into in this country, was considered and disposed of. In the present case the question has no reference to the international relations at all. It is simply whether the contract was essentially illegal by the law of the country where it was entered into, and of which the parties to it were citizens. If the case is to be entertained by this Court, that law must be ascertained. The courts of this country cannot undertake to judge for themselves in that matter. They could be conceived to do so only upon the assumption, altogether opposed by the pursuer, that there is no speciality arising out of the Federal constitution of the United States, or out of the *de facto* relative position of the States, at the date of the contract. It is no part of the functions of the courts of this country to judge between citizens of a foreign State in regard to their relative rights and duties as citizens of their own country. If, in the complicated transactions of trade, or otherwise, it shall become necessary to determine matters of that kind, in order to enable the courts here to exercise their jurisdiction in suits properly before them, they must be ascertained, like other points of foreign law, by referring to authorities competent to expound that law. While this is the course that must be taken if the Court is to judge in the matter, the Lord Ordinary thinks that in sound judicial discretion it should not undertake to investigate the foreign law in the present case, but leave it to the parties to have that matter discussed in the courts of their own country. It is the constitutional law of the foreign State, affecting the principles of its government, of which this Court is asked to judge, in order to determine a question of private contract. It is conceivable that even such a question may by necessity be forced upon the tribunal of another country; but no such necessity can exist where, as in the present case, there is ample occasion to consider whether this is the appropriate *forum*. In maintaining his right to have the case adjudicated upon in this Court, the pursuer is driven to suggest that it may not now be decided in his own country upon the same view of the law which would have been enforced in Texas at the date of the contract. This implies that he declines to have it disposed of by the existing law of the country of both himself and the defender, and of the contract. The Lord Ordinary thinks that

such a contention is untenable. If in disposing of the question reference ought to be made to a former political state of matters, it is to be assumed that will be done by the courts of the country whose law is to be administered. They must be best informed, and are indeed alone competently informed, as to the constitution of that country, and the legal effect of the political events which have taken place there. The Lord Ordinary does not conceive that this Court could do anything in the matter, except receive competent evidence as to how it would be determined if now decided by the American tribunals. It is strictly a question of their law, and that of a constitutional kind, with which a foreign court can have least to do. And it is not the less so that it arises out of a civil contest, which was recognized by this and other neutral countries as a state of war importing the rights and duties of belligerents and neutrals. Such recognition affected international relations, but it could not affect the political nature of the contest, or the rights and duties of American citizens in reference to it.

The defender having reclaimed, the Court unanimously altered the Lord Ordinary's judgment.

The LORD JUSTICE-CLERK said—This is a case of considerable importance, and requires very careful consideration. The pursuer, who describes himself as some time of Texas, and presently residing in Chester Square, London, brings an action against the defender, whom he designs as merchant carrying on business, and now or lately residing at New Orleans in America. He has founded jurisdiction in this country by arrestments, and no objection is taken to the jurisdiction of the Court. There is a preliminary objection stated, to the nature of which I will immediately advert; but it is important, in the first place, to ascertain precisely what is the cause of action. It arises out of a contract which is in substance a contract of joint adventure to which there were five parties, and it is embodied in a charter party and relative deed of agreement. The charter party was entered into between Mr Mott, of New Orleans, and Theodore S. Moise, major in the Confederate army, and three other persons, and the contract was that the vessel General Rusk should be chartered, and should be loaded at Texas, and should from that proceed to Cuba and the West Indies, carrying a cargo of cotton, and thence return to Texas or some other port in America with munitions of war for the Confederate Government. It was by relative agreement, dated 20th March 1862, that the pursuer Mr Clements had a share in the joint adventure. The agreement narrates the charter party, and further narrates—(His Lordship here quoted the terms of the agreement.) It is important to observe, in the first place, who are the parties to this agreement. There are the two Macaulays and Mr Mott, all of whom belong to New Orleans; Mr Moise, whose precise domicile does not appear anywhere; and Mr Nelson Clements, who was domiciled in Texas. The subject-matter of the contract is in one respect very singular—in respect it is an adventure to supply a belligerent Power with munitions of war. But in other respects there is nothing remarkable about the contract; on the contrary, it is an exceedingly common one. But for the peculiarity of the circumstance of the Southern States being under blockade, and but for the nature of the cargo, there is nothing peculiar about the contract. It is one of those mercantile contracts about which it is impossible to say that it has a *situs*. It is of a cosmopolitan nature. The parties to it belong to different States, the vessels trade between different ports, and therefore the contract had no special *situs*. The place of entering into the contract was Texas; but the only contracting party connected with Texas was the pursuer Mr Clements. The other contracting parties belong to Louisiana, and the action of the pursuer is laid on the allegation that the adventure was attended with success, and parties are agreed that some profits were realised. The steamer was laden with cotton in Labucca Bay, ran the

blockade, made a voyage to the West Indies, and returned to Texas with a cargo of munitions. The parties are further agreed that, in terms of the provisions of the agreement, the defender acted as manager, and that he has in his hands whatever proceeds there may be from the adventure. The action is one of accounting, which the pursuer asks the defender to make, but the defender objects that although the Court has jurisdiction to try the question in respect of the arrestments, still this is not the proper or competent *forum*. That is always a plea involving delicate considerations, and it is necessary to examine very minutely what the defender's allegations are. There are, so far as I can observe, statements bearing on this point only in the 14th statement of facts for the defender. He says—"According to the law of the state of Texas, and of the United States of America, within whose territory the contract founded on by the pursuer was made, the same was and is illegal; and the same could not be enforced in the courts of the said State of Texas, or in the courts at Washington, to which the courts of the said State of Texas are subordinate, the court at Washington being the Supreme Court of the United States. At all events, the pursuer, according to the laws of said State, and of the United States, has no claim upon the proceeds of the joint adventure, excepting under and subject to the conditions of the foresaid written agreement; and he has no claim under that agreement upon the said proceeds until the foresaid claim by the Government, of the so-called Confederate States, and all other claims by alleged creditors, shall have been satisfied." On this allegation he founds the following plea in law:—"Forum non competens. The only proper and competent *forum* for determining the rights of the parties under the agreement or joint adventure in question is the appropriate tribunal of the State in which said agreement was entered into, and the action ought to be dismissed, in respect this Court is an inconvenient and incompetent *forum*." Now this plea may be read as suggesting two separate grounds for sustaining the plea of *forum non competens*. I think it expresses only one ground, but I am willing to deal with it as if it expressed two. I think it clearly says that the only proper *forum* is Texas, the place of contract; but according to the defender's own showing, the court of Texas has no jurisdiction against him; for the courts there have no jurisdiction against him *ratione domicilii*, or in consequence of his having real estate there, or on any other ground known in law. The only reason suggested is that the contract was made there; but that would give no jurisdiction to a Texan tribunal. But I should be sorry in a case of this importance to tie down a party to the strict words of his plea, and therefore I am willing to take it as suggesting that this is an incompetent *forum*, apart from the suggestion that Texas is the proper one. But then I am bound to inquire—the suggestion of a Texan tribunal being displaced—if this court is an incompetent *forum*, where is the proper place for trial? Apart from the suggestion of a Texan tribunal, there was no other made by the defender; and I don't know of any case in this department of law where this plea has been sustained if the defender did not set forth another proper jurisdiction. The defender seems to have considered himself under an obligation to say something on the subject, but his only suggestion is a *forum* with no jurisdiction. But further, I think it important to consider the other pleas not disposed of by the Lord Ordinary, for the purpose of seeing the nature of the questions which we are asked to try. The second plea is, "In respect that the joint adventure in question was undertaken by citizens in the United States of America, for the purpose, *inter alia*, of furnishing supplies and munitions of war to be employed by citizens of said States against the Government thereof, no claim founded on the said joint adventure can be enforced in the courts of this country, and the present action should be dis-

missed." It is unnecessary to advert to the other pleas, because they go to the merits of the joint adventure. Now, it is impossible not to see that the questions raised by the pleas are of a very embarrassing and serious character. It may be also that they may prove to be extremely troublesome. But then the question is, whether the inconvenience of a *forum*—for that is the idea involved in the plea of *forum non competens*—is only that it is inconvenient for the Court to try the question. If that were the meaning of the plea, I would only be too happy to get rid of the whole matter. But that is not the meaning. I think the plea means that the questions raised are of such a character that, for the interests of parties and the interest of justice, it is desirable they should be tried elsewhere. Now, I cannot concur with the Lord Ordinary that these questions would be more suitably tried elsewhere. It is nothing to the purpose to say that we may have occasion to inquire into foreign law. But I will say that, so far as at present appears, foreign law will have very little to do with the solution of these questions, because by foreign law I understand the municipal law of some particular State; and the questions raised here do not appear to be municipal at all, but to lie in the *ius gentium*, or in international law. The questions are difficult to be tried anywhere, but so far as I can see they may be tried in the Supreme Court of any country. Now, that being the nature of the plea, have we any precedent for sustaining the plea of *forum non competens*? There is one class of cases in which foreign executors are called to account for the executory estate in this country. In these cases the question always is, whether it is more for the interests—the true and legitimate interests—of the executory estate that the distribution should take place in the courts of the country where the executors administered it. There is a strong presumption in favour of that, and accordingly in most of these cases the plea has been sustained. The grounds of these judgments are not far to seek. The law of the executory estate is the law of its administration. The executors are there, the papers there. There have been other cases of a different class, and that class may be described generally as cases of partnership accounting. Here, again, there is a manifest expediency in having the accounting in the place of the partnership domicile, where the business was carried on, where the books are, and where the partners concurred in carrying on the business; and in that class of cases the Court have listened to this plea also. There may be other cases, and there has been such a case between principal and agent, but the agency was carried on in a foreign country, and that led to the plea being sustained against the principal; but there are many exceptions to the rule. (His Lordship here referred to the case of the Edinburgh and Glasgow Bank against Ewing, and said that the question raised was always a mere balance of convenience or inconvenience.) He continued—In the present case there is a total want of materials for the judgment of the Lord Ordinary. I cannot see what tribunal it is that his Lordship supposes will be more suitable for the trial of the question. There is no partnership in the case. A partnership has a local situation, but a joint adventure has no *locus*. This is a kind of contract that may be tried in any court where the parties are and jurisdiction arises to try the question. No doubt, questions as to the legality of the contract give this case a peculiar complexion; but still it cannot but be said the illegality of the contract depends, in the first place, on a matter of fact which can be ascertained here as well as anywhere else. That fact is whether the so-called Confederate States were a belligerent power, or merely a gang of rebels; and I cannot see that could be better inquired into in Texas than here. If the parties are rebels the illegality of the contract is plain on the public law of the world. If they are not rebels, but belligerents, still it is a question of public law;

and therefore however difficult the question may be, we are not entitled to sustain this plea, because it must never be forgotten that a Court which has jurisdiction is bound to exercise it at the suit of any litigant. *Judex tenetur impartiri iudicium suum.*
The other Judges concurred.

Saturday, March 17.

FIRST DIVISION.

MORRIS v. GUILDRY OF DUNFERMLINE

(ante, p. 165).

Expenses. Charges for obtaining evidence of a statement denied on record objected to on the ground that an admission would have been given if it had been asked, but *allowed*.

Counsel for Pursuer—Mr W. M. Thomson. Agent—Mr George Wilson, S.S.C.

Counsel for Defenders—Mr John Hunter. Agents—Messrs Morton, Whitehead, & Greig, W.S.

This was a point reserved by the auditor for the consideration of the Court. The defenders had been assoiized with expenses. Their account of expenses included a charge of £4, 4s. for searching some old registers, and another of £21, 4s., being a sum paid to registrars for extracts from them. The pursuer now stated that this was an unnecessary proceeding, because if he had been asked he would at once have admitted the practice which the extracts were intended to prove. But it appeared that the practice had been averred on record by the defenders, and denied by the pursuer, and the Court held that the pursuer having been thus called upon by the defenders to admit the matter, it was his business to tender an admission, and not to wait until it was asked for, if it was intended afterwards to retract his denial. The charges were therefore allowed.

M'NEILL v. SCOTT.

Process—Remit ob contingentiam—48 Geo. III. c. 151. An interdict having been granted in the Bill Chamber, and the passed note having been called and enrolled as a Second Division cause, a petition and complaint was thereafter presented to the First Division. Held (diss. Lord Deas) that it was not incumbent on the First Division to remit the petition and complaint to the Second Division.

Jurisdiction—Breach of Interdict. Held (diss. Lord Deas) that a petition and complaint for breach of interdict is incompetent before a Lord Ordinary, and must be presented to the Inner House.

Penalty—Breach of Interdict. Circumstances in which held (diss. Lord Deas) that a second breach of interdict had been committed, and the person complained against fined.

Counsel for Complainer—Mr Patton and Mr Cook. Agent—Mr William Sime, S.S.C.

Counsel for Respondent—Mr Gordon and Mr Scott. Agent—Mr J. G. C. Peebles, S.S.C.

This is a petition and complaint presented by the Right Honourable Sir John M'Neill, G.C.B., residing at Granton House, with concurrence of the Lord Advocate, for Her Majesty's interest, against Mr James Scott, merchant, Grassmarket, Edinburgh, and manufacturer of chemical manures at Granton. Sir John complains that in July, August, and September 1865 Mr Scott had been guilty of contempt of Court and breach of an *interim* interdict granted by Lord Mure on 8th June 1865, whereby Mr Scott and his firm of James Scott & Company were interdicted, prohibited, and discharged from using their works at Granton "for the manufacture of chemical manures in any way which shall be a nuisance to the complainers (Sir John and others), or which shall affect the health, or