

defence, and found the defenders liable to each of the pursuers in the sum of £300. Both parties appealed—the defenders on the merits, and the pursuers on the amount of the damages; but the Sheriff (GLASSFORD BELL) adhered.

The defenders appealed to the Court of Session. MUIRHEAD for them.

MACDONALD, for the pursuers, was not called upon.

At advising—

LORD PRESIDENT—It is clear that the accident was caused by the negligence of Sinclair, and by that alone. The question then is, Whether the defenders are responsible for his acts? He was employed and paid solely by them. The defenders maintain that Calder and he were engaged as fellow-servants in a common operation, and that this was accordingly one of the risks which Calder undertook. There are sometimes difficult cases in reference to common employment. We had a case recently (*Wyllie v. Caledonian Railway Co.*, 27 Jan. 1871, ante, p. 325) where the pursuer was injured while engaged with the Company's servants in trucking cattle. In that case there was undoubtedly common employment in a certain sense, yet we found the Company liable. The present seems to me a much clearer case. Here we have two servants acting for different masters—Sinclair was acting for his master, the Caledonian Railway Co., and Calder for his master, the North British Railway Co. There was no community, but rather antagonism, in their operations. The North British train comes up, and in virtue of their running powers demands a passage, which the Caledonian Railway Co. and their servants are bound to give. Calder must be held to have been a stranger to the defenders. I entirely concur with the manner in which the Sheriff-Substitute and the Sheriff have treated the case.

The other Judges concurred.

Appeal refused.

Agent for Pursuers—T. F. Gordon, W.S.

Agents for Defenders—Hope & Mackay, W.S.

Wednesday, June 21.

SECOND DIVISION.

LYNCH v. STEWART.

Process—Jurisdiction—Forum non competens. An English woman sued a Scotchman for money, alleged to have been intrusted to him in a foreign country, where both the pursuer and defender were then resident, in order to be transmitted to Scotland. The defender was at present resident in Scotland, and arrestments *jurisdictionis fundandæ causa* had been used against him.—Plea of *forum non competens*, repelled.

Title to Sue—Husband and Wife. A defender objected that the pursuer was a married woman, and that her husband was not a party to the action. The pursuer denied that she was married, but offered to have her alleged husband sisted. This having been done,—held that she had a good title to sue.

This was an action by Mrs Eliza Lynch, sometime residing at Paraguay, against Dr Stewart, sometime residing in Paraguay, against whom arrestments had been used *jurisdictionis fundandæ causa*, concluding for a sum of £14,645.

The pursuer alleged:—"In the month of October 1868 the pursuer and defender were both at the headquarters for the time of the Paraguayan army, at a place called Pikysyri in Paraguay. On or about the 17th day of that month the pursuer deposited in the hands of the defender a quantity of specie belonging to her, consisting of 4400 ounces of coined gold, and 4659½ patacons. The defender undertook to transmit the said specie to this country; to lodge the proceeds thereof in the Royal Bank of Scotland in his own name; and to hold the same for behoof, and on account of the pursuer, until the amount should be restored to her."

The defender alleged that the pursuer was a married woman, whose husband was a domiciled Frenchman, and pleaded *inter alia*, "no title to sue," and "*forum non competens*."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the defender's first and second pleas in law, and having considered the argument and proceedings; repels the second of said pleas, which is to the effect that this Court is incompetent, or at any rate is not a convenient or appropriate *forum* for trying the questions raised in the present suit; and, in regard to the first of said pleas, finds, before disposing of it, that it is proper that the question, whether the pursuer is a married woman, as alleged by the defender, as well as all matters of foreign law bearing on that question, or otherwise on said first plea in law, should be inquired into and ascertained; Reserves in the meantime all questions of expenses, and appoints the case to be enrolled in the Procedure Roll, that parties may be heard as to the steps now to be taken.

Note.—Although the defender's plea of *non forum competens* is stated as his second in the record, it properly falls to be first considered and disposed of, for the obvious reason that, if this is not the competent or convenient *forum* for trying the questions raised between the parties, the action ought to be at once dismissed without determining the question of title or any other question. Both parties expressed themselves satisfied as to this at the debate before the Lord Ordinary.

"1. The first question is that which is raised by the defender's second plea in law, now repelled by the Lord Ordinary, viz., '*non forum competens*, or at any rate this Court is not a convenient or appropriate *forum* for trying the questions raised in the present suit.' The grounds upon which the Lord Ordinary has proceeded in repelling this plea may be shortly summarized as follows:—(1) It is not said that there is any want of jurisdiction. No plea of that description has been taken by the defender, nor indeed could be, for the proceeds of the specie which forms the subject of dispute, and which the defender says belongs to him, stands arrested in the hands of the Royal Bank, at the instance of the pursuer. There can be no doubt, therefore, of the jurisdiction of this Court. (2) The only other country, if not Scotland, in which, according to the defender's contention, the action ought to have been brought, is Paraguay. But it is not said that either of the parties have their domicile in, or are natives of that country. The defender is a Scotchman, and the pursuer an Englishwoman. The pursuer is now resident in London, and the defender describes himself in the title to his revised defences (No. 22 of process), lodged so recently as the 30th of January of the present year, as 'Doctor of Medicine, sometime re-

sisting in Paraguay, thereafter in Edinburgh, and now or lately residing in Paraguay, or other part of South America, or elsewhere furth of Scotland.' But at the debate it was admitted by his counsel, in answer to the Lord Ordinary's inquiry, that he was at present in Scotland. The Lord Ordinary cannot therefore be much influenced by the defender's statement towards the end of the second article of his statement of facts, to the effect that he 'resided continuously in Paraguay from 1857 till December 1868. He has again gone to Paraguay, where he, his wife, and children now are. He was there when the present action was instituted, and has been so ever since, and is now resident there.' It is at any rate, and to say the least of it, very doubtful whether the Courts of Paraguay, or any other country except Scotland, have jurisdiction over the defender. Nor does the Lord Ordinary think it sufficient for the defender to state, as he has done by the minute, No. 30 of process, 'that he was ready and willing to answer in the Courts of Paraguay to any writ or action which the pursuer might bring against him with reference to the subject matter of the present process;' for whatever may be the willingness of the defender, it by no means follows that an action would be sustained against him in Paraguay, if neither *de facto* nor *de jure* the courts of that country have jurisdiction over him. In the case of *Graham v. Stevenson*, 9th August 1788 (Hume's Reports, p. 250), a similar plea to the present was repelled, although the party maintaining it, and who argued that the action ought to have been brought in England, offered to find caution to answer to any suit that might be instituted against him in that country. So also in the recent case of *Longworth v. Hope, &c.*, 1st July 1865 (3 Macph., 1049), an action was sustained in this Court, notwithstanding that the defenders were English, and offered to meet the pursuer in the English Courts. And (3) there are in the peculiar circumstances of this case obvious reasons in justice, independently of the reasons already adverted to, against sustaining the present plea, and leaving it to the pursuer to proceed in the Courts of Paraguay. On the defender's own showing, especially in the 16th article of his statement of facts, the rights and interests to which she lays claim in the present action have been already prejudged against her by the government if not by the tribunals of Paraguay. Besides, if the present action were dismissed, her hold over the funds in dispute, and her chance of recovering them, however successful she might be in vindicating her right to them, might be entirely defeated and cut off. Upon the whole, therefore, the Lord Ordinary has had little hesitation in repelling the defender's second plea in law

"2. He has felt some difficulty, however, in regard to the defender's first plea in law, arising chiefly from the consideration that to go into the inquiry whether the pursuer is or is not a married woman—the wife of Monsieur Quatrefoiges—as averred by the defender, must necessarily lead to considerable expense and delay. But the Lord Ordinary has been unable to see how this inquiry can be well avoided, nor is he satisfied that it would in the end be for the pursuer's advantage that the defender's plea or defence against her title to sue should be tried and determined first on the footing that she is the wife of Monsieur Quatrefoiges; and then, supposing that she were to be unsuccessful in maintaining her title on that

footing, to commence the contest of new on the footing that she is not the wife of Monsieur Quatrefoiges. Two such separate courses of litigation would not unlikely prove in the result to be more expensive and dilatory than the disposal at once of the question of marriage or no marriage. It seems to be the natural and proper course to have this point, on which the defence or plea of the pursuer's want of title to sue entirely depends, at once taken up and determined, for if it were, after the necessary inquiry, to turn out that *de facto* the pursuer's averment that she is not a married woman is true, the defender's plea or defence against her title to sue would be definitively and conclusively disposed of against him. The Lord Ordinary, therefore, thinks that the preferable and correct course is to have the fact of marriage or no marriage, in the first place, cleared up, rather than to proceed on the assumption that there is a marriage, while, after all, the fact may be otherwise. Besides, the Lord Ordinary may add that he is not satisfied that in law the sisting of Monsieur Quatrefoiges, assuming him to be the pursuer's husband as proposed by the minute, No. 31 of process, would be sufficient. The action has been brought, and the record made up and closed, at the instance of Mrs Lynch alone. She claims the funds in dispute as belonging to her absolutely in her own right. But if in reality she be a married woman, and the funds in dispute belong exclusively to her husband *jure mariti*, as averred and offered to be established by the defender, it is very doubtful whether the sisting and concurrence now of the husband could cure the radical defect which, *ex hypothesi*, attached to the instance of the wife. If, indeed, the funds belonged to the pursuer and not to her husband, his concurrence for his interest, although only made *cum processu*, might be sufficient; but it is another and different matter altogether whether, assuming that the pursuer neither has nor ever had any right to the disputed funds, but that the same belong to her husband exclusively, his sisting himself now as a party to the action is sufficient. Another reason for holding that it would be inexpedient to proceed in disposing of the defender's plea against the pursuer's title to sue on the assumption that she is a married woman, and that her husband has not only offered to sist himself, but has by the deeds produced renounced all right he may have to the disputed funds in her favour, is, that even this matter and the deeds referred to being manifestly foreign deeds, may require proof of foreign law before their precise meaning and effect in the present question now to be disposed of can be determined. If so, it is better that the evidence as to the fact of marriage or no marriage should be gone into at once, and that all the evidence necessary and competent in relation to the defender's plea or defence against the pursuer's title to sue should be at the same time exhausted."

The pursuer reclaimed.

TRAYNER and BURNET for her.

The Solicitor-General (CLARK) and MACLEAN for the respondent.

The Court adhered to the Lord Ordinary's judgment as to the plea of *forum non competens*.

On the other question, they held that the defect in the pursuer's title, if it were a defect, was cured by the offer by the alleged husband to sist himself as a party to the action. The Court therefore altered the Lord Ordinary's judgment on this ques-

tion; and the husband having been sisted, sustained the pursuer's title to sue.

Agent for the Pursuer—William Mason, S.S.C.

Agents for the Defender—Fyfe, Miller, & Fyfe, S.S.C.

Thursday, June 22.

FIRST DIVISION.

HON. CAROLINE GEORGIANA HOPE AND OTHERS *v.* STAMFORD ROBERT LUMSDAINE.

Superior and Vassal—Public Burdens—Relief—Retention. Circumstances in which it was held that a vassal, whose superior was bound to relieve him of all public burdens, was entitled to retain from arrears of feu-duties due the poor-rates of bygone years, not only of those for which the arrears of feu-duties were claimed but also of previous years, the feu-duties of which had been paid and settled long before.

The pursuers in this action were the trustees under the trust-disposition and settlement of the late George William Hope of Luffness, Waughton, Craighall, and Rankellor, who had been in possession, as heir of entail, of these estates from the year 1838 to the date of his death, on 18th October 1863. The defender Stamford Robert Lumsdaine of Lathallan was the youngest son and heir of provision of the deceased James Lumsdaine, and heir of line of the deceased William Lindesay Lumsdaine of Lathallan, his eldest son. He also represented generally the said William Lindesay Lumsdaine. The defender and his predecessors were vassals of the said George William Hope in the lands of Bonnybank, part of the lands of Southern Callange, and also in the lands of Norther Callange, all included in the Barony of Craighall. The reddendo for these lands of Bonnybank and Norther Callange, payable to the superior, was a certain sum of money, a quantity of victual, together with certain kain hens and carriages, which had all been in use to be commuted for a money payment, though the superior and vassal were not exactly agreed about the rate of commutation.

For the years 1856 to 1858, while the lands were in possession of William Lindesay Lumsdaine, and for the years 1859 and 1860, while they were in possession of his trustees, and also for the years 1861 to 1863, while they were in possession of the defender, the pursuers, as trustees of the said George William Hope, the superior, claimed arrears of feu-duties, amounting in all to about £260. The defender met this demand by a claim of retention of the sums paid by himself and his predecessors for poor-rates out the said lands from the year 1844 to the year 1863, amounting in all to about £220. He founded upon the following clause contained in the reddendo of his titles—“And it is hereby provided that the said Archibald Christie and his spouse (the original vassals in the lands) and their foresaids shall be bound and obliged to paie the whole cess and public burdens, they always having allowance thereof in the first end of the foresaid feu-duty yearly at clearing.” This clause was continued throughout the whole progress.

The point practically at issue between the parties was in regard to the defender's claim of retention. The pursuers, while admitting that poor-rates were to be considered among the public burdens

covered by the clause of retention in the charter, contended that the defender's right only extended to the retention of each year's poor-rates out of that year's feu-duty, and that there could be no claim for the poor-rates of back years, the feu-duties of which had been paid; and consequently, that though the defender had a right of retention of the poor-rates for the years 1856 to 1863 out of the feu-duties for those years, arrears of which were sued for, he had no claim of retention for the poor-rates of the years 1844 to 1855, the feu-duties of which had been paid.

The defender maintained that he was not only entitled to retain for the years 1856 to 1863, but also for the years 1844 to 1855.

The Lord Ordinary (JERVISWOODE) pronounced an interlocutor, of which the following part applied to this point—“Finds first, as respects the claim made by the defender for allowance and repetition from pursuers, as trustees and executors of the superior, the deceased Mr George William Hope, of poor-rates stated to have been paid by the defender's predecessors, as owners of the lands of Norther Callange, for the years 1844 to 1855 inclusive, but not demanded by or allowed to them by Mr Hope at the dates of settlement of the feu-duties for these years, and still remaining unpaid—that the said claim is not barred by prescription or otherwise, and that the defender is entitled, on instructing the amount thereof by production of sufficient vouchers of payment, to retain the same from such balance as may be found to be due by him in the present action; but finds, in respect of the failure on the part of the defender's predecessors to claim allowance for said poor-rates annually on settling the feu-duties as provided by the titles, that he is not entitled to interest upon the amount of said poor-rates prior to the date of citation in the present action, from which date finds him entitled to interest thereupon.”

Against this finding of the Lord Ordinary the pursuers reclaimed.

ADAM for them.

MARSHALL for the respondents.

At advising—

LORD PRESIDENT—This action is raised for the recovery of arrears of feu-duty against the vassal in the lands of Norther and Souther Callange, and these arrears extend from 1856 to 1863. The action is met by several defences, with none of which however have we anything to do at present, except one. That defence is a claim of retention or compensation, for I am somewhat doubtful as to the proper technical term to be applied. The defender alleges that he and his predecessor in the feu, whom he represents not merely in the feu but also universally, were entitled to retain from the feu-duties all cess and public burdens, and among others poor-rates. It is not disputed by the superior that this is a good claim in general, and he is willing to allow retention from the feu-duty of each year of the poor-rates applicable to that year; but he denies the right of the defender to retain from the feu-duty of any year the poor-rates or other public burdens applicable to other years, for which he is claiming no arrears of feu-duty, they having been paid and settled long ago. The question in fact is, whether the defender is entitled to retain from the arrears of feu-duties for the years 1856 to 1863 the poor-rates, not for those years only, but also for the years 1844 to 1855.

Now, in one reading of the original feu-right it would be very difficult to admit this claim on the