

Now, my Lords, where is there the least ground for such a claim? Before any manufacture was established, they took upon themselves to assert to the Court that the manufacture to be carried on was to be a nuisance. The result has proved that it is not so. Then they are at liberty to say, "To be sure it is not a nuisance, we see now; but it may become a nuisance." If so, why may we not upon that ground, now that it is an object of sense, and the manufacture exists, apply that same doctrine in this country? Any man who carried on a manufacture which was not a nuisance at the time, might have an interdict applied for to prevent his thereafter carrying it on in a way in which it would become a nuisance. That is the only complaint. The appellants have no present ground of complaint—no present ground of action—none whatever. It was problematical; and the reality now stands in the place of the problem; it is now known what the fact is against them. But they say, "Hereafter the trade may be carried on in a different way, and then it will become a nuisance." When it does become a nuisance, and I hope not till then, in the Court of Session or in any other Court, the appellants will be at liberty to apply for and obtain a fit and proper remedy for the mischief that may occur. No law of any country does or ought to restrain any man from the full enjoyment of his own property where it injures no one; and no man has a right upon a point of law, upon any supposed injury that hereafter may result, to put restriction upon the liberty of another man to use his own property in the way he may think best for his own purposes.

My Lords, in every possible view of this case, after having given every possible attention to it, I submit to your Lordships, that, in point of principle, the appellants have not made out a case which calls for your Lordships' interposition, and therefore this appeal should be dismissed with costs.

Interlocutors affirmed with costs.

First Division.—Richardson, Loch, and Maclaurin, *Appellants' Solicitors*.—William Rogers, *Respondents' Solicitor*.

MAY 10, 1852.

ALICIA FRANCES SUTTON, Administratrix of Henry Stephen Sutton, *Appellant*,
v. ROBERT AINSLIE, W.S., *Respondent*.

Evidence—Proof—Competency—Foreign Witness—Gambling Debt—Acts of Sederunt, 29th Nov. 1825; 16th December 1841—Jury Court Act, 55 Geo. III. c. 42—Bill of Exceptions—*A suspension having been presented of a charge for payment of the interest of a bond, on the ground that the consideration was a gambling debt, the Court, after the preparation of a record, allowed witnesses residing in London to be examined for the suspender on commission, on adjusted interrogatories. The case went to trial on an issue, and, in the course of it, the suspender proposed to put in evidence the report of the commission, but it was objected that such was an incompetent course, unless the suspender proved that the witnesses could not attend the trial on account of absence abroad, or that the suspender could not bring them to the trial. The presiding Judge repelled the objection; and, on a bill of exceptions, the Court confirmed the ruling. The bill also contained an exception, that the presiding Judge ought to have told the jury that the charger was not bound to prove consideration, and that the presumption was, that value was given unless the contrary was proved by the suspender. The Court also repelled this exception.*

HELD (affirming judgment) *both exceptions were properly disallowed.*¹

The charger appealed to the House of Lords against the disallowance of the bill of exceptions.

Rolt Q.C., and *Moncreiff*, for appellant.—1. The *first* exception is, that the deposition of the London gamblers ought not to have been admitted without proof of their inability to attend the trial in person. The Jury Court Act (55 Geo. III. c. 42) gave the Court power to frame rules; and the act of sederunt, § 22, provided for the case of foreigners whose depositions were to be taken by commission; but, by § 23, these were not to be received by the Court if the deponent could attend. Those provisions were often put in practice from 1815 to 1825, and received our construction.—*Haddaway v. Goddard*, 1 Mur. 150; *Setton v. Setton's Trustees*, 1 Mur. 9. The act of sederunt 1825, § 28, puts all the enumerated cases, of which the present is one, on the same footing; and proof of inability to attend was necessary before witnesses' depositions could be received, as is confirmed by § 59.—*Wight v. Liddell*, 4 Mur. 328, 5 Mur. 47; *Armstrong v. Leith Bank Co.*, 12 S. 440. In *Mackay v. M'Leod*, 4 Mur. 278, the report is vague, but the fair

¹ See previous reports 14 D. 184; 24 Sc. Jur. 79. S. C. 1 Macq. Ap. 299; 24 Sc. Jur. 428.

conclusion is, that it had there been either proved or admitted that the witness was abroad. Here it was not proved, and the respondent had it in his power to satisfy the Court by witness or affidavit that the deponents were abroad, if he could, for the objection was taken at the trial three times. The same remarks are true of the act of sederunt 1841, § 17, the two acts being identical on this point: per *Boyle* L. J. G. 24 Sc. Jur. 80. It is said the practice is against us; but if so, a practice since 1841, running counter to the plain words of the act of sederunt, cannot avail. Practice is a useful guide only where the act is ambiguous. Besides, cases may have occasionally occurred where evidence of foreign residence was not given, simply because the parties had previously arranged to use the depositions. The Court cannot relax a peremptory rule laid down by an act of sederunt, which is of the same authority as the statute authorizing it—*Scott v. Gray*, 4 Mur. 61; and the Court will enforce it strictly—*Wilcox v. Farrell*, 10 D. 807. The true construction is, that proof of non-ability to attend in person, whether by illness, absence, or residence out of the jurisdiction, is a condition precedent to the deposition being received. 2. The *second* exception is, that as the charger was not bound in point of law to prove a consideration, the presumption being that value had been given, the Judge refused to direct the jury to that effect. The Judge recommended, *i. e.* left to the discretion of the jury, to find a verdict against us—thus leaving them to deal with the law as well as the fact.

Sol.-Gen. Inglis, (with him *Sol.-Gen. Kelly*), and *Anderson*, Q. C., for respondent. *1st Exception*—We must distinguish between what is sufficient evidence to the Court to let in the documents, and what would be sufficient to go to the jury. Here it appeared sufficiently on the face of the report of commission, that the deponents resided abroad, *i. e.* in London—which was enough to satisfy the Court, the presumption being that the witness could not attend, as he was out of the jurisdiction. The act of sederunt 1815 did not contemplate the case of a foreigner residing abroad at all, the omission being supplied for the first time by the acts of sederunt 1825, § 28, and 1841, § 17. Now the latter part of § 17 (1841) contains no word which corresponds to the case of a foreigner mentioned in the former part of that clause. The only likely word, “absence,” cannot apply to one who, being a foreigner, may never have been in Scotland—it was not rendered necessary, therefore, by the act of sederunt 1841, to be proved, that the foreigner could not be produced in person. The first two cases cited being prior to 1825, do not apply to the case of a foreigner. In *Mackay v. M'Leod*, for aught in the report, the objection may have been, that there was no evidence of the deponent being a foreigner. As to *Wight v. Liddell*, the counsel there having the evidence in his power and at hand, tendered it merely as a matter of prudence, but not because it was necessary. *Armstrong's* was a case of a Scotsman temporarily absent, and therefore it was reasonable to shew that he was not likely to return. The other cases do not apply. Then, even if the language of the act of sederunt was doubtful, we have the authority of the leading judges that it has never been the practice for the Court to exact evidence that the foreign deponent could not attend. 2. This exception was groundless, for the law, asked by the appellant to be laid down by the Judge, was neither sound nor necessary. As to the Judge recommending the jury, that meant that he directed the jury.

LORD CHANCELLOR ST. LEONARDS.—My Lords, there are two questions here for your Lordships' consideration, one of which is upon the acts of sederunt of 1825 and 1841, and the other is upon the charge of the Judge to the jury. As regards the question on the acts of sederunt, it is impossible to deny, that where rules of Court are sanctioned and directed by an act of parliament, with the view of seeing if the opinion of the Judges is true and correct, in a very great sense you must consider the acts that were in force hitherto, and which ought not, without some sufficient ground, or some good authority, to be upset. Where an act of parliament authorizes rules of Court to be made by the Judges, they must have, not a forced, not an unnatural, but a flexible construction put upon them—that is, such a construction as, from the nature of the decisions, the Court would have been likely to put upon its own rules if they had remained in the way they had hitherto been—not disregarding them—not overlooking them—not neglecting the terms of them—but giving that natural construction which the Court itself, exercising the power delegated to it by act of parliament, would have intended to have put upon the words that are used. Now, the act of sederunt of 1815 does not provide, as is observed, in terms, for residence abroad, although it does provide for persons being abroad who are not likely to return; and it is suggested from those terms, that the clause of the act means persons who are resident in Scotland, but who have gone abroad, and, from some cause, are not likely to return; and that explains the cases which are quoted upon the subject of that act of sederunt, which were cases relating to a disability from attending, arising from illness, and having no bearing on the question of residence abroad. So that the question turns on whether residence abroad is, or is not, in the second branch of the acts of sederunt. If it had not been, no one can deny that the second branch, whatever may be the cases it refers to, requires that it ought to be proved as to those cases, at the time of the trial, that the party is absent from the cause stated, either that of disability or sickness. It is not because you get a commission, and say the necessity for it has arisen from the sickness of the party, that you can, under the act of parliament, or under the act of sederunt, read that commission without proving at the time of the trial, that the party is prevented

from attending at the trial from sickness. Those cases, however, prove nothing upon the proposition which your Lordships are called upon to decide.

Now, the act of sederunt of 1825 assumes a different shape. It provides, in the first part of it, expressly for the case of a party who is resident abroad, and who resides abroad. It is not correct to say that the terms of the act of sederunt of 1825 are in all respects the same as the act of sederunt of 1841; because there is a considerable change of phraseology. I am by no means satisfied that that was not purposely changed, and that that phraseology was not purposely altered in the latter part of the act of sederunt, to provide against the disability that occurred in the act of 1825. Now the act of 1825, after providing for the cases of residence abroad, and for other cases, concludes in these terms—"That it being established at the trial, to the satisfaction of the Court, by affidavit or by oath in open Court," that is the second branch, "that such witnesses cannot attend, owing to one or other of the causes aforesaid," enumerating them, so that they might understand the difficulty with which the Courts of Scotland had to deal. Because, if they had not enumerated the particular acts of disability, it might have been held that they had not included every case of disability which is there stated; and, among other cases of disability, it makes use of the words "permanent infirmity," or "obliged to go into foreign parts," or who "shall be abroad." Now, that is the case of a foreigner. As far as I understand the cases quoted by the learned counsel (which are so very indefinitely, and so very vaguely, reported, that it is difficult upon the authorities to say they have any direct meaning) upon that act of sederunt, the opinion seems to be that the case of a foreigner is not within the second branch. If a person be a foreigner, and do not appear, the fact of his non-appearance, in that case, is proved by the absence. That a man is absent, is proved by his non-attendance. You do not want in that case to prove his absence. The absence of the man is apparent, because he is not there. Then, what is the cause? The cause is, that he is a foreigner. The only two cases referred to on the subsequent acts of sederunt of 1825 and 1841, both shew it to be the inclination of the opinion of the Court, that the absence of the foreigner is sufficient cause of excuse, and that you need not prove more. That is apparently stated on the face even of those vague reports. You have not, I think, anywhere the case of a witness who was said to be settled abroad, in England, where that evidence was not satisfactory according to the opinion of the Judge who was presiding, nor of any case where such proof was necessary. The absence of such evidence, and the admission of the commission, is itself conclusive in the opinion of the Judge. And those cases that are cited, are cases that do not frequently occur, where parties have been rejected previously to the trial, and where it has been postponed—the Court being of opinion that the objection ought to be taken. Still that would be an exception to the general rule that must be adopted upon the act of sederunt.

So that it seems the act of 1841, which is different in its terms, introduces other cases. For example, it includes cases that are not provided for in the words of the act of 1825, and it avoids that generality that you have in the act of 1825. It does not say if they cannot attend "for one or other of the causes aforesaid," but it enumerates the causes. The construction of that perhaps may be this, which I will give your Lordships. But, before I come to that construction, I have no hesitation in saying, that the act is so vaguely expressed, and so much open to doubt, that I am not surprised that this case should have been brought to your Lordships' House in order to try the question, it being difficult to imagine, if either construction had been adopted, that it might not have been supported; because, to say that this act of sederunt tells its own tale, or explains itself, or says exactly what is to be done, is not consistent with truth.

Now, the act is in these terms—"That when it shall be made out upon oath, to the satisfaction of the Jury Court, that a witness resides beyond the reach of the process of the Court, and is not likely to come within its authority"—now, my Lords, I pray your attention to what follows—"before the day of trial, or cannot attend on account of age or permanent infirmity, or is obliged to go into foreign parts, or shall be abroad, and not likely to return before the day of trial, it shall be competent to examine such witness by commission on interrogatories," and so on. Now that applies to this case. Then comes this material part—"and it being established at the trial, to the satisfaction of the Court, by affidavit or by oath in open Court, that such witnesses cannot attend owing to one or other of the causes aforesaid," it shall then be competent to read the evidence.

Now, observe the two cases to be provided for—death, or inability to attend. Now the first part of this act of sederunt is without a word about an inability to attend—not a syllable. But it provides, as an abstract act, for residence abroad. Then comes the second branch, which provides for inability to attend on account of sickness, of age, or infirmity, or so on. And then the act of parliament comes to provide for that which it was alone the intention of the act of sederunt to provide, namely, death or other difficulty,—having provided for the other cases, namely, inability to attend, that is, an inability arising from infirmity, and so on. What I submit as the true view (although the act is most vague and unsatisfactory) upon the able argument which your Lordships have heard, is this:—I think the true construction of this act of sederunt

is, that the second branch does not apply to the case of permanent residence abroad, and, therefore, the evidence taken upon the commission in that case was receivable at the trial.

But there is another great reason for that—and which appears to be a very sensible rule in laying that down, and it is not, perhaps, a bad way of trying if that was the intention of the legislature—if a man resides abroad, and means to reside abroad, that means a permanent residence. He is, therefore, not in the jurisdiction. He is out of the reach of the law of Scotland. That is a sufficient answer. You may then take his evidence on interrogatories, and, at the trial, you may put in nothing but that evidence. If the other parties know he has come within the jurisdiction, they can make an objection. If the fact is, that it is only a temporary absence, or age, infirmity, or sickness, or so on, then you must prove that disability at the trial, and that is an excuse.

What I have stated to your Lordships is open, apparently, and certainly, to some doubt. But then I ask you to look at what has been the practice, and see what has been the construction of the very learned Judges, who, I may say, were unanimous in their opinion upon the subject, and under whom this very act of sederunt was framed, and by whom the law is administered daily and hourly? It will require the strongest case to induce you to reverse a practice founded on the construction—not upon arbitrary practices—but founded upon the construction which they have put, and a reasonable construction, as I submit, upon their own act of sederunt, which practice has never been departed from, and, therefore, may be taken from 1841, which is as good as from 1815, as that which is to be considered as the constant course of construction. That practice has been the law of the Court—it is not a technical point—but it is the practice of the Court, and which practice had been acted on as a rule of the Court—as the decision of the Court—and has had the due acquiescence of the bar as the ruling of the Court, with the knowledge of all parties in Scotland who are in the habit of construing acts of parliament.

Under those circumstances, it would require very strong arguments indeed to satisfy your Lordship's House in overruling the construction which, I submit to your Lordships, this act of sederunt fairly admits of, and which it has received so consistently, and so constantly, at the hands of the Judges. Although I admit it is not satisfactory to have to deal with a case where the law is not framed with perspicuity, still I think your Lordships must follow the decision of the Courts below. It has been asked more than once, what would be the case of a converse construction? Suppose the appellant had himself sought to give the evidence: The construction would have been the same. The words are general. If you adopt any construction of words limiting the right as to one party, the other party must be bound by it. I do not, I own, feel oppressed by that argument.

My Lords, the only other objection is the charge of the learned Judge. I confess I should have been better satisfied if the learned Judge had made the charge he was desired to make in point of law. There is no doubt this bond required no proof at the outset. It might, and would, require rebutting proof, if evidence of gambling was sought to be proved. That evidence being received, if the appellant hoped to succeed before the jury, he must, then, give that evidence which he cautiously abstained from giving, that is, evidence that some money did pass; instead of that, he stood silently by and offered no evidence to show that money was ever given. Persons connected with a gambling transaction must give such proof, in the absence of other proof, as will satisfy the jury that the bond is not given, upon colour, for a gambling transaction. That is the proof they are bound to give in support of such a bond. The learned Judge was desired to tell the jury this bond required no proof of consideration, unless there was proof on the other side. That is the law; and I think it would have been better if the Judge had so laid down the law. But I can see no sufficient reason to find fault, upon mere technical grounds, with his Lordship's charge. I do not understand the learned counsel to say that the Judge recommended the jury to find a verdict for the defendant unless there was evidence impeaching the bond; I do not understand him to object to the recommendation; I do not understand that, although some observations were made upon it. Now, what is the recommendation of a Judge but the direction of the Judge; and if he was wrong, the counsel should have objected to that recommendation being made to the jury, and have said that he was not doing that which he ought to have recommended them. The recommendation of a Judge amounts to a direction; it is only in stronger terms, and is very stringent and binding in its operation; and if he was wrong, there should have been a suggestion to the Judge that he did not do what he ought to have done in recommending them. I think that ought not to be an objection now. In substance, however, I cannot but say I should have been better satisfied with the charge if it had been directed to the point of law, supposing the jury to have been made acquainted with the law, and that he had directed them to find according to that law; still the direction amounts to that, and therefore I think it is not desirable that your Lordships should overrule the decision.

Upon the whole, I advise your Lordships to affirm the decision of the Court below, without costs.

Interlocutor affirmed.

First Division.—Robertson and Simson, *Appellant's Solicitors*. Spottiswoode and Robertson, *Respondent's Solicitors*.