

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