

COURT OF SESSION.

Tuesday, July 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

SAMSON & CO. v. HOUGH AND OTHERS.

Process—Proof—Evidence on Commission—Commission to Take Evidence of Pursuer Resident Abroad.

Where the pursuer of an action is resident abroad it is a question of circumstances in each case whether, if a witness for himself, he must be personally present at the proof, or whether his examination may be taken on commission.

William Samson & Co., shipping agents, carrying on business in Uruguay and Buenos Ayres, raised an action against Edward Jordan Hough of North Shields, and others, the registered owners of the steamship "William Burkitt" of London, concluding for £799, the sum contained in a bill of exchange granted, as pursuers alleged, in their favour by the master for the necessary disbursements of the ship, and accepted by the managing owners.

On 2nd July 1886 the Lord Ordinary on the motion of the pursuers allowed William Samson, residing in Buenos Ayres, a partner of the pursuers' firm, to be examined as a witness for them by commission on the subject-matter of the closed record, and granted commission to the Consul at Buenos Ayres to take the examination on adjusted interrogatories.

Against this interlocutor the defenders reclaimed (by leave).

Argued for them—The pursuer of an action could not competently have himself examined by commission; he was bound to come to this country and submit himself to cross-examination; the rule of practice in such cases was settled by *Softo v. Gillespie*, March 5, 1867, 39 Jurist, 268.

Replied for respondent—There was no hard and fast rule of practice as to whether or not a pursuer resident abroad was bound to come to this country for examination. The question was one of circumstances, and each case fell to be decided on its own merits. Here the distance of the pursuer's place of business from this country was an important element why he should not be brought over, and it was eminently a case for his examination on commission.

Authorities—*Donnan v. Paterson*, July 14, 1859, 21 D. 1301; *Hansen v. Donaldson*, Nov. 27, 1873, 1 R. 237; Mackay's Practice, 80.

At advising—

LORD PRESIDENT—I have no desire to interfere with the rule laid down in the case of *Softo*, in 39 Jurist, as the result there was arrived at, I happen to recollect, after very careful consideration. But it would be difficult to regard that decision as laying down any absolute rule upon this matter, because each case must depend more or less upon its own special circumstances. In the present case it would be a great hardship to bring the pursuer of this action to this country for examination. He is a merchant carrying on business in Buenos Ayres, and it would be a

considerable pecuniary loss for him to come here; besides, there was no speciality in the case requiring that he should be examined otherwise than on commission. I think therefore that the interlocutor reclaimed against should be allowed to stand.

LORD MURE concurred.

LORD SHAND—If this Court were to sanction any absolute rule that a pursuer resident abroad in order to raise an action in this country must present himself for examination in the courts of law, such a regulation would, I am sure, often lead to great injustice.

It therefore comes to be a question of circumstances in each case whether or not the pursuer must present himself for examination, and in the present case the distance of Buenos Ayres from this country, and the time which would be occupied in the voyage here and back, is an element of no small importance, taken along with the circumstance that the present dispute arises out of an ordinary mercantile transaction containing no speciality whatever.

LORD ADAM concurred.

The Court refused the reclaiming-note.

Counsel for Pursuers—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defenders—Thorburn. Agent—Andrew Wallace, Solicitor.

Wednesday, July 14.

FIRST DIVISION.

STEMRICH, PETITIONER.

Process—Proof—Evidence on Commission—Evidence Required in a Foreign Court—Act to Provide for Taking Evidence in Her Majesty's Dominions in relation to Matters pending before Foreign Tribunals (19 and 20 Vict. cap. 113).

In an application under this statute made by the Consul-General for Germany in order to obtain for a foreign court the testimony of witnesses within the jurisdiction of the Court of Session, the examination of the witnesses was ordered to take place before the legal assessor of the German Consul at Leith, who was the commissioner suggested by the petitioner.

Observed that the appointment was that of the Court and not of the petitioner, and that it was not to be understood that as a matter of course the nominee of the petitioner would in all cases be appointed.

William Stemrich, acting Consul General in London for the Empire of Germany, presented a petition to the First Division of the Court of Session for an order under 19 and 20 Vict. cap. 113, for the examination of certain witnesses within the jurisdiction of the Court of Session, whose testimony was certified in manner prescribed by the Act to be required in a German Court. Among the witnesses proposed to be ex-