

## COURT OF SESSION.

Tuesday, July 13.

## FIRST DIVISION.

[Lord Fraser, Ordinary.]

## SAMSON &amp; 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-

amined was Hugo Knoblauch, merchant, the German Consul at Leith.

The petitioner prayed that authority might be granted to James Bland Sutherland, S.S.C., Leith, the legal assessor of the German Consul at Leith, to examine the witnesses named in the petition, and for an order commanding their attendance.

Authorities—*Blair*, July 14, 1883, 10 R. 1223; *Robinow*, July 19, 1883, 10 R. 1246.

When the cause was moved the Lord President referred to the unreported case of *Robinow*, mentioned in the report of *Blair*, 20 S.L.R., p. 810, where the Court appointed the examination to be before the Sheriff-Substitute of the district.

The Court granted the application, *observing* that in the present case the gentleman named in the prayer was well known to the Court, and that the appointment was made by the Court itself, and it was not to be understood that as a matter of course the nominee of the petitioner would in all cases be appointed.

Counsel for Petitioner—Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, July 15.

### FIRST DIVISION.

THE SOCIETY OF SOLICITORS IN  
THE SUPREME COURTS OF SCOTLAND,  
PETITIONERS *v.* CLARK.

(*Ante*, p. 690).

*Law Agent—Society of Solicitors in the Supreme Courts—Act 34 and 35 Vict. cap. 107—Petition to Strike Name off Roll.*

On the petition of the Society of Solicitors in the Supreme Courts, the Court *ordered* the name of a member who had been convicted under the Criminal Law Amendment Act 1885, and imprisoned, to be struck off the roll of the members of the Society.

On 5th May 1886, Andrew Clark, S.S.C., was charged along with another person under a complaint at the instance of the Procurator-Fiscal of Midlothian before the Sheriff-Substitute of the Lothians, under the Summary Jurisdiction (Scotland) Acts, with a crime and offence under section 11 of the Criminal Law Amendment Act 1885, said to have been committed on 20th April 1886.

After trial, Clark and the other person named in the charge were convicted of an offence under section 11, and sentenced to imprisonment for thirty days.

Clark brought a bill of suspension and liberation before the High Court of Justiciary, which bill was upon 8th June 1886 (*ante*, p. 690) refused, and warrant of imprisonment granted against Clark, who had obtained interim liberation.

Upon 16th June 1886 the Council of the Society of Solicitors in the Supreme Courts held a meeting to consider what steps should be adopted in consequence of the conviction of Clark. They passed a resolution that the Council "were of opinion that the conduct of the said Andrew Clark had been such as to warrant his expulsion

from the Society," and they directed the Society's fiscal to present a petition setting forth their resolution, and craving sentence of expulsion. This petition of the Solicitors in the Supreme Courts was then presented, praying the Court after such intimation, if any, as the Court should order, to pronounce sentence of expulsion against Clark, and to direct his name to be struck off the roll of members of the said Society.

The petitioners stated that their Society was originally incorporated by charter under the Great Charter, and that by statute of 1871 (35 and 35 Vict. c. 107) the charter was of new confirmed and ratified so far as not altered by the Act, and the petitioners of new incorporated into a body corporate and politic. Section 29 of this statute provides—"The Council may, on a report by the fiscal of the Society, or on the presentation of a complaint by any person aggrieved by the conduct of a member, inquire into any allegations affecting the professional character of a member, and if they shall see cause, after such inquiry, may suspend such member from practising as a solicitor in the Supreme Courts for any period not exceeding two years; and such member shall during the period of such suspension be debarred from exercising or enjoying any of the rights or privileges of a member; and if it shall appear to the Council that the conduct of the member has been such as to warrant his expulsion from the Society, they shall direct their fiscal to present a petition to the Lord President and the other Judges of the Court of Session, setting forth the resolution of the Council on the subject, and the Court shall have power by either of its Divisions to deal with the petition as they shall think fit, and if they see cause, pronounce sentence of expulsion; and any member against whom such sentence shall have been pronounced shall from and after the date of such sentence forfeit all his rights and privileges as a member of the Society: Provided always that such expulsion shall not effect the rights, if any, of the widow and children of such member to participate in the fund, nor his obligations as a contributor in terms of the provisions herein contained."

The Court ordered intimation on the walls and in the minute book, and service on Clark.

Clark lodged answers. He set forth that he had been long in business and a member of various public bodies, and averred that he was innocent of the crime charged; that the full facts were not before the Council; that prior to presenting the petition no inquiry was held by the Council or their fiscal, and that no complaint was ever made to the respondent regarding his conduct; that they made no intimation to him of the proposed proceedings, and gave him no opportunity of making any explanation before passing their resolution; and that they should have given him an opportunity of defending himself. He maintained that in any view the charge did not touch his "professional character" as a member of the Society, and that the petition was irrelevant, and the action of the Council of the Society oppressive and unjust, and that the Court should not act on the resolution of the Council of the Society in the circumstances in which it has been arrived at; "that the conviction founded on is not *per se* such evidence of the respondent's guilt as to entitle the Society to proceed upon it in a matter