missed." It is unnecessary to advert to the other pleas, because they go to the merits of the joint adventure. Now, it is impossible not to see that the questions raised by the pleas are of a very embarrassing and serious character. It may be also that they may prove to be extremely troublesome. But then the question is, whether the inconvenience of a *forum*—for that is the idea involved in the plea of *forum non competens*—is only that it is inconvenient for the Court to try the question. If that were the meaning of the plea, I would only be too happy to get rid of the whole matter. But that is not the meaning. I think the plea means that the questions raised are of such a character that, for the interests of parties and the interest of justice, it is desirable they should be tried elsewhere. Now, I cannot concur with the Lord Ordinary that these questions would be more suitably tried elsewhere. It is nothing to the purpose to say that we may have occasion to inquire into foreign law. But I will say that, so far as at present appears, foreign law will have very little to do with the solution of these questions, because by foreign law I understand the municipal law of some particular State; and the questions raised here do not appear to be municipal at all, but to lie in the *jus gentium*, or in international law. The questions are difficult to be tried anywhere, but so far as I can see they may be tried in the Supreme Court of any country. Now, that being the nature of the plea, have we any precedent for sustaining the plea of *forum non competens?* There is one class of cases in which foreign executors are called to account for the executry estate in this country. In these cases the question always is, whether it is more for the interests—the true and legitimate interests—of the executry estate that the distribution should take place in the courts of the country where the executors administered it. There is a strong presumption in favour of that, and accordingly in most of these cases the plea has been sustained. The grounds of these judgments are not far to seek. The law of the executry estate is the law of its administration. The executors are there, the papers there. There have been other cases of a different class, and that class may be described generally as cases of partnership accounting. Here, again, there is a manifest expediency in having the accounting in the place of the partnership domicile, where the business was carried on, where the books are, and where the partners concurred in carrying on the business; and in that class of cases the Court have listened to this plea also. There may be other cases, and there has been such a case between principal and agent, but the agency was carried on in a foreign country, and that led to the plea being sustained against the principal; but there are many exceptions to the rule. (His Lordship here referred to the case of the Edinburgh and Glasgow Bank against Ewing, and said that the question raised was always a mere balance of convenience or inconvenience.) He continued—In the present case there is a total want of materials for the judgment of the Lord Ordinary. I cannot see what tribunal it is that his Lordship supposes will be more suitable for the trial of the question. There is no partnership in the case. A partnership has a local situation, but a joint adventure has no *locus*. This is a kind of contract that may be tried in any court where the parties are and jurisdiction arises to try the question. No doubt, questions as to the legality of the contract give this case a peculiar complexion; but still it cannot but be said the illegality of the contract depends, in the first place, on a matter of fact which can be ascertained here as well as anywhere else. That fact is whether the so-called Confederate States were a belligerent power, or merely a gang of rebels; and I cannot see that could be better inquired into in Texas than here. If the parties are rebels the illegality of the contract is plain on the public law of the world. If they are not rebels, but belligerents, still it is a question of public law; and therefore however difficult the question may be, we are not entitled to sustain this plea, because it must never be forgotten that a Court which has jurisdiction is bound to exercise it at the suit of any litigant. *Judex tenetur impertiri judicium suum.* The other Judges concurred.

Saturday, March 17.

FIRST DIVISION.

MORRIS *v.* GUILDRY OF DUNFERMLINE

(*ante*, p. 165).

Expenses. Charges for obtaining evidence of a statement denied on record objected to on the ground that an admission would have been given if it had been asked, but *allowed.*

Counsel for Pursuer—Mr W. M. Thomson. Agent—Mr George Wilson, S.S.C.

Counsel for Defenders—Mr John Hunter. Agents—Messrs Morton, Whitehead, & Greig, W.S.

This was a point reserved by the auditor for the consideration of the Court. The defenders had been assoilzied with expenses. Their account of expenses included a charge of £4, 4s. for searching some old registers, and another of £21, 4s., being a sum paid to registrars for extracts from them. The pursuer now stated that this was an unnecessary proceeding, because if he had been asked he would at once have admitted the practice which the extracts were intended to prove. But it appeared that the practice had been averred on record by the defenders, and denied by the pursuer, and the Court held that the pursuer having been thus called upon by the defenders to admit the matter, it was his business to tender an admission, and not to wait until it was asked for, if it was intended afterwards to retract his denial. The charges were therefore allowed.

M'NEILL *v.* SCOTT.

Process—Remit ob contingentiam—48 *Geo. III. c.* 151. An interdict having been granted in the Bill Chamber, and the passed note having been called and enrolled as a Second Division cause, a petition and complaint was thereafter presented to the First Division. *Held* (diss. Lord Deas) that it was not incumbent on the First Division to remit the petition and complaint to the Second Division.

Jurisdiction—Breach of Interdict. Held (diss. Lord Deas) that a petition and complaint for breach of interdict is incompetent before a Lord Ordinary, and must be presented to the Inner House.

Penalty — Breach of Interdict. Circumstances in which held (diss. Lord Deas) that a second breach of interdict had been committed, and the person complained against fined.

Counsel for Complainer—Mr Patton and Mr Cook. Agent—Mr William Sime, S.S.C.

Counsel for Respondent—Mr Gordon and Mr Scott. Agent—Mr J. G. C. Peebles, S.S.C.

This is a petition and complaint presented by the Right Honourable Sir John M'Neill, G.C.B., residing at Granton House, with concurrence of the Lord Advocate, for Her Majesty's interest, against Mr James Scott, merchant, Grassmarket, Edinburgh, and manufacturer of chemical manures at Granton. Sir John complains that in July, August, and September 1865 Mr Scott had been guilty of contempt of Court and breach of an *interim* interdict granted by Lord Mure on 8th June 1865, whereby Mr Scott and his firm of James Scott & Company were interdicted, prohibited, and discharged from using their works at Granton "for the manufacture of chemical manures in any way which shall be a nuisance to the complainers (Sir John and others), or which shall affect the health, or

be offensive, or a discomfort to the complainers or parties residing in Granton House, Craigroyston, and Muirhouse, the residences of the complainers." The Court had already found on 20th July 1865, in a previous complaint, that Mr Scott had been guilty of contempt of Court and of breach of the said interdict. On that occasion no fine was imposed, but the respondent was found liable in expenses. The respondent's answer to the complaint was that he had done all in his power, and incurred great expense in order to prevent discomfort to the complainer, and that even if any vapours escaped accidentally in the course of his anxious endeavours to obviate all cause for complaint, such accidental occurrences cannot be considered as a contempt of Court. He also stated his willingness to carry out any improvements which might be suggested by any man of skill to be appointed by the Court.

A proof having been allowed and led, the parties were heard thereon. At the close of the debate a doubt was suggested by Lord Deas as to whether it was not imperative on the Court to remit the process to the other Division, in respect the process in which the interdict was granted belonged to that Division. The enactment on the subject occurs in sec. 9 of the Act 48 Geo. III. c. 151, and is in these terms:—"Provided that where any action, matter, process, *complaint*, or cause has been brought before one of the said Divisions, or the Lords Ordinary thereof, the other Division, or the Lords Ordinary thereof, *shall* remit any action, process, matter, *complaint*, or cause, *subsequently* brought before them relating to the same subject-matter, or thing, or having a connection or contingency therewith, to the consideration of the Division or Lords Ordinary before whom the first cause, action, process, complaint, or matter had been previously brought." The Court to-day (Lord Deas dissenting) held that they were not bound to remit this case to the Second Division.

Lord CURRIEHILL said—I am of opinion that, supposing we have a discretion in the matter, it is not proper for us to remit this case to the other Division at this stage of the proceedings. The petition has been presented, answers lodged, a proof allowed and led, and parties heard thereon at great length. Neither party is asking for the remit. But it is said we have no jurisdiction because the statute is imperative. I am of opinion that the statute does not apply to this case. If it did the case would be in a very extraordinary predicament. The original application for interdict was presented in June 1865. The note was passed, and interim interdict granted on 8th June 1865. The first complaint for breach of interdict was presented on 22d June 1865, and was finally decided by us, after a proof, on 20th July 1865. The interdict process did not depend in the Outer House until 18th July 1865, when it first appeared in the printed roll. If, therefore, the statute applied, the interdict process should have been remitted to the first breach of interdict process, because the former was not brought before the Lord Ordinary in the Outer House until some time after the latter. There was nothing done in the interdict process in the Outer House from 18th July till 9th December 1865, and it was betwixt these dates that this second breach of interdict complaint was presented. It was presented on 23d November 1865. Was it then on that day incumbent on us to remit this complaint to Lord Barcaple in the Outer House? Consider what the complaint is. It is of the nature of a criminal proceeding, which is competent only in the Inner House, and must be presented with the concourse of the Lord Advocate, who is no party to the other action. I think therefore, that we could not have competently remitted the complaint to Lord Barcaple, because he had no jurisdiction to deal with it. The interdict process continued to depend before Lord Barcaple until 14th February 1866, when his Lordship reported it with proposed issues to the Second Division. Is it to be said that from that moment we lost the jurisdiction to deal with this complaint, which up till that day we possessed? Was it then incumbent on us to remit the case to the Second Division? I think not. But farther, on 13th March 1866 the Second Division approved of the issues, and remitted the case back to Lord Barcaple, before whom it is at this moment, and it may possibly never again return to the Second Division.

Lord DEAS said—It appears to me that our jurisdiction to deal with this complaint depends on section 9 of the Act separating the Court into two divisions. If this complaint comes within that section, it is imperative upon us to remit it to the other Division. The question is, whether it does. I have no idea that this complaint is competent only in the Inner House, nor is it at all correct to say that the first breach of interdict complaint depended before the interdict process itself. It was the dependence of the interdict that made the complaint competent. It might have been presented to the Lord Ordinary, being just a complaint for contempt of Court. Such applications were made to the Lord Ordinary in the case of Spalding, 7th July 1836 (14 S. 1102), and the recent case of Paterson *v.* Kilgour, 19th July 1865 (3 Macq. 1119). But I have no doubt either of the competency of applying to the Inner House. We have here nothing to do with the first application for breach of interdict; the question is, whether the interdict process or the present complaint was first in dependence. Now, the note of suspension and interdict was passed, and interim interdict granted, on 8th June 1865. We all know that a respondent in a suspension is entitled to fix the Division in which it is to depend within twelve days after the note is passed, and if he does not do so the suspender is entitled to fix it. The moment the Division is so fixed, the process becomes a depending one in the Division marked upon it. Well, this suspension was called as a Second Division cause on 29th June 1865, and the present complaint was not presented until 23d November 1865. It is therefore quite clear that the interdict process became a Second Division cause long before this complaint was presented. His Lordship referred, in support of his views, to the cases of Gordon *v.* Cunninghame, 15th December 1827 (6 S. 257); A. B. *v.* Graham, 21st November 1829 (8 S. 113); and Clelland *v.* Clason and Clark, 27th July 1850 (7 Bell's App. 153).

Lord ARDMILLAN concurred with Lord Curriehill. The question was undoubtedly one in which the Court had no discretion if the objection was well founded. The view he took was that this complaint being a proceeding of a very peculiar character, it was not competent before the Lord Ordinary. He knew of no case in which such a proceeding had been held competent in the Outer House. When that complaint was presented the other process was before Lord Barcaple, and the Court could not then have denuded itself of jurisdiction by remitting it to the Lord Ordinary, who had no jurisdiction. There was no cause in the Inner House at the time to which the complaint could have been remitted, and there is no such cause in the Inner House at this moment. If this complaint, therefore, was presented to a tribunal which was then, and is now, the appropriate tribunal, his Lordship thought that what occurred in the interval did not affect the matter.

The Court then proceeded to advise the case on the merits. They found (Lord Deas dissenting) that the respondent had been guilty of breach of interdict on 22d, 24th, and 31st July 1865, and he was fined in £5, to be paid to the Clerk of Court, for the benefit of the Royal Infirmary. He was also found liable in expenses. The other acts of breach of interdict alleged were found not proved.

Lord CURRIEHILL was of opinion that the first three breaches must be held to be proved. The complainer and the witnesses adduced by him proved distinctly that an offensive smell was felt on these occasions, which proceeded from the respondent's works. The allowing of that was a breach of the in-

terdict. It must have arisen either from defective apparatus or negligence in management. His Lordship thought that Mr Scott was entitled to credit for the attempts which he had made, at considerable expense, to remove the cause of complaint. He was satisfied that Mr Scott was not actuated by any wish to annoy his neighbours, but he had subjected himself to a second complaint for breach of interdict; and but for his conduct since July this would be a very aggravated case. It was therefore necessary to mark the opinion of the Court by the imposition of a small fine.

Lord DEAS was of a different opinion. He thought that in order to constitute the offence charged it was necessary that there should be a wilful contempt of Court. It was impossible to say that if the smell in July arose from inattention or accident there was a contempt of Court. His Lordship thought that the difficulty of the case arose from the terms of the interdict, which were much too vague. It did not prohibit the works; on the contrary, it implied a permission to carry them on In regard to the smell on the 31st July, it was clearly proved that it had been caused by the temporary emptying of a digester, which was thought necessary by Professor Penny, who had been employed by the respondent to devise means for removing the offensive smell. It was a strong thing to say that a man was committing a contempt of Court when in the very act of taking measures to obey it; and these measures seem to have been successful, for it is not proposed to hold that any of the breaches alleged after 31st July have been proved.

Lord ARDMILLAN concurred with Lord CURRIEHILL.

The LORD PRESIDENT declined, being a brother of the complainer.

PATERSON *v.* KILGOUR AND MACQUEEN.

Reparation—Cheating at Cards. An action of damages founded on allegations that a person had been cheated when playing cards with others who had conspired for the purpose, but not alleging that the person said to have been cheated was *incapax*, dismissed as irrelevant.

Counsel for Pursuer—Mr G. H. Pattison. Agent—Mr John Leishman, W.S.

Counsel for Defender Macqueen—Mr Patton and Mr W. N. M'Laren. Agent—Party.

Counsel for Defender Kilgour—Mr Grant. Agent—Mr James Barton, S.S.C.

This action is raised by the mother and executrix of the late Andrew Murray Paterson, C.A., in Edinburgh, against J. M. Macqueen, S.S.C., and Henry Kilgour, writer in Edinburgh. The ground of action alleged is that the deceased had been cheated and defrauded by the contrivances and devices of the defenders, and of another person named Galbraith, now dead, in pursuance of a conspiracy previously concocted among them for that purpose. The sum sued for is £396, which is the amount of the damage alleged to have been sustained. The material averments made by the pursuer, but denied by the defenders, are as follows:—

Cond. I. The deceased Andrew Murray Paterson, chartered accountant in Edinburgh, after suffering from disorderment of the stomach and nervous system for several years, took, in the year 1855, by advice of Professor Christison, a voyage to the West Indies for the benefit of his health. The voyage unfortunately did not effect any permanent improvement in Mr Paterson's health, and after his return he continued to suffer from the same complaint. He had been recommended by his medical attendants, for the alleviation of his sufferings, to take small quantities of morphia or opium and brandy after meals; and after doing so for some time, he found it necessary, in order to obtain relief from pain, to take these medicines in considerable and gradually-increasing quantities. This had a most unfortunate result, and gradually led him to the excessive use of stimulants, to the great injury of his constitution, health, and habits.

Cond. II. Shortly after Mr Paterson's return to this country, which was in July 1855, Mr Paterson was introduced to, and became acquainted with, the defenders, John Moir Macqueen and Henry Kilgour, and the deceased James Shaw Galbraith, writer in Denny, in the county of Stirling; and he was, in the year 1856, elected and induced by them to accept, *inter alia*, the office of trustee on the sequestrated estate of John Ritchie, residing at Denny, in whose affairs they were interested for themselves and for a client, by which means he was brought much into communication and contact with all of them.

Cond. III. At this time, partly in consequence of the disease under which he suffered, and partly in consequence of the frequent and habitual use of opium and stimulants, Mr Paterson was in an extremely bad state of health. Not only were his bodily powers prostrated, but his mental faculties were much impaired. From June 1856 until after the month of June 1857 he continued in the state above described. He was habitually and almost constantly, during said space of time under the influence of opium and stimulants, so as not to know what he was doing; and he had not, even in the intervals of comparative sobriety and abstinence, the full possession or command of his mental faculties. He was at all times during said period easily imposed upon and deceived, and had no strength of mind or power to detect or resist the desires of others who wished to deceive or cheat him, or to lead him into error for their own purposes.

Cond. IV. The defenders and the said James Shaw Galbraith, seeing the condition of body and mind in which Mr Paterson was, and knowing that he, under his father's trust-settlements, was entitled to property, both heritable and moveable, of a considerable amount, and being all of them needy and in want of money, resolved to enrich themselves at his expense. For that purpose they, in or about the month of June, July, or August 1856, or at some other time prior to May 1857, the precise period being to the pursuer unknown, entered into a scheme or conspiracy to engage Mr Paterson in play with them at cards for money—they arranging among themselves that, without his discovering it, they should so act and deal with the cards, and so manage by preconcerted signals to one another, and by other devices known to them and to those who practise in that way, as that they should always win, and Mr Paterson lose, on the result.

Cond. V. This conspiracy and scheme the defenders and Mr Galbraith jointly practised and carried out successfully. During the months of August, September, October, November, and December 1856, and January and February 1857, they induced Mr Paterson, under pretence, *inter alia*, of diverting his mind from his disease, and of otherwise amusing him, to engage in card-playing with them. They so played sometimes in Edinburgh in various houses, hotels, and other places there, and sometimes in Mr Galbraith's house at Denny. What games they played the pursuer does not know; but while one of their number, in order to deceive Mr Paterson, sometimes so played as to appear to lose money to him, care was taken that the other two who were in company should win from him to a greater extent, and this pretence of losing by one of the three was a mere lure to induce Mr Paterson to play, and to prevent his detecting the fraud that was being practised upon him. In playing the games in which the defenders and Mr Galbraith induced Mr Paterson to engage with them, the defenders and Mr Galbraith did not play fairly, but by signals known to one another, and by other contrivances and devices, they jointly and systematically, and in pursuance of their said scheme and device, played false so as always to make sure of winning in the end, and of Mr Paterson becoming the loser.

Cond. VI. When ready money was not at hand, the defenders and Galbraith took bills from Mr