matters. He had many such neighbours of good rank and position, to whose houses he was ever welcome while thus employed, and his correspondence with his men of business, as well as the evidence of tenants and others connected with his estates, shows a warm and persistent desire to meet the various duties and demands of his position. I agree with the Lord Ordinary in thinking that these interests and ties were more permanent and important than any that bound Colonel Udny to England.

If it be held that his residence in London did not in the circumstances destroy Colonel Udny's Scotch domicile of origin, as little could this be done by the residence at Boulogne, which was obviously adopted for a special and, it might be, a temporary purpose, to avoid the prosecutions or persecutions of creditors.

It seems, therefore, to be clear that at the time of the defender's birth, in May 1853, his father, Colonel Udny, though then at Boulogne, was a domiciled Scotchman; and it need not be argued that he continued to be so at the date of the marriage in 1854, when he was living at Ormiston, in Scotland. If this be so, it follows, on the undoubted law established by the authorities, that the defender was thereby legitimated.

It can be of no consequence, though it should be thought that Colonel Udny was partly moved to take this step by the prospect of facilitating an intended plan for disentailing his estates and paying his debts. The fact of the marriage is sufficient, whatever the motive may be, and the influence of concurring motive is too vague a consideration to be entered upon.

The continued residence of Colonel Udny in Scotland after his marriage is not immaterial, as showing how slight was the bond that connected him with France, and how completely he had thrown off any connection with England.

In holding that the domicile of Colonel Udny was Scotch, both at the date of the defender's birth and at the date of the Colonel's marriage, it becomes unnecessary to consider the separate question, how far it would be sufficient for the defender's case if his father's domicile was Scotch at the date of the marriage, though not so at the date of the birth. That question, as involving a point of general law, is important, and may or may not be difficult; but it does not arise upon the facts as I view them, and therefore need not be decided.

The other Judges concurred.

The Court therefore found that the defender, though illegitimate at his birth, was legitimated by the subsequent marriage of his parents—Assoilzied the defender, and found him entitled to expenses.

Counsel for Pursuer—Mr Young, Mr Clark, and Mr Duncan. Agents—Horne, Horne, & Lyell, W.S.

Counsel for Defender—The Dean of Faculty, the Solicitor-General, and Mr Fraser. Agent—William Skinner, W.S.

M'EWAN *v.* MIDDLETON.

Retention—Copartnery—Decree-Arbitral—Liquid Counter Claims. Held in a suspension of a charge on a decree-arbitral that a partner taking over the business, &c., was entitled to retain a sum ascertained in the submission to be due to him by the retiring partner, and which had been taken into account as an asset in striking the balance, as against the amount he was decerned to pay to the retiring partner. *Observations* upon the jurisdiction of arbiters, especially in regard to questions of compensation.

The parties to this case had, in the year 1859, entered into a contract of copartnery for carrying on the business of calenderers in Glasgow. The endurance of the contract was to be ten years, but it was provided that upon the death or insolvency of either partner during its currency, the whole trade, stock, &c., was, in the option of the surviving or solvent partner, to devolve upon him, and that he should in that case be bound "to pay out the deceased's or insolvent's share and interest," as the same should be ascertained by a balance. It was further provided that in case any dispute or difference should arise relative to the meaning of the contract or in relation to the business, the striking of annual balances, the winding-up of the business, or the subject-matter of the contract, the same was to be referred to the decision of arbiters therein named who were to act in succession.

In 1862 M'Ewan found it necessary to have recourse to these provisions of the contract, and after certain procedure, the arbiter found that Middleton was insolvent *in the sense of the contract.* M'Ewan elected to take over the business and estate of the company, and the parties thereafter proceeded before the arbiter to ascertain and adjust their respective rights and interests. The date of dissolution was fixed as at 15th December 1862, and the parties had in April previous adjusted and subscribed a balance-sheet bringing down their accounts to 31st March 1862.

Middleton was proprietor of the tenement in part of which the company carried on their business, and the remainder of it was leased out. The company acted as factors for the property, the account being known as the "property account." Upon that account there stood at Middleton's debit, as at 31st March 1862, the sum of £1485, 4s. 5d., consisting partly of cash advances and expenditure by the company upon the property, and partly of the sum in a cash credit bond which the company had signed for Middleton's behoof, to enable him to make the purchase of the property. This sum was treated in the accounts of the company as an asset, and consequently formed part of the *data* upon which the capital accounts of the partners were made up.

After a remit to an accountant and various procedure before the arbiter, he found that the sum which M'Ewan had to pay Middleton, as at the date of the dissolution of the company, was £406, 1s. 1d. The sum at debit of Middleton on the property account had by this time been reduced to £968, 6s., and was still dealt with as an asset of the company.

M'Ewan objected to the arbiter pronouncing decree absolutely for the sum at Middleton's credit, and asked him to record the fact that the sum of £968, 6s. was due on the other hand by Middleton to M'Ewan as the remaining solvent partner. The arbiter thereupon expressed his views to the effect that while there was no power conferred upon him by the submission to deal further with the property account, it was true that "incidentally" the state of that account fell to be ascertained, "as the partnership accounts could not otherwise be adjusted." He then said, "It may be stated that, as at the date of dissolution, the amount at Mr Middleton's debit on that account amounted to £968, 6s., consisting partly, however, of the amount due under a cash credit

bond which neither the company nor Mr M'Ewan has paid. Any liquid debt due by Mr Middleton to Mr M'Ewan can be set off against the sum decerned for."

Thereafter a formal decree-arbitral was pronounced by the arbiter, in which he ordained M'Ewan to pay Middleton the sum standing at his credit on his capital account. The parties thereafter made an ineffectual attempt to arrange their respective claims under the decree and upon the property account, and to settle along with these certain other questions which had been stirred between them. In the course of this negotiation a sum of £108, 14s. 11½d. was paid by M'Ewan to Middleton to account of his claim against M'Ewan, and Middleton had by this time paid up the cash credit bond. Having failed, however, to adjust their differences amicably, Middleton charged M'Ewan, under the decree-arbitral, for the sum awarded to him in the submission, less that paid to account as above.

M'Ewan brought a suspension of this charge, upon the footing that he was entitled to set off the sum at Middleton's debit on the property account against the sum awarded to Middleton, and consigned the sum to which, in his view, the questions between them had been reduced. Lord Mure passed the note upon full caution, and thereafter Lord Kinloch, before whom the case came to depend, refused the suspension.

M'Ewan reclaimed.

SHAND and MACLEAN, for him, argued that the sum at the charger's debit had been liquidated in the submission, though it had not been one of the matters referred; that the arbiter had therefore rightly not entertained it as a set off; that the suspender was now entitled so to plead it; and that (5th plea) the charger could not challenge that account, and charge upon the decree-arbitral, the latter being so far made up of, and depending for its accuracy and its amount upon, the former.

A. R. CLARK and ASHER, for the charger, contended that the sum at his debit was illiquid and unvouched; that it was competent for the arbiter to have entertained the plea as a counter claim; that it had been proponed and repelled, and that his judgment was final; that in the only other view it was competent and omitted and could not be raised after decree in a suspension. In support of this contention they referred to Erskine 3. 4. 19. and cases there cited, to Gordon, M. 2642, and to the Act 1592, cap. 143.

At advising,

The LORD JUSTICE-CLERK said—I imagine that your Lordships are strongly impressed with the feeling that the proposal to enforce payment of the sum here charged for is most unreasonable in the circumstances. Whether there is any legal principle on which the charge can be suspended is another question. I should be extremely sorry if the rules of our law did not enable us to do justice where the justice of the case is so plain. I think, however, the case is not attended with much difficulty; and I cannot agree with the view taken of it by the Lord Ordinary.

These two gentlemen settled a balance-sheet and docquetted it in April 1862, by which they are both bound, and upon which they can't go back. The partnership fell to be wound up as at 15th December following, upon the footing that M'Ewan was to take over the concern and pay out Middleton the amount of his interest. For the purpose of carrying this through, it was necessary that a balance-sheet should be made as at that date, and nothing else was necessary to enable them to settle the partnership accounts and dissolve. That shows for what the arbiter was applied to, although the reference clause is expressed in very broad terms, and would have enabled the parties to have resorted to him under very different circumstances. As the circumstances really arose, the question submitted to the arbiter was, what was the balance as at 15th December 1862? The partners employed the arbiter to make a balance-sheet for them at that date, just as they had made one for themselves in March. I think the arbiter very accurately understood his duty, and performed it properly. Now, to make the balance-sheet which he was to prepare correct, it was necessary that he should give effect to all that had happened since last balance. Among other things he found in that balance-sheet an item of £1485, 4s. 5d., entered to the debit of Middleton, as the debt due by him on the Miller Street property account. That is entered as an asset due to the company by Middleton as an individual, and the arbiter having duly investigated that account, found that subsequent transactions had reduced this debt to £968, 6s., and accurately entered that to Middleton's debit. He took it as a good debt, and upon that footing he struck the capital accounts for the parties, and so made the company debtor to Middleton for the sum of £406, 1s. 1d. Now, it is abundantly clear that the arbiter could not have justly brought out that balance unless Middleton personally owed the company the sum at his debit on the property account. The justice of the decree-arbitral depends on that. But it is now said that though that sum had been incidentally fixed in the submission, it was not thereby liquidated, and that the attempt to have it liquidated under the reference failed. I think the arbiter was quite right in holding that it did not fall within the reference. It could only be maintained to have so fallen as a plea of compensation. Now, the arbiter had no jurisdiction to entertain such a plea. No arbiter is entitled to entertain such a plea. Take the case of a specific reference—*e.g.*, of a special claim or set of accounts submitted to an arbiter. He can't go beyond what is referred. He can only ascertain the amount of the claim or the balance due on the accounts and give decree for it. He stands in a different position from a court of law. All his jurisdiction flows from the consent of parties, and in the case supposed the consent is only that he shall determine as to a particular claim or balance. The jurisdiction of a court of law is different and more extensive. When one brings an action to enforce payment and the defender pleads compensation, the judge's right to give effect to the plea arises from the fact that he would have had jurisdiction to entertain the plea had it been put in the form of a claim in an action. This goes so far as that even in the case of a foreign pursuer, over whom the Court had naturally no jurisdiction, on the principle of reconvention, a judge may deal with a plea of compensation. That is the distinction between the jurisdiction of an arbiter under a special reference and a court of law in regard to compensation. And when we come to the case of a general reference, there is equally no room for an arbiter entertaining a plea of compensation. No doubt the referee is entitled to take up all claims on either side, but he does so not because he is entitled to entertain a plea of compensation, but because there have been submitted to him all claims of the parties *hinc inde*. Parties have submitted their whole claims, and the arbiter arrives at his judgment not by giving effect to any plea of compensation, but by putting

the whole claims of parties together and against each other, and by striking the resulting balance. Thus a general submission as much excludes the notion of an arbiter giving effect to a plea of compensation as a special reference. For these reasons I am perfectly clear that the referee in this case could not entertain this plea. What then comes of the arguments that this was competent and omitted or proponed and repelled? It was neither the one nor the other. It was not omitted, for it was brought under the notice of the arbiter, and he decided that it did not fall within the submission. Nor was it proponed and repelled, for it was not entertained and disposed of, just because the arbiter decided that he could not competently entertain it. In these circumstances the present charge is given for the sum awarded to Middleton, less a payment made to account. The suspender objects to the charge, saying, "I don't dispute the justice of the award in your favour, but I object to the charge, because you are indebted to me in a large amount, on an account the balance of which has been ascertained and forms partly the basis on which your claim is made up." In short, he says, "Had it not been that it was found that Middleton was owing me, he could not have had this claim against me." But it is said that such a plea as this can't be entertained in a suspension. Now, I give no opinion on the abstract question, as to whether a plea of compensation can be raised in a suspension. But I think that this is not, properly speaking, a plea of compensation, but one of retention, founded upon the most manifest principles of equity. It appears that part of this debt was really not money advanced, but was the amount of a cautionary obligation undertaken by the firm for behoof of Middleton, on which, however, the firm had not been distressed, and which was afterwards paid by Middleton himself. Now this is the best practical illustration which could be given of the plea of retention. Suppose the whole of the debt had been a claim of relief by the firm as cautioners. This is the very position in which a partner is entitled to plead retention and refuse to pay until relieved of that obligation. But will it make any difference if, in place of being merely a claim for relief, it is one for money actually advanced? I think, on the contrary, it makes the case much stronger. It does not vary its nature. The two cases are founded on the same principles exactly. It is as if M'Ewan said, "While you don't do your duty to me, you can't ask me to do mine to you." I confess I have not the smallest difficulty in giving effect to this contention by refusing to allow this charge to proceed till Middleton has done his duty to the other party.

Lord COWAN—I think it is not at all necessary to go into any consideration of questions in the law of compensation. Leaving the law on that subject in perfect entirety, we have here a case where a sum charged for has been brought out by an arbiter by placing on the other side of the account a sum due by the charger to the suspender. That debt goes to make up the balance decerned for by the arbiter. Every pound taken off the one goes to diminish the other. In these circumstances, could there be anything more unjust than that, while Middleton refuses payment of the sum due by him, he should require M'Ewan to pay him the sum due to him? Although a question of compensation has been pressed into the case, it has nothing to do with it. The arbiter could not competently entertain such a plea. I can't help thinking that the 5th plea in law for the suspender is well founded, and that Middleton is personally barred from charging for the sum found due to him while he keeps up that which he owes.

Lord BENHOLME—I entertain the same views with regard to this case as those which your Lordships have expressed, and I would only in addition suggest the analogy of a mutual contract. The matter betwixt the parties and the relative obligations arise out of the same transaction. In these circumstances, is the suspender to be debarred from pleading retention because of what took place before the arbiter? I think not. The arbiter did quite rightly. He was bound to keep to the matters submitted, and it would have been beyond his province altogether to have taken up a plea of compensation. I think, however, the sum at the charger's debit was clearly ascertained and liquidated in the course of the submission. In these circumstances, is the charger to be entitled to decree and payment of a share of the assets without discharging his debt to the company? I think that the principles of the law of retention are clearly applicable to a case of this kind.

Lord NEAVES—I am of the same opinion. I think the case a very clear one indeed. The charger gives a charge for about £400 under a certain deduction. What is that £400? It is, *inter alia*, the one-half of the sum due by Middleton to him on the property account. *There is* room here for the application of the maxim "frustra petis," &c. The right of the one party is identical with that of the other. The two things are inseparable; they are based on the same foundation. Can, then, Middleton ask M'Ewan to pay when he is owing him about an equal sum on the basis on which the arbiter proceeded? I am of opinion that he cannot—that he is barred from doing so.

The Court therefore recalled the Lord Ordinary's interlocutor; found that so long as the charger failed or delayed to pay the debt due by him on the property account he was not entitled to charge the suspender under the decree-arbitral, and found the suspender entitled to expenses, and to uplift the consigned money.

Agent for Suspender—John Ross, S.S.C.
Agents for Charger—Maconochie & Hare, W.S.

Friday Dec. 14.

FIRST DIVISION.

BEATTIE AND OTHERS *v.* BEATTIE.

Husband and Wife — Legitimacy — Succession — Canadian Law. In a question as to the right of succession to heritable property in Scotland raised by persons claiming to be lawful children, *held* that they were not legitimate, their parents having been before their alleged marriage "knowing adulterers" with each other, who by the law of Canada could not validly contract marriage.

This is an action brought by certain parties claiming to be the lawful children of the late Francis Beattie, for the purpose of setting aside certain services carried through by the defender, and of establishing their right to heritable subjects in Scotland as the lawful children of their father, the said Francis Beattie. On behalf of the defender, it is maintained that the pursuers have no title to sue, in respect that they are illegitimate, their mother having been the wife of another man when she was married to their father. A proof having been allowed and taken,