[*3d August* 1840.]

(No. 15.)

DUNCAN STEWART, Appellant.[1]

[*Attorney General (Campbell) — Sir W. Follett.*]

WILLIAM GIBSON, Respondent.

[*Dr. Lushington — Tinney.*]

Et e contra.

Pactum Illicitum—Stat. 29 *Geo.* 2. *c.* 16., *and* 33 *Geo.* 3. *c.* 2. —*Order in Council,* 11*th May* 1803. — An American ship was sent from Britain on a joint adventure to the coast of Africa for the purchase of slaves; a quantity of arms and gunpowder were sent also from Britain by a British ship, under the direction of the party conducting the adventure, security having been found, in terms of the existing regulations, that the same should be expended in trade upon the coast of Africa; the arms and gunpowder were afterwards transhipped on board the American on the African coast, and the American ship was seized and condemned as contraband: — Held (affirming the judgment of the Court of Session) that the whole transaction was illegal, and that consequently no action of accounting in regard thereto could be maintained between the parties concerned.

Title to pursue — Society. — Question, whether one partner of a company, out of the funds of which the expense of fitting out the vessels as above stated was defrayed, is entitled, privato nomine, to sue a third party, an alleged participant in the adventure, for a proportion of such advance,—raised, but not decided, in respect it was held (reversing the judgment of the Court of Session), that, in the circumstances, the claims insisted on were not well founded.

[1] Rep. in 6 S. & D. 733; 9 ibid. 525; 12 ibid. 683; 14 ibid. 806.

Statement.

BY the statutes 29 Geo. 2. c. 16. ss. 2, 3, and 4. and 33 Geo. 3. c. 2. s. 2. power was given to the King in council, by proclamation or order in council, to prohibit the exportation of gunpowder, arms, and ammunition when he should see cause, and for such time as should be therein expressed; and it was enacted, by section 4. of the last-named statute, that every ship on board of which any gunpowder, arms, and ammunition should be carried out of this kingdom, or on board of which such articles should be laden, when the same should be prohibited by proclamation or order in council to be exported, should be forfeited, together with all her guns, ammunition, &c., and the same should be subject to seizure. There is a proviso in section 5. of the same statute, that nothing therein contained shall prevent any ship from taking or having on board such quantities of naval stores as may be necessary for the use of such ship during the course of her intended voyage, or from having and taking on board, by licence from the Lords of the Admiralty, any arms and ammunition for the necessary use or defence of such ship.

By orders in council previous to 11th May 1803, the carrying of gunpowder, arms, and ammunition from this kingdom in any ship was prohibited, under the penalties and subject to the proviso contained in the above statute (excepting where required and licensed for the use and defence of the ship.) An order in council was issued, on 11th May 1803, in the following terms:

— "That all ships and vessels clearing out for the coast "of Africa, for the purpose of carrying on the slave "trade there, be permitted to take on board, as an "assorted part of their cargoes, as much gunpowder and "as large a quantity of trading guns, pistols, cutlasses, "and flints, lead balls, bars, and shot as the exporters

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" shall think necessary, provided that sufficient secu-
" rity be given to the principal officers of his Majesty's
" customs of the port in which the ships are fitted
" out, and before they proceed on their respective
" voyages, in treble the value of the articles exported,
" that the same shall be expended in trade upon the
" coast of Africa; which security is not to be cancelled
" until proof that such expenditure has been made by
" the oath of the captain or master of the ship or vessel,
" in like manner as is prescribed with regard to spirits
" and East India goods used in carrying on that
" trade."

In 1806 the Washington, an American ship, belonging to James Broadfoot, an American citizen, was placed by him at the disposal of William Gibson and Company, merchants, Liverpool, of which firm the pursuer (respondent) and William Broadfoot were partners. A power of attorney was given to the pursuer (respondent) enabling him " to sell the said ship Wash-
" ington, to appoint and discharge the officers and
" seamen, and do every thing concerning the said ship
" that I could do were I myself personally present."
Acting under this power, the pursuer (respondent) apportioned an adventure in the African slave trade amongst several persons, of which he was to have one fourth, and the defender (appellant) one eighth, and the pursuer (respondent) was to pay his share of the adventure, being 1,400*l.*, to Gibson and Company. Gibson and Company were to have a commission of 5*l.* per cent. for fitting out the ship and purchasing the cargo. The Washington was accordingly dispatched to the river Congo, whence she was to proceed to Charleston in Carolina. The defender Stewart sailed as supercargo and in command of the vessel. She carried four guns, and was per-

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mitted, by a special order upon application of the pursuer as manager of the adventure, to carry 3½ barrels of gunpowder "for defence of the ship," and "not for the "purpose of trade." She was largely insured.

The pursuer (respondent) soon after dispatched the British ship Croydon to the Congo, with thirty cases of fire-arms and thirty barrels of gunpowder, licensed and cleared out for the purpose of trade. On her arrival in the Congo the muskets and powder were transferred on board the Washington, which last vessel was immediately captured as contraband by a British privateer, and, with the cargo, was condemned as a legal prize, and conveyed to Surinam. A suit was then commenced in the Admiralty Court at Barbadoes, which terminated in the restoration of the vessel; but this was reversed on appeal to the Privy Council, where the vessel was condemned as a legal prize. In the meantime the ship and cargo were, by arrangement between the parties, sold at Barbadoes. The defender (appellant) was occupied about a year attending to the judicial proceedings and looking after the ship.

Much loss was incurred in this adventure, the expense of which had been defrayed out of the funds of Gibson and Co.; for a proportion of which William Gibson and Co. brought an action in Scotland against Stewart, in 1811, but which action was dismissed, in respect there was no evidence that Gibson had the authority of his partner Broadfoot for entering into the speculation.

In 1822 William Gibson, the pursuer (respondent), brought an action in his own name against Stewart (appellant), concluding for 1,272*l.* 8*s.* 7*d.*, "being the "balance arising upon his eighth share of the Wash-"ington and cargo;" also 1,132*l.* 9*s.* 4*d.*, "being money

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"received by him (Stewart) in Barbadoes from the "pursuer's agents, and applied to his own purposes;" also 139*l.* 16*s.* 3*d.*, "conform to state of accounts to be "produced."

The appellant stated various pleas in defence, particularly that the pursuer was not in titulo to recover the sums even if due, but without expressly pleading the illicit nature of the transaction as a defence.

The Lord Ordinary (Eldin) decerned (1st February 1827) in terms of the libel.

The defender (appellant) reclaimed, and thereupon, with the leave of the Court, by virtue of section 11. of the 6 Geo. 4. c. 120., stated on record, as an additional plea, the illegality of the adventure.[1] The Court allowed that plea to be added, as appearing to be supported by the facts stated by the pursuer in article 8. of his condescendence as follows; viz. "In order to facilitate "the purchase of the Washington's cargo of slaves, "the pursuer had shipped, by a British vessel named "the Croydon, from London for the river Congo, "a quantity of muskets and gunpowder, which were "to be delivered to the defender, or his order, on "their arrival in that river; and the defender, before "he sailed in the Washington, received a bill of lading "of those guns and powder, which are accordingly "entered in the general invoice book of the adventure "referred to in article 5. The reason why the muskets "and powder were shipped by the Croydon from Lon-

[1] It had previously (1814) been determined by the Common Pleas in England, in a case arising out of the above joint adventure, that Gibson could not recover insurance from the underwriters, on the ground that the shipment by the Croydon was a fraud on the statutes and order in council above referred to, and that the condemnation was good evidence of the ship having been engaged in an unlawful act. See Rep. 1 Marshall, 41, 119; 5 Taunt. 433.

" don was, that by the existing orders in council no
" foreign ship was allowed to carry these articles, under
" certain penalties. After coming to an anchor in the
" river Congo, the defender applied to and received
" from the commander of the Croydon delivery of the
" muskets and powder, but instead of carrying them
" ashore, as he ought to have done, he very improperly
" carried them on board the Washington. This trans-
" action was witnessed by a British letter of marque
" privateer called the Prince of Orange, the commander
" of which immediately went on board the Washington,
" and took possession of her as a prize, and afterwards
" carried her to Barbadoes for adjudication, on the
" ground that she had more guns and powder on board
" than was allowed by the sufferance from the custom-
" house at Liverpool."

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The Court, on 7th March 1828, pronounced the following interlocutor (signed on the 8th):—" The Lords
" having resumed the consideration of this note, with
" the whole proceedings following thereon, and heard the
" counsel for the parties, they alter the interlocutor of
" the Lord Ordinary complained of, sustain the defence
" founded on the illegality of the adventure, and assoilzie
" the defender from the conclusions of the libel, so far as
" the same relate to the sum of 1,272*l.* 8*s.* 7*d.* sterling
" concluded for, and decern; also find the defender
" entitled to the expenses incurred by him in defending
" himself against the conclusions of the libel from
" which he is assoilzied; appoint an account thereof to
" be given in, and remit the account, when lodged, to
" the auditor to tax the same and to report; and fur-
" ther, in regard to the other conclusions of the libel,
" remit the same to Lord Corehouse, Ordinary, in

Judgment of Court, 7th Mar. 1828.

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"place of Lord Eldin, to proceed and do further there-
"in as to his Lordship shall seem proper."

When the case went back to the Lord Ordinary an additional record was made up, in which the pursuer (respondent) claimed the above-named sum of 1,132*l.* 9*s.* 4*d.*, "as advances made to the defender "(appellant) in the year 1807 by Messrs. Francis "Dixon and R. A. Hyndman, the pursuer's agents, "Barbadoes, which were by the defender applied ex-"clusively to his own private and personal purposes." In the record the items of the account were stated in detail; among others, 745*l.* sterling, being a sum twice paid as costs of a lawsuit in Barbadoes relating to the seizure of the ship, and the sums of 22*l.* 10*s.* and 16*l.* 12*s.* 6*d.*, Barbadoes currency, part of the costs of the same suit, and some expenses incident to the ship while in Barbadoes. These sums were paid to the defender by the agents in Barbadoes, and to them repaid by bills drawn upon and retired by Gibson and Company; and the same sum of 750*l.* was afterwards allowed by the court at Barbadoes to be retained by the defender out of the proceeds of the ship and cargo when sold. It appeared that the 139*l.* 16*s.* 3*d.* was the value of certain parts of the cargo which were alleged to have been taken from the Washington before the capture, and applied by the defender (appellant) in paying a debt he owed to some natives. These several sums formed items in Gibson and Company's account of the adventure. The defender claimed, as a set off, remuneration for his trouble in attending to the proceedings relative to the condemnation of the ship.

A minute and answers were thereafter given in to Lord Newton as Ordinary, in room of Lord Corehouse.

The cause afterwards came to depend before Lord Fullerton, Ordinary, who (11th July 1833) appointed cases to be lodged, and suggested in a note that they should contain a "clear and connected statement not only of "the judgments already pronounced, but of the par- "ticular facts upon which the parties now mainly "rely in support of their arguments on the remaining "points."

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The Lord Ordinary reported the cases to the First Division of the Court, and their Lordships (6th June 1834) pronounced the following interlocutor:—"The "Lords having advised the mutual cases on the points "remaining undecided, and heard the counsel for the "parties, repel the defences; find the defender liable "to the pursuer in the sum of 745*l.* sterling, and also "in the sums of 22*l.* 10*s.* and 16*l.* 12*s.* 6*d.*, Barbadoes "currency, mentioned in the pleadings, with the legal "interest of the said several sums from the respective "dates stated in the account, No. 8. of process, till "paid, and likeways in a proportion of the commission "charged in said account, corresponding to the two "last-mentioned sums, with the legal interest thereof "till paid; also find the defender liable to the pursuer "in the sum of 139*l.* 16*s.* 3*d.*, with interest thereof from "the 31st day of December 1816 till paid; remit to "the Lord Ordinary to hear parties on the defender's "claim for remuneration, and the pursuer's claim for "the remaining articles of said account, No. 8. of pro- "cess, and to do therein and in the cause as to his "Lordship shall seem just and consistent with the "above findings, and reserve for his Lordship's consi- "deration the question of expenses."

Judgment of Court, 6th June 1834.

The case having then returned to Lord Fullerton,

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Ordinary, and minutes of debate upon the points contained in the above remit having been lodged, his Lordship (30th May 1835) pronounced the following interlocutor, having the subjoined note annexed:—"The "Lord Ordinary having heard parties' procurators, and "having considered the revised minutes and former pro-"ceedings, repels the defender's claim for remuneration, "and also repels the pursuer's claim for the articles of "the account, No. 8. of process, referred to in the remit "from the Court, and decerns accordingly; farther, "appoints parties to be heard on the remaining points "in the cause, if any, and also on the point of ex-"penses."[1]

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[1] "*Note.*—On the first point, viz. the defender's claim for remune-"ration on account of his attendance and services in the West Indies, "during the proceedings which terminated in the condemnation of the "vessel, the Lord Ordinary thinks that, in the circumstances of this case, "it is inadmissible. It is a claim on equitable grounds advanced by the "defender, who was not only the master of the vessel, but a partner in "the adventure; and had the accounting for the ultimate loss proceeded "agreeably to the principle assumed in the summons, the claim might "perhaps have formed a very reasonable article in that accounting on the "side of the defender. But the defender has pleaded the condemnation "of the vessel, and the illegality of the contract ascertained by that con-"demnation, in bar of all accounting or claim against him as partner for "any share of the loss, and that plea has been sustained by the Court. "Having taken the benefit of such a plea, he is not, in the opinion of "the Lord Ordinary, entitled to make any demand on the score of "services performed in relation to the adventure, and before it was termi-"nated by the condemnation of the vessel.

"Secondly, The Lord Ordinary can see no ground for the pursuer's "claim, in relation to the articles of the account forming the only re-"maining point in this discussion. These are certain items which were "included in that account,—an account paid to the defender, first, "by the bills drawn by him on Dixon, and afterwards paid to him "a second time by Hyndman, and taken credit for by Hyndman, on "settling with the captors for the proceeds of the vessel. By the former "interlocutor of the Court the pursuer has recovered the full amount "of that account from the defender of which he had received a double "payment; and what the pursuer now demands is another repayment of

Both parties reclaimed, and the Court, 16th December 1835, pronounced the following interlocutor upon the appellant's note: — "The Lords having advised this "reclaiming note, and heard the counsel for the "parties, adhere to the interlocutor reclaimed against, "so far as it respects the claim for remuneration, and "refuse the desire of this note; remit to the Lord "Ordinary to dispose of what remains of this cause "and of the expenses." And of the same date the counter reclaiming note for the respondent was likewise refused.

Judgment of Court, 16th Dec. 1835.

Parties having thereafter been heard before Lord Fullerton, Ordinary, his Lordship, 14th January 1836, pronounced the following interlocutor:—"The Lord "Ordinary having resumed consideration of this cause, "and heard parties' procurators, in conformity with

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"certain articles, which he says ought not to have been allowed to the "defender at all in either account.

"The parties differ as to the principle of the judgment of the Court; "and if the Lord Ordinary had considered that the present question "depended on any particular view of the Court in pronouncing it, he "would again have reported the case. But this course appears to him to "be unnecessary, as in any view which can be taken the pursuer's claim "is untenable. By the decision already pronounced he is completely "indemnified; and such being the case, and even taking his own view of "the judgment, as proceeding on the ground that Hyndman in claiming "the amount from the captors acted as his agent, it is impossible to see "why he should claim the articles now in dispute from the defender, or "how it can be relevantly stated that those articles ought not to have "entered into the account at all. The case is now precisely the same as "if there had been no previous payments to the defender by Dixon's "bills, and as if Hyndman, viewing him as the pursuer's agent, had paid "those items to the defender, and then taken and got credit for them in "accounting with the captors. Now, had that been done, it would seem "a most extraordinary proposition to maintain that the pursuer was "entitled to recover from the defender the amount of those very charges "which he or his agent had got credit for from the captors, on the single "ground that, whether justly or not, they had been actually paid to the "defender."

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" the special findings contained in the interlocutor of " the Court, of date the 6th June 1834, decerns " against the defender for payment to the pursuer " of the following sums, viz. the sum of 745*l.* sterling " with the legal interest thereof from 29th September " 1807 till paid; item, the sums of 22*l.* 10*s.* and " 16*l.* 12*s.* 6*d.*, Barbadoes currency, amounting toge- " ther, at the rate of exchange stated in the account, " No. 8. of process, to the sum of 28*l.* 9*s.* 6*d.* with the " legal interest thereof from 26th March 1807 till paid, " together with the sum of 1*l.* 8*s.* 6*d.* sterling, being " a proportional part of the commission charged in said " account, corresponding to the said sum of 28*l.* 9*s.* 6*d.*, " with the legal interest thereof from 29th September " 1807 till paid; item, the sum of 139*l.* 16*s.* 3*d.* " sterling, with the legal interest thereof from 31st " December 1816 till paid; and grants warrant for the " extracting hereof ad interim: finds the defender " liable to the pursuer in the expenses he has incurred " relative to the second and third conclusions of the " libel, but subject to such modification as to the " Lord Ordinary may seem right; and remits to the " auditor to tax the account thereof, and to report."

Judgment of Court, 20th May 1836.

The appellant reclaimed, and the Court, 20th May 1836, pronounced the following interlocutor:—" The " Lords having advised this reclaiming note, and heard " counsel, adhere to the interlocutor reclaimed against, " and refuse the desire of this note; and remit to the " Lord Ordinary to modify the expenses referred to in " the interlocutor: find the defender liable in the " expense incurred by the pursuer in the Inner House " since the date of the said interlocutor; and remit " the account thereof to the auditor to tax the same

" and report to the Lord Ordinary, with power to his " Lordship to dispose of such report as shall be just."

There were cross appeals presented.

Statement.

Stewart the defender appealed from the interlocutor of Lord Eldin, dated 1st February 1827; the interlocutor of the Inner House, dated 7th March 1828, in so far as it entertained any of the conclusions of the libel, and did not assoilzie the appellant in toto, and find him entitled to his whole expenses; the interlocutor of the Inner House, dated 6th June 1834; the interlocutor of Lord Fullerton, dated 30th May 1835, in so far as it repelled the defender's claim for remuneration; the interlocutor of the Inner House, dated 16th December 1835, adhering to the last-mentioned interlocutor of Lord Fullerton; the interlocutor of Lord Fullerton, dated 14th January 1836; and the interlocutor of the Inner House, dated 20th May 1836.

The pursuer (respondent) presented a cross appeal against the interlocutor of the 7th March 1828, in so far as it sustained the defence founded on the alleged illegality of the adventure, assoilzied the appellant from the conclusion of the action relative to the sum of 1,272*l.* 8*s.* 7*d.*, and found him entitled to the expenses of defending himself against that conclusion, and the interlocutor decerning for the taxed amount of those expenses, and also the interlocutor of the Lord Ordinary of the 30th May 1835, and the interlocutor of the Court of the 16th December 1835, in so far as they repel the respondent's claim for the remaining articles of the account No. 8. of process.

The defender (appellant), in his answer in the cross appeal, repeated his argument on the illegality of the

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Appellant's Argument.

adventure, and stated that the articles in the account dismissed by the Court were either included in the 745*l.* or were paid out of the funds which belonged to the captors.

Appellant (*in the original appeal*).—The respondent Gibson has neither title nor interest to maintain this action, because the adventure under which he claims was never effectually formed; and because, at all events, it was not he, but William Gibson and company, who made the alleged furnishings and advances of which payment is sued for; and the respondent holds no right, either directly or indirectly, to the funds of that company. The respondent's own statement in the closed record establishes, that it was not the respondent who made the advances on account of which he makes the present claim, but William Gibson and company; and therefore, if any sum is due by the appellant on the head of these advances, it is to William Gibson and company, and not to the respondent. The respondent's statement in the record is, that the advances were made "out of the funds of William Gibson and "company, of which he (the respondent) was the "managing partner." The account, too, containing a state of the advances, is entitled "Ship Washington "and owners, in account current with William Gibson "and company." The summons in the former action proceeded on the statement that the money was due to William Gibson and company. In that action he argued, that "the action was properly brought against "the defender at the instance of the petitioner (respon-"dent) for himself and for William Broadfoot, the "partners of the company."

The respondent is not entitled to claim the sums in dispute, in respect that that adventure which he did attempt to carry into execution, and in consequence of which the claim is made, was illegal. This proposition is clear not only from the judgment of the Common Pleas, but upon the facts of the case as stated by the respondent himself; and the interlocutor of the Court, in March 1828, is beyond dispute well founded.

Independently of the obvious fact that the sums sued for, and sustained at the pursuer's instance, are partes ejusdem negotii, equally tainted with illegality as the other sums sued for and disallowed, the appellant is in a situation to show that the respondent's claims to those sums which have been found due to him by the Court below are not well founded on their merits. In the first place, the 745*l.* was not paid to the appellant, but to Dixon, the agent at Barbadoes, and never was intermeddled with by the appellant, so that no claim can lie against him on that head. 2dly, The appellant cannot be liable for these expenses, on the ground that a sum of equal amount was received by him from Hyndman out of the proceeds of the condemned property, for the funds out of which Hyndman made that payment belonged exclusively to the captors. The captors were aware of the great labour, and trouble, and expense which the appellant had incurred in this business, and though they were not called upon to reimburse him; yet as this money had been paid on that head, they were sensible that it would be unfair to deprive him of it, and settled accounts upon the footing of it remaining with him. 3dly, The sum paid by William Gibson and company on account of these expenses, being 745*l.*, was charged by them in their account current with the adventure, and upon that account current a balance of 1,272*l.* 8*s.* 7*d.*

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Appellant's Argument.

was brought out against the appellant as his eighth share of the loss. Every farthing which they advanced or alleged they had advanced was there charged, including extravagant commissions and accumulated interest to the extent of between 5,000*l.* and 6,000*l.* The present demand, therefore, which is rested upon their having paid these expenses, is just a second or double charge for the same sum. When William Gibson and company charged all their advances, their demands on account of the adventure must surely be held as closed. The respondent demanded from the appellant 1,272*l.*, which, according to William Gibson and company's own account, was his eighth share of all the sums expended by them in relation to the adventure, including the very expenses in question.

The respondent's claim for 139*l.* 16*s.* 3*d.* arises from goods said to have been taken by the appellant from the Washington after the capture, and of course after ship and goods had been the property of the captors, and from expenses incurred in an attempt to recover the insurance on the appellant's commission as supercargo. If the interlocutor holding the sums before adverted to be well founded, it must be on the ground that they were unconnected with the adventure; and hence it is submitted to be indisputable that the claim of the appellant, for remuneration for services performed to the adventure under special employment, is also unconnected with it, and fell to have been sustained.

Respondent's Argument.

Respondent (*in the original appeal*).—The note to the interlocutor of the Lord Ordinary truly states the grounds upon which the appellant has properly been found liable for the sums in question.

The appellant having twice received payment (from

the respondent's agents) in the West Indies of the amount of the costs of the admiralty suit, and having accordingly, by his letters written on his arrival in Britain, desired that he should be debited with the amount of Hyndman's bills for the second of those double payments, was properly found liable in restitution thereof to the respondent.

Respondent's Argument.

The appellant, after having pleaded the illegality of the adventure in bar of all claim of accounting against himself as a partner therein, was not entitled, upon the supposition of that plea being well founded, to insist in any claim of remuneration for services alleged to have been performed by him in relation to the adventure before its termination by the condemnation of the vessel.

The following observations were made at the conclusion of the hearing of the cause on 26th January 1838.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, it appears to me that farther investigation will be required before I state my opinion upon the case at your Lordships bar. At present I have very great difficulty with regard to the party who brought this suit. It is not proved that in the Court of Session, a practice, which appears necessary for the purpose of administering justice in this country both in the courts of law and equity, prevails, namely, that those with whom a contract is made should be the parties who sue upon that contract. Beyond all doubt the contract in this case was not made with the individual who instituted this proceeding. Indeed he does not state that the contract was made with himself; on the contrary, the summons states the contract to

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Ld. Chancellor's Speech.

have been made on behalf of the firm of Gibson and company. This is a question with respect to which it is very important to have the best information, before we lay down a rule which shall be binding upon the courts in Scotland; and I shall be glad to obtain such farther information as I can as to the practice in the Court of Session.

With regard to the question of illegality, I entertain no doubt that the Court of Session were right in pronouncing this transaction illegal upon the facts as they appear upon the papers. It is not disputed by the counsel at the bar that if we had before us a contract to do that which subsequently took place it would be illegal. If the contract had been in so many words, that an adventure should go out, relating in part to certain articles of merchandize which might be legally taken, and in part to arms and ammunition which by the law of the country could not legally be taken, and it was thereby agreed that in order to evade the law, no part of the arms and ammunition should be carried out in the ship which was to carry out the other goods, but should be carried in another ship to a place out of the immediate power and jurisdiction of this country, and then should be transhipped into the ship carrying the merchandize, that would be a transaction illegal, in violation of the British law, and a contract upon which no relief could be given.

Now we find that in point of fact that is the nature of the transaction in question, which was carried on under the immediate management of the party now sueing on the contract entered into; and all your Lordships have to do is, to make up your minds whether that which subsequently took place did form part of the contract between the parties or not,—whether the illegality of the

one part of the transaction would not affect that part of the transaction which is alleged to be legal. Seeing what took place, and looking at the invoice, I cannot doubt that the whole formed one transaction; and, consequently, that the whole was affected by the illegality which it is admitted existed with regard to part of it. If your Lordships should be of that opinion, the only question will be how far the illegality of the transaction affects the particular sums in question between the parties.

Lord Brougham.—My Lords, I confess that upon this case I have felt from the beginning very great embarrassment from not having before us, according to the better practice of former times, a note of the opinions which were pronounced by the learned judges who dealt with the case in the Court below, and of the reasons upon which those opinions were founded. The consequence of the absence of this great desideratum in the present case is, that we do not know upon what grounds any one part of this decision has been pronounced. Upon some branches of it we may have less doubt than upon others, particularly respecting that which forms the subject of the cross appeal, the illegality of the transaction, whereupon the present appellant was assoilzied from his claim. But then, we still have not any means of telling in what light the Court below, in the opinions which they ultimately came to, and in the judgment which they ultimately pronounced, regarded the two most material portions of the case which form the subject of the original appeal,—I mean the question of parties, which extends over and pervades the whole case, the matter of the cross appeal as well as the original appeal, and the

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question as to the sums of 745*l.*, 139*l.*, and the two smaller sums of 22*l.* and 12*l.* severally, which formed the subject of the cross appeal alone. And this is the more to be regretted with respect to these last-mentioned sums, inasmuch as it leaves us entirely in the dark and without the power of forming even a conjecture of the grounds upon which their Lordships came to one judgment with respect to the 1,272*l.* 8*s.* 7*d.*, assoilzieing from that claim on the ground of illegality, and another judgment respecting the lesser sum, allowing that claim, although to all appearance that claim comes within the scope of the argument of illegality, as much, and in the same way, and for the self-same reasons, in which and for which, the judgment proceeded against the claim of the larger sum, as arising from an illegal contract.

My Lords, what I said respecting the want of notes of the Judges' opinions has to a certain degree anticipated, and will show your Lordships, what my opinion is respecting the merits of the case. Now, first, I shall take that which relates to the improper party who has brought the action, because that goes over the whole case, both the original and the cross appeal; and it is not a mere technical objection which is here taken, —it is not the same kind of objection as a plea of abatement in our courts for the non-joindure of a defendant, but it is rather the case of a nonsuit by the non-joindure of a plaintiff. In the one case it may be matter of form, but in the other case it is matter of substance. If a contract is made by A. with B., A. of course may be sued upon that contract by B., and vice versâ; but if a contract is made by A. and B. with C., shall A. alone sue C. upon that contract, unless he produces an authority from B. or a release by B., which comes to

the same thing? In both of these cases B. must sue as well as A., for doubtless the contract enuring to the benefit of both, being made by both, the performance of it must enure to the benefit of both, and both, and not one, have a right to come into Court against the other party and sue the other party.

Now, my Lords, nothing has been stated in this case which at all satisfies me that there is, either in point of form or in the substantial law of Scotland, any difference, with reference to this particular, from those principles which regulate our courts of equity as well as of law in this country; nothing which shows that the principles on which the courts of Scotland proceed differ from those principles which by natural justice, or even according to the plain dictates of common sense, must be the rules of proceeding in all courts of law or equity. Nevertheless, I am disposed to agree with my noble and learned friend in not pronouncing at present upon this, although it would be a shortening of the whole question, both the original and the cross appeal, because it is barely possible there may be some rule which we are not aware of, and it may be as well that we should postpone our decision for further information.

I must proceed, in the second place, to say that I do not think the question will necessarily arise in this case at all. First, with respect to the cross appeal: upon that I entertain no doubt whatever; the question has been disposed of in the Court below as regards the sum of 1,272*l.* 8*s.* 7*d.*, upon the ground that there was an illegal agreement in which this voyage and speculation had its origin, that that illegality rides over the whole adventure and speculation, and that ex dolo malo non oritur actio. Perhaps, correctly speaking,

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dolus malus does not apply to what is illicitly done, but to what is malum in se, so that there is no dolus malus, properly speaking, here, but there is pactum illicitum, and there is dolus malus in evading the positive enactments of the municipal law. But ex pacto illicito non oritur actio. It is said that here there was a legal agreement completed on or before the 27th of May 1806, and that that is not vitiated and rendered illegal by a sort of reaching backwards, because on the 2d of June afterwards, on the African coast, something was done which must be admitted to be illicit and in contravention of our municipal law. Now this is a question of fact; and the question is, whether the circumstances of the case do not afford sufficient evidence, I should say, irrefragable evidence, of the two proceedings being connected inseparably together, both forming parcels of one transaction, both making up one adventure in trade, and that adventure becoming illegal altogether, because bottomed in and originating from that which was in itself illegal.

We are asked to go a great way when we are called upon to believe that these two adventures were not one transaction; we are asked to go a little further when we are called upon to believe that they had not a close connection with each other; but we were asked to go a length which I am sure no man of ordinary, plain, common sense and understanding can accompany the respondent in going, when we are called upon to say that there was no connection whatever between the two, and that the one was entered into without any prospective looking forward to the other, and that the other was entered into without any retrospective view to the former. Yet all this we must believe before we can admit the

argument of the respondent (and it is necessary for his case, absolutely necessary, before he can overturn the decision of the Court below brought here by his cross appeal); that is to say, we must believe all this before we can suppose that the matter admitted to be illegal matter was collateral to the legal matter, and that the legal matter was independent of and uninfluenced and unaided by the illegal matter. Can any man believe that so material an article as gunpowder to a great amount, muskets, flints, and other arms and ammunition to still larger amount, a chest of 400 stand of arms and a chest of 200 stand,—that all this was an after thought, just a sudden, accidental fancy that seized upon these slave traders after they had wholly completed their adventure, had arranged their outfit, and had contracted with one another for the carrying on of their crime (which used to be called a trade,—but which has now obtained its proper appellation, by an act of parliament which I had the happiness to bring in, with as great pleasure as any thing I ever did in my life, I mean the felony act of 1811); that in the arrangement of this adventure, in the conspiracy by which they planned a crime to be perpetrated upon the coast of Africa, the powder and muskets had never entered into their imagination up to the 27th of May, but that having arranged a cargo of beads, having got an assortment of tartan hussar dresses, among other things, for the poor natives whom they were going to plunder and murder and torture in carrying them through the horrors of the middle passage,—that these tartan dresses and beads, by which they were to get the mothers to sell their children, and the different members of families to sell their relations,—that all these were put aboard the vessel on the 24th of May,

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and that they never thought of muskets and gunpowder and flints—till when? The time is material here. Till the 2d of June; so very long a period after as no less than six days. No less than six days afterwards it was that they suddenly thought, what are we doing? We are going to Africa, but we are going to murder and rob the people there, and therefore we must have gunpowder and muskets. We are going to get the poor people to help us in our robbery and murder, and therefore we must have beads and other things. Therefore let us go and illegally put them on board, and as we cannot put them on board at Liverpool let us put them on board at the River Congo.

Now it is as to that we are called upon to judge. We are called upon to say that this was a totally collateral and unconnected adventure, wholly foreign to that which happened six short days before. My Lords, this is totally impossible; and I really feel that I ought to apologize for having dwelt so long upon it. I am perfectly clear that this is one transaction, one voyage out. The invoice speaks no other language; the book which has been produced in the proceedings below speaks no other language; the abstract jumbles them altogether, and mixes them all up as one transaction: the party is debited with the whole. But, above all, the whole scope and circumstances of these proceedings plainly show, that it is one united joint connected transaction, not two several transactions.

My Lords, even if I had more doubt than I have, (I say I have none,) I should really think that it would not become your Lordships, upon a mere matter of fact, to be very ready to reverse the decision of the Court below; that when four learned judges have drawn a

conclusion upon facts; that you should take another view of these same facts, and, having no other materials whereby to modify the opinion arrived at in the Court below, should say from thence, we arrive at an opposite conclusion.

Upon the whole, therefore, I have no doubt whatever, but entirely agree with my noble and learned friend, that the cross appeal must be dismissed, and, in my opinion, with costs. I do not see a shadow of ground for this cross appeal.

Now, my Lords, I have thus disposed, in my humble opinion, of part of the original appeal; I cannot divine what the Court meant by taking a distinction between the 139*l.* 16*s.* 3*d.* and the 1,272*l.* 8*s.* 7*d.* This matter seems to me to be in one or other of two predicaments. Either there is, which I strongly suspect, a blunder altogether (I speak with great respect) and this 139*l.* is part of the 1,200*l.* and odd, because that 1,272*l.* 8*s.* 7*d.* is called an eighth;—an eighth of what? How does the 139*l.* 16*s.* 3*d.* happen to get out of the scope of that dividend of which the 1,272*l.* 8*s.* 7*d.* is the quotient? By the process of dividing by eight; I think there is nothing suggested to show why the 139*l.* 16*s.* 3*d.* did not come within the scope of that process of division; if so, it is disposed of by the part of the judgment assoilzieing from the 1,272*l.* 8*s.* 7*d.* Or suppose it is a separate sum from the 1,272*l.* 8*s.* 7*d.*; then does not it come within the scope of the illegality? How can you differ the 139*l.* from the 1,272*l.* 8*s.* 7*d.*? I can see no difference. I am therefore perfectly ready to say that the judgment cannot stand as regards the 139*l.* 16*s.* 3*d.*

With respect to the libel I think it is hardly necessary to enter into that. The two small sums of 22*l.* and

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12*l.* I think may be put out of the case; but with respect to the 745*l.*,—that is the part of the case as to which I stated during the learned attorney general's reply I feel most doubt, because it is involved in considerable obscurity as to the ground upon which the Court below proceeded. I am inclined to go along with the argument in the reply, however, and to consider, that either upon the ground of want of parties in this case, which would ride over this part as well as over the other, or upon the ground that at all events Gibson cannot claim this, the decision here is wrong. But I think it right to add that I do not see how the question of illegality affects the 745*l.*, though I am of opinion that it affects the 1,200*l.* and the 139*l.* If I should ultimately feel prepared to advise your Lordships that that 745*l.* has been well allowed as not coming within the scope of the illegality, and also that it has been well allowed because well claimed, inasmuch as there is no foundation for the alleged want of proper parties — and only upon that assumption can it be said that it is well claimed,—if it should be found upon further inquiry that there is no foundation for the objection of the want of proper parties, I do not see how there should be any allowance made by way of set off in the nature of a quantum meruit to the other party. Though I feel the pressure of the argument of the want of parties, I feel also, as Dr. Lushington argued, that it would be setting off a quantum meruit against a legal demand. But, as at present advised, I am inclined to think that we shall never come to that set off at all, and that upon further inquiry, in all probability your Lordships may be advised to reverse the whole of the decision on that point. I am quite clear that with respect to the

cross appeal, you ought to affirm it, with the costs of appeal.

My Lords, I have entered into the matter at this great length, with a view to save your Lordships the trouble of hearing any further arguments when you ultimately decide the case. It may be understood that, unless we come to another opinion upon making further inquiry upon that part of the case, what has now been said may be considered as the reasons for reversing the judgment. If we come to another opinion, of course it will be affirmed.

My noble and learned friend has suggested to me, that though it is quite clear what we shall do on the cross appeal, it is not usual, in deciding two appeals, to decide the cross appeal first, and then to consider the original appeal. It is quite clear what the judgment will be upon the cross appeal. My noble friend agrees with me, in imposing upon the parties the trouble of bringing a note of what passed in the Court below; in all probability such a note would have enabled us to dispose of it at once.

The Attorney General.—I feel the very great importance of what your Lordship has said; but your Lordship will allow me to say, that you will only expect a note where reasons are given, and that unfortunately it often happens that the Inner House give their decision only without giving the reasons.

Lord Brougham.—We know that in Westminster Hall it has been the usual practice, since the time of Lord Kenyon, upon the important questions that go from the Court of Chancery to the Courts of Common

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Law, that they certify their answer without giving reasons. That has been found so inconvenient that the Court are now disposed to come back to the old and better practice. I hope the Court of Session will not be offended, if we apply to them the same observations which have been applied to the Courts of Westminster Hall, and that they will take the trouble of giving their reasons as well as giving judgment. Perhaps a knowledge that it has been proposed here will be an inducement to those very learned persons to adopt that course. I have the greatest respect for them, and wishing to have their reasons is a token of our great respect.

Further consideration deferred.

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LORD CHANCELLOR.—My Lords, upon the principal question in this case, viz. the illegality of the transaction from which the question between the parties arose, there is, I think, no doubt. It has, I think, been very properly adjudged to be so by the Court of Session. It is not disputed that it would have been a violation of the act of parliament to have exported the arms and ammunition in the Washington; therefore they were sent in another ship, for the purpose of being transhipped into the Washington, when it might be thought safe so to do, and this was accordingly done upon the coast of Africa; and the ship and cargo being seized were afterwards condemned.

All the questions between the parties must therefore, in my opinion, be considered with the assumption that the adventure was illegal, and this will dispose of the pursuer Gibson's appeal against the interlocutor of the 7th March 1828 and the 10th June 1829; and, it

appears to me, that necessarily carries with it the reversal of the interlocutor appealed from by the defender Stewart, so far as the Court found him liable to pay 139*l.* 16*s.* 3*d.*, which appears to be the value of certain parts of the cargo, which were applied by Stewart, the captain, in paying a debt he owed to some natives. If the whole adventure was unlawful, there can be no right to recover this sum. If, the cargo having been sold, an action had been brought for the proceeds, and the illegality of the adventure had been set up and established, the pursuer could not have recovered, and so the Court of Session have determined. Why is this sum, being a part of the adventure, not to be affected by the same rule? If the captain had sold the goods represented by the 139*l.* 16*s.* 3*d.*, he could not, according to the decision, have been made responsible for the proceeds. Upon what principle then has he been made responsible for them; because, instead of receiving value for them in money or goods, he has received value in the liquidation of his own debt. The captain indeed alleges that the goods were not so applied until after the capture, by which they ceased to be the property of the pursuer. In neither case however can the pursuer be entitled to recover the value of them.

This part of the case is also included in the question, whether the pursuer can maintain a suit founded upon transactions, not with himself individually, but with Gibson and company, in which firm he was a partner; and as this question, if decided in the negative, will conclude all the subjects of appeal against the pursuer, it requires particular consideration. The ship Washington belonged to James Broadfoot, an American citizen. The pursuer Gibson and William Broadfoot

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carried on business in Liverpool in partnership under the firm of Gibson and company. The ship was sent to Gibson and company, for the purpose of being fitted out at Liverpool in 1806, for an adventure in the slave trade, and a power of attorney in the most ample terms was addressed to the pursuer Gibson, enabling him to deal with the ship to the extent even of selling it. Under this power Gibson apportioned the adventure amongst several persons, of which he, the pursuer, was to have one fourth, and the defender one eighth. The letter to him informed him he was to pay 1,400*l.*, his share of the adventure, to Gibson and company; and that as they had been at the sole trouble of fitting out the ship and purchasing the cargo, and their responsibility was pledged for the amount, they were to have 5*l.* per cent. commission. The accounts of the ship were kept under the heading of "ship Washington and owner, with "William Gibson and company." The ship having been captured and ultimately condemned, though ordered to be released by the Court of Admiralty in Barbadoes, expenses on account of the suit there, and on account of the ship, and of the defender personally were incurred, which were paid to the agents there by bills drawn upon Gibson and company, which were paid by them; and some of the items comprising the sum for which such bills were drawn constitute part of the pursuer's demand.

The pursuer in 1811 brought an action against the defender for the alleged balance of his account, in the name of himself and his partner William Broadfoot, but after many years it was decided by the Court of Session that such suit could not be maintained, because it appeared that the pursuer had not had the authority

of his partner for entering into this speculation. In consequence of that failure, the pursuer has brought the present action in his own name, not alleging any transfer to him of any interest of his partner William Broadfoot, but claiming right in himself to sue for and recover the sums alleged to be due to the defender on account of this joint adventure, although all the money transactions were with Gibson and company, and although the pursuer had only one fourth and the defender one other eighth of the adventure.

It does not follow, because one partner exceeds the limits of his authority as between himself and his copartners in any transactions he may enter into, that the firm is not pledged to those with whom the dealing takes place in the name of the partnership. A decision, therefore, that the pursuer had not the proper authority to bind William Broadfoot, his partner, in those transactions, proves nothing in the question, whether he can alone sue those with whom he dealt in the name of the firm.

That the funds of Gibson and company were employed in the adventure is admitted; that they paid the bills drawn from Barbadoes is a fact common to both statements. How the account stands between Gibson and William Broadfoot does not distinctly appear, although it is alleged that Gibson is debtor to his partners; but under such circumstances, how can the pursuer be entitled to receive the repayment of what the firm of Gibson and company have so advanced? Yet such would be the result of the interlocutor decerning for payment to the pursuer of the 745*l.* If, therefore, it were necessary to decide this question, I should not hesitate to advise your Lordships to reverse the interlo-

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cutor appealed from by the defender upon that ground alone.

There appear to me, however, to be other grounds which make it unnecessary to decide expressly upon that point. The interlocutors of 6th June 1834, 14th January 1836, and 20th May 1836, find the defender liable to pay to the pursuer 745*l.*, 22*l.* 10*s.*, and 16*l.* 12*s.* 6*d.* These sums are composed of the expenses in the Admiralty Court at Barbadoes, and some expenses incident to the ship whilst there, and said to have been due to the defender, who was there employed in attending to the interest of the owners. The amount was advanced by Dixon and company, the agents in the island, and repaid to them by bills drawn by the defender upon the house of Gibson and company, by whom they were paid, and so constituted items in the account of that house with the ship. If the defender had by those means obtained payment of sums to which he was not entitled, such overcharges might properly be the subject of investigation in settling the accounts of the adventure, but they could only be items in such accounts; and if, from the illegality of such adventure, no legal investigation of such accounts could be enforced, upon what principle can the repayment of particular items of such accounts be decreed?

The objection applies to every item, and though the particular sum should appear to have been improperly charged, it is impossible, without taking the whole account, to know whether it ought to be repaid, or merely to be disallowed in the account, as it cannot be known whether the balance be due to or from the party against whom such is disallowed.

It appears, however, that by far the greater part of these charges, that is, all the expenses in the Admiralty Court, were properly paid by Gibson and company on account of the adventure, being the expenses of protecting the property against the claim of the captors, and which was successful in the island. But these expenses, it is said, were paid twice over, the amount having been deducted from the proceeds of the sale of the ship; and such appears to have been the fact; but such deduction was made from the proceeds, which were the property of the captors, and not of the pursuer or of Gibson and company; and though apparently improperly made, no injury was thereby done to the pursuer. If the payments were properly made by Gibson and company in the first instance, no right to recover back the amount can arise from their having been improperly placed to the account of and so improperly paid by the captors.

It was argued that this deduction, having been made by order of the Admiralty Court at Barbadoes, amounted to an adjudication that the sums ought to be paid out of the proceeds of the ship. This, however, does not appear to be so, the order of the Court of Admiralty being only to permit the deduction till the account should be settled; and it appears that no part of the 745*l.*, paid to Dixon and company, came to the hands of the defender. These payments, too, are subject to the same observation, that they were transactions with Gibson and company, and not with the pursuer, and that they constitute only items in the account of the adventure, the illegality of which precludes all parties from asking the adjudication and assistance of the Court, and therefore equally precludes the discussion of any parti-

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cular items of the account. For the same reason and upon the same ground I think the defender is precluded from claiming remuneration; indeed, as the pursuer recovers nothing in the action, this claim of the defender cannot arise.

The result is, that the interlocutors appealed from by the defender ought to be reversed, so far as they find him liable to pay any thing to the pursuer, and to pay costs to him; on the contrary, the pursuer ought to pay the costs below of the defender, as he was, by the interlocutor of the 14th of January 1836, ordered to pay the costs of such part of the suit in which he was then held to have failed; of course there can be no costs of the appeal by the defender. The appeal by the pursuer must, I think, be altogether dismissed, and with costs.

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Lord Brougham. — My Lords, I agree in the view taken by my noble and learned friend of this case. The whole rests manifestly upon the illegality of the transaction, it being unnecessary to have recourse to other ground; though in that I concur with my noble and learned friend,—I mean with respect to the partnership.

It is not true, as it was attempted to be argued, that this decision respecting the illegality must rest upon importing into the cause the judgment in the Common Pleas. That judgment is not imported. The authority of the case holds, but as to the facts we have no right to go to the Court of Common Pleas; we must apply this judgment as an authority in law to the facts found in this case, and the facts in this case are perfectly sufficient to enable us to apply to it the authority of the judgment in point of

law; that judgment being upon the legality or illegality of the contract, and the facts in the case showing what the transactions were whereunto that contract bore reference.

The facts are stated in the 8th article of the pursuer's own condescendence. It is needless to remind your Lordships that we have in this case nothing to do with the illegality of the slave trade; this transaction was some time before that was put down by law. The pursuer had shipped by a British vessel named the Croydon, from London for the river Congo, a quantity of muskets and gunpowder, which were to be delivered to the defender or his order, "he "being the supercargo of the Washington," on their arrival in that river; and the defender, before he sailed in the Washington, "received a bill of lading of those "guns and powder." Of what guns and powder? of the guns and powder shipped in the Croydon. Now it was legal to ship those guns and powder in the Croydon, a British vessel, but it was illegal to ship them in the Washington, a foreign vessel; but nevertheless the supercargo, who had the management of the whole adventure, and who actually sailed in the Washington to the Congo, "received a bill of lading of those guns and powder, "which are accordingly," (says the party himself,) "entered in the general invoice book of the adventure "referred to in article 5th." And when we look to article 5th, we find it is a duplicate of the invoice book of the ship, cargo thereto relating, outfit, and insurances: and "relative bill of lading, conform to foresaid invoice "book, signed by the master, David Adams, in favour "of the defender," (that is, Stewart, the present appellant,) "as supercargo;" so that it is perfectly

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manifest that this indissolubly connects the adventure in the Washington with the proceedings in reference to the cargo in the Croydon; and the Court of Common Pleas thought that the voyage of the Washington was in fact as much altogether an illegal voyage as if the cargo had been originally shipped (which it could not be) in the foreign vessel, the Washington, and not in the Croydon. And (as one of the learned judges below very properly observed) there was nothing in this proceeding to prevent, instead of the transhipping of these goods (the powder and stores, and so on,) in the Congo in Africa, their being transhipped in the river Thames, and shipped to America in contravention of the order in council. The transhipment made in the Congo to the Washington is alleged to have been made contrary to the orders of the master of the cargo. But supposing he had landed the goods, as it was contended he had a right to do, and not put them on board the Washington, still the question is, whether the sending them to the Congo in the Croydon was not merely colourable, in order that they might be under the control of the pursuer, who had the charge of the foreign vessel; and therefore it does not depend merely upon the fact, which is admitted, of his having sent the goods on board the Washington. It appears evidently what the intention of the parties throughout the whole was; and even if they had been landed, still the evidence would, in my opinion, have gone far to prove the illegality of the transaction.

The House of Lords ordered and adjudged, That the interlocutors complained of in the said original appeal, in so far as they entertained any of the conclusions of the libel, and did not assoilzie the said Duncan Stewart from the

whole of the said conclusions, with expenses of the said action, be and the same are hereby reversed: And it is further ordered and adjudged, That the said interlocutors, in so far as they find that the said Duncan Stewart is not entitled to any remuneration for his services, as mentioned in the said interlocutors, be and the same are hereby affirmed: And it is further ordered, That the expenses of the said action in the Court below, in so far as the same relate to any claim made by the pursuer against the defender, be taxed and ascertained according to the practice of the said Court, and when so taxed and ascertained be paid by the said pursuer to the said defender: And it is also further ordered and adjudged, That the said cross appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is also further ordered, That the said appellants in the said cross appeal do pay or cause to be paid to the said respondent therein the costs incurred in respect of the said cross appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE & ROBERTSON — RICHARDSON & CONNELL, Solicitors.