are quite prepared to pay over the sum due by them to such parties as may be found entitled thereto; and with that view they have brought an action of multiplepoinding, convening all parties interested, that their respective claims to the sum in the defenders' hands may be decided."

The Lord Ordinary (ORMIDALE) pronounced this interlocutor and note:—

"*Edinburgh, 22d October* 1870.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, repels the defences, and decerns against the defenders in terms of the conclusions of the summons: Finds the pursuer entitled to expenses, allows her to lodge an account thereof, and remits it, when lodged, to the auditor to tax and report.

"*Note.*—This being an action for the price of certain furniture sold and delivered by the pursuer to the defenders; and as the defenders admit the sale and delivery, as also the price, and that it is still resting owing, the Lord Ordinary has seen no sufficient ground for further procedure, or for not at once pronouncing decree in the pursuer's favour, in terms of the conclusions of the summons. The only reason that was urged at the debate by the defenders against this course was founded on the multiplepoinding referred to in the defences as being about to be brought, and which was afterwards instituted. But as the Lord Ordinary has, of the same date as that of the preceding interlocutor, dismissed the multiplepoinding as incompetent, all ground of defence to the present action has been removed. It will be observed that the arrestment said to have been used in the defenders' hands at the instance of Finlay & Son, and the intimation of claim said to have been made by Balgarnie, relate not to the present or any debt due by the defenders to the pursuer Mrs Millar, but to a debt said to be due by them to her son. And it will also be noticed that the defenders do not even aver that the furniture referred to did not belong to Mrs Millar. They merely say that Finlay & Son and Mr Balgarnie have made a statement to that effect. But no steps have been taken by either of those parties for the purpose of establishing a claim either to the furniture or its price; and the multiplepoinding being now out of Court, there is nothing to interpose between the pursuer and immediate decree in her favour."

The defenders reclaimed.

M'LAREN, for them, quite relied on Bell's Com., vol. ii, p. 297.

STRACHAN and BLACK, in answer, were not called on.

The LORD JUSTICE-CLERK—This is a very clear matter. The defenders have taken delivery, and are bound to pay the price. They say that they have been interpelled by the diligence used by Messrs Finlay & Son; but that diligence was directed against any funds in their hands which belonged to the son of the pursuer. This sum of £50 belongs to the pursuer herself; therefore I think that the Lord Ordinary is right.

The other Judges concurred.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agent for Defenders—David Forsyth, S.S.C.

Saturday, December 3.

FIRST DIVISION.

SWANSON *v.* GALLIE.

Bill of Exchange—Co-acceptors—Accommodation—Proof—Evidence Act, 16 and 17 Vict. c. 20, § 5. *Held* that one co-acceptor of a bill could not prove that his acceptance was only for the accommodation of the other co-acceptor, except by writ or oath of that other; and that parole evidence was inadmissible, except to clear up any ambiguities or extrinsic difficulties raised by the oath in reference when taken.

Held that, the Sheriff having incompetently allowed a proof *prout de jure* in the case, the Evidence Act, 16 and 17 Vict. c. 20, § 5, did not prevent this Court from now allowing a reference to oath, that section only applying to cases when the party has been competently adduced as a witness, so that his evidence is evidence in the cause. Remit made to the Sheriff to take the deposition and report.

This was an appeal from the Sheriff-court of Caithness, in a case in which the pursuer, as executor-dative, *qua* next of kin of the late John Gallie, sued the defender Magnus Swanson for the sum of £30, being the amount of a bill, dated 13th September 1869, drawn by John Macdonald Nimmo, writer, Wick, upon, and accepted by, the defender and the said John Gallie. The third article of the pursuer's condescendence was as follows—"The said bill, though the said John Gallie appears therein as an acceptor with the defender, was granted exclusively and solely for the benefit of the defender."

The Sheriff-Substitute (RUSSEL) allowed to each party before answer a proof *prout de jure*, and the Sheriff (FORDYCE), on appeal, allowed a proof *prout de jure in so far as competent*. Proof was accordingly led, and on the proof the Sheriff-Substitute held that the pursuer had a competent claim for relief and repetition against the defender; repelled the defences; and decerned against the defender for the sum sued for. The Sheriff adhered on appeal.

The defender thereafter appealed to the First Division of the Court of Session.

BURNET, for him, argued, that the Sheriff was wrong in allowing proof *prout de jure* in the manner he did. Art. 3 of the pursuer's condescendence could only be proved by writ or oath of the defender; see Thomson on Bills, p. 239, and case of *Laing*, 27th June 1827, 5 S. 851.

ORR PATERSON, for the pursuer and respondent, argued that the case of *Laing* was the only one founded on in Thomson upon Bills for the doctrine that liability among co-acceptors can only be proved by writ or oath, and that it was not decisive on the point. He referred to *Hunter* v. *George and Others*, 7 Wil. and Shaw 333, where the House of Lords had recognised a departure from this principle. He farther pleaded that, assuming the proof limited to writ or oath, the pursuer was not now limited to reference to oath as under the old practice.

At advising—

LORD PRESIDENT—I have very little doubt that there has been a miscarriage in the Sheriff-court as to the competency of the evidence in this case.

The only question in the case which we have to deal with just now is, whether the allegation on which the action is raised can be proved except by writ or oath of the defender. The pursuer says the bill was accepted by the said deceased John Gallie, and by the defender Magnus Swanson, and "the said bill, though the said John Gallie appears therein as an acceptor with the defender, was granted exclusively and solely for the benefit of the defender." There were then, on the pursuer's showing, two co-acceptors, and the one is here sued by the executor of the other. He is not sued for the one half only, but for the whole, on the allegation that the bill was retired by the pursuer, though it had been granted exclusively for the benefit of the defender. Now the very form in which this allegation is made proves plainly that it is directly contradictory of the written instrument, for he says that though in the written instrument Gallie appears as co-acceptor, yet he was really only giving his name for the accommodation of the defender. Now at first sight it may appear strange that the question of the competency of proof in this case, otherwise than by writ or oath, should never have been made the subject of direct decision. The fact however is, I suspect, that the rule which applies to drawers and acceptors *in pari casu* is so plainly applicable to joint acceptors that it has been regularly and uniformly acted on without question.

The rule which prevents the acceptor of a bill from proving otherwise than by writ or oath of the drawer that it was so accepted for that drawer's accommodation only, is founded upon the common law principle that the plain terms of a writ can, in the general case, be controverted only by the writ or oath of parties. This principle is not peculiar to bills, but is applicable to other writs as well, and there is no reason why it should not apply to the case of joint-acceptors as well as to that of drawer and acceptor. Though it has never yet been expressly decided, there is really no novelty in the present question. As a matter of practice, it has been recognised in innumerable business transactions, and has frequently been incidentally accepted as trite law in the conduct of cases through this Court. I am, therefore, for recalling absolutely the Sheriff's interlocutor, and give the pursuer an opportunity of reference to the defender's oath, if he still wishes it.

LORD DEAS concurred in these observations of the Lord-President, and added—The Sheriff seems to have recognised this principle of law in a sort of way, for he allows a proof "*prout de jure in so far as competent*" only; and in the note to his final interlocutor he says that he is quite aware that in such questions the proof is by writ or oath, "but it appears to him that if the co-obligant, in giving his oath, enters upon some circumstances bearing directly on the origin and purpose of the transaction, he was bound to disclose all other circumstances referring to the matter, if within his knowledge and power, and that if he does not he then renders parole proof necessary and competent to explain the meaning of the admissions in the oath," &c. He thus seems to assume, that because you can only prove by writ or oath, you are to do so in the course of an ordinary proof, without a special reference. I never heard of such a proposition. The Sheriff should have found that the allegation could only have been proved by writ or by a reference to oath. After a proper reference to oath had been made, it might have turned out that the result of that reference left open some questions which required further proof. There might have been some extraneous matters brought out which required to be cleared up by parole evidence, which would then be admissible. But it is impossible to decide this, and allow such proof, until the oath is taken on the reference.

As to the future proceedings in this case, I do not think that the pursuer can be prevented making a reference to oath, if he still desires it, by the incompetency of the previous proceedings. The fault was with the Sheriff in allowing such a proof, and this is not, I think, a case where the Evidence Act of 1853, by its fifth section, intended to exclude such a reference.

LORDS ARDMILLAN and KINLOCH concurred.

The Court accordingly, of this date (Nov. 26th), recalled the Sheriff's interlocutors since the allowance of proof, and found that the allegation in article 3 of the pursuer's condescendence could only be proved by writ or oath of the defender, and continued the case to admit of the pursuer putting in a minute of reference to oath, if so advised.

Of this date (December 3) the parties appeared again before the Court, and

PATERSON, for the pursuer, tendered a minute of reference to the defender's oath, as ordered by the above interlocutor.

BURNET, for the defender, objected to the competency of this proceeding, on the ground that the defender had already been examined as a witness, and referred to the statute 16 and 17 Vict., c. 20, § 5. and to *Rutherfurd's Trustees*, 23 D. 1276, as the only case in point, and showed that in that case the objection now taken had been waived by the defender. He pleaded that the course now proposed to be taken exposed his client to the risk of a prosecution for perjury, which it was the intention of the Legislature to prevent, as explained in Dickson on Evidence, p. 1002, § 1709-11.

PATERSON, in reply, referred to the case of *Dewar* v. *Pearson*, 4 Macph. 439.

At advising—

LORD PRESIDENT—The question which has now been raised before us in this case is one of considerable delicacy, and at the same time it is one of importance in practice, for it might occur in many cases of the same kind. The clause in the Act referred to, and on which the objection is laid, occurs, as Lord Ardmillan has pointed out, in the same Act as authorises the examining the parties to a cause as witnesses. The substance of the clause is as follows—"The adducing of any party as a witness in any cause or proceeding by the adverse party shall not have the effect of a reference to the oath of the party so adduced: provided always that it shall not be competent to any party who has called and examined the opposite party as a witness thereafter to refer the cause, or any part of it, to his oath, and that in all other respects the right of reference to oath shall remain as at present established by the law and practice of Scotland." This is simply to say that a party is not to have both advantages, the right to examine his adversary as a witness, and the privilege of referring to his oath. Of course, it follows that the prohibition of reference to oath contained in

this clause only applies where the party has examined his adversary as a witness, and, having done so, has failed in his case on the parole evidence. But that is not so here, for it does not appear to me that we can say that he has lost his case, and lost it on the parole proof. It is open to the pursuer to say, "the statute only intended to prohibit reference to oath where the party has been competently examined, and his testimony is evidence in the cause, but by your interlocutor you have declared the proof taken incompetent, and we are now just in the same position as if that evidence had never been led. If I am refused a reference to the defender's oath, I am denied all opportunity of proving my case except by writ." I confess I think that is the true construction of the statute, and I do not think that the Act had any intention of applying to questions of possible perjury at all. It had not that in contemplation, and I do not think that we can carry the statute beyond its own terms in order to provide for that possibility.

LORD DEAS—We have decided that the proof allowed by the Sheriff, and taken in this case, was incompetent, and if ever there was a case in which the taking of that incompetent deposition ought not to exclude a reference to oath, it is this case. For it is very clear that the miscarriage originated with the Sheriff, and both parties are equally to blame in following out his incompetent interlocutor. It does not appear that any objection was taken by the defender to this course of proceeding; in fact, the chief part of his evidence was given in his own favour; and I am of opinion that this first deposition cannot be used for any purpose either for or against the defender. There is, therefore, no reason why reference to his oath should not be now allowed.

LORD ARDMILLAN—I agree with your Lordships, and should be of the same opinion, even though the error had been on the part of the pursuer, and not of the Sheriff. But seeing that the fault lies with the latter, I can have no doubt in the matter. The Sheriff-Substitute allowed proof *prout de jure*; against this the pursuer appealed, and the Sheriff, having heard parties, appears to have been struck with the fact that there might be something which could not be proved by parole proof. He therefore adds a most extraordinary clause to a most incompetent interlocutor.

LORD KINLOCH—I am of the same opinion. I think that what the statute intended was, that if a party has had the benefit of his adversary's evidence, and has made full use of it, and has ultimately failed in his case, he shall not be allowed to fall back upon and refer the case to his adversary's oath. This enactment appears to me perfectly reasonable. But in the present case the statutory reason for the exclusion of the reference to oath does not exist. The pursuer has not obtained, and cannot obtain, any advantage from the examination of his adversary which has taken place. We have forbidden him to look at that evidence—we have practically wiped out that evidence altogether, and put matters in the same position as if the pursuer had never examined the defender or any one else at all. I therefore cannot see any reason in the statute for excluding the reference.

The Court accordingly sustained the reference, and appointed the defender to appear and depone.

The question was then raised, Where the oath was to be taken? and objections were stated to its being taken on commission, referring to the Evidence Act of 1866; and likewise to a remit being made, or the case being sent back to the Sheriff in consequence of the 62d and 72d sections of the recent Court of Session Act, 1868.

LORD PRESIDENT—This still leaves the question untouched, whether a reference to oath is proof in the sense of these Acts? I am of opinion that it is not.

The Court accordingly remitted to the Sheriff to take the deposition, and report.

Agent for the Appellant—John A. Gillespie, S.S.C.

Agents for the Respondent—J. & A. Peddie, W.S.

Saturday, December 3.

SECOND DIVISION.

BARSTOW *v.* DUNN'S TRUSTEES.

Removing—Multiplepoinding—Sist. Trustees under a trust-deed brought an action of multiplepoinding, which included all the property which was disponed to them under said deed. Thereafter a final judgment reduced the deed to a certain extent, and declared certain subjects to belong to the heir-at-law of the truster. *Held* that the proper course of the trustees was to deliver over these subjects immediately to the heir-at-law, and not await the issue of the multiplepoinding, although they had formed part of the fund *in medio*, and had been claimed in that process.

This was an appeal from the Sheriff-court of Lanark in an action of removing at the instance of the *curator bonis* of William Park against Mr Carrick of the Royal Hotel, Glasgow, and the trustees of the late Alexander Dunn of Dunntocher.

William Park was heir-at-law of Alexander Dunn, and in 1866 his *curatar bonis* obtained a final judgment of the House of Lords, whereby the subjects from which the defenders were sought to be removed were declared to fall under a reduction of the deathbed settlement of Alexander Dunn, and to go to his heir-at-law. In 1862 an action of multiplepoinding had been brought by the trustees of Alexander Dunn, which is still in dependence, embracing the whole funds belonging to Dunn, which had been disponed to them under this deed of settlement; and in this action the subjects in question formed part of the fund *in medio*, and a claim for them was lodged by the present pursuer. The defence of Mr Carrick was, that he had a lease of the subjects from the said trustees; and that of the trustees was *lis alibi pendens* in respect of the action of multiplepoinding. The Sheriff-Substitute (DICKSON), on 30th August 1870, sisted procedure until the issue of the process of multiplepoinding now pending in the Court of Session at the instance of Alexander Dunn's trustees as nominal raisers against William Park and others, in so far as the said action involves the rights of the parties therein to the subjects from which decree of removal is sought in the present action.

On appeal, the Sheriff (BELL) pronounced this interlocutor:—

"*Glasgow, 7th November* 1870.—Having heard