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

parties' procurators on the pursuer's appeal, and reviewed the whole precess—Finds that the premises, from which decree of removal is concluded for, now form *ex facie* a portion of the building known as the Royal Hotel, George Square, Glasgow: Finds that the said Royal Hotel is one of the subjects *in medio* in the multiplepoinding referred to in the interlocutor appealed against, presently pending in the Court of Session: Finds that the pursuer is admittedly a claimant in said multiplepoinding, and has not yet obtained any deliverance therein to the effect that the premises here in question are not a part of the subject *in medio*, or any deliverance preferring him to said premises: Finds that the other claimants in the multiplepoinding, who are no parties to this action, are entitled to be heard before the pursuer obtains any such deliverance: Finds that it is inexpedient to proceed further with this process until the way has been cleared as above indicated, else there might be a clashing between the procedure here and in the said multiplepoinding, or the same matter might be made the subject of investigation simultaneously in both Courts: Therefore adheres to the interlocutor appealed against, with this modification, that it shall be competent for the pursuer to move for the recall of the sist as soon as he has obtained a deliverance in the Court of Session which either withdraws the premises referred to in the summons from the multiplepoinding or prefers the pursuer thereto."

The pursuer appealed.

LEE and SOLICITOR-GENERAL for him.

BALFOUR in answer.

At advising—

LORD JUSTICE-CLERK—I am of opinion that there exists no ground whatever for sisting this action of removing, and therefore that we should alter the interlocutors appealed against, and remit the cause to the Sheriff to be proceeded with.

It is admitted that nothing can be done in the multiplepoinding which can affect the subjects dealt with in this action. The history and merits of these actions regarding the succession of William and Alexander Dunn are so familiar to your Lordships in this Division that I have no doubt your Lordships will agree with me that this action, which relates to a subject which belonged to Alexander Dunn only, cannot depend on the result of the multiplepoinding brought by his trustees. In that multiplepoinding the fund *in medio* can include only the heritable subjects which formerly belonged to William Dunn, Alexander's deathbed deed having been reduced as regards subjects acquired by him otherwise than by succession to his brother William. The pursuer, in whose name his curator has raised the present summons, is infeft in the subjects as heir-at-law of Alexander, and the only interest which the trustees can legitimately have in the action is to see that a proper division is made between their property and that of the pursuer, and that cannot be a matter of difficulty; but, whether it be difficult or not, it cannot be so well decided as by the Judge Ordinary in the present process.

LORD COWAN—I concur. No doubt the multiplepoinding embraced the subjects from which it is now sought to remove Carrick, but the multiplepoinding was raised before the decree of reduction, which had the effect of removing the subjects, which belonged to Alexander Dunn alone, from the control of his trustees. There is no competition in the multiplepoinding regarding this part of the hotel. The relative interests of the heir-at-law and the trustees in these buildings ought to be determined as speedily as possible, and cannot be better extricated than in this very process.

LORD BENHOLME—I cannot doubt that your Lordships are correct. These trustees, after a final judgment, in which it was settled that the subjects in dispute did not belong to them, took upon themselves to grant a lease of them—a proceeding as illegal as it was unwarrantable. Hence they wish for delay. They granted a lease which they cannot defend, and they support it in every way they can.

LORD NEAVES—I cannot say that I am one of those who view with satisfaction a rich man's inheritance contributing so largely as the property of these gentlemen has to the support of the judicial institutions of the country.

While I cannot say that it is surprising that the Sheriff should have been misled by the ingenuity of the arguments for the respondent, if the case was pleaded before him with the same ability as it has been stated to-day; nevertheless he has gone wrong, and I cannot but think that the attempt to sist this action is unreasonable. I think the questions in dispute do not depend in any way on the issue of the multiplepoinding, and that they ought to be at once and in this action disposed of.

Agents for Pursuer—Murray, Beith, & Murray, W.S.

Agent for Defenders—William Ellis, W.S.

Tuesday, December 6.

FIRST DIVISION.

FALCONER *v.* DALRYMPLE.

Loan—Agent—Implied Trust. Circumstances in which—the loan being admitted,—a borrower was *held* bound to pay £7000 to the lender, although he had conveyed his whole estate to his agent, who was also agent for the lender in the transaction, and in return had got a discharge of all his debts and liabilities; and the said agent had credited the lender in his books—but without his knowledge, and without any special authority from him to uplift funds—with the £7000, the agent subsequently becoming bankrupt.

This was an action at the instance of the Hon. C. J. Keith Falconer, late of the 4th Light Dragoons, against G. A. F. Elphinstone Dalrymple, late of Westhall, in Aberdeenshire, for repayment of a sum of £7000 lent by the pursuer to the defender through Messrs J. & A. Blaikie of Aberdeen, with the interest on the same so far as not paid. The loan took place under the following circumstances:—In 1853, Messrs Blaikie, who were then acting as the agents of both the pursuer and defender, advised the pursuer to lend the defender on heritable security over the estate of Westhall (which the defender had just purchased, and to meet the price of which he was obliged to borrow large sums of money), the sum of £7000, which had previously stood in another heritable security, but which was called up at Martinmas that year. After some correspondence, in which Messrs Blaikie explained the nature of the security proposed, the pursuer agreed to this arrangement, and instructed Mr John Blaikie to advance the money to the defender as suggested by him. This was accordingly done, and Mr John Blaikie, instead of a bond and disposition in security in the pursuer's favour, took an absolute disposition of the estate of Westhall