possession or in that of some-one to whom the trustees have let the house, he agreeing that their tenant was to have the use of his furniture. He continues to pay the annual instalments up to the date of his bankruptcy.

The question then is, whether M'Caul is a seller of the furniture, retaining possession thereof undelivered to the buyer, or whether he is in possession of the furniture on a contract whereby he is allowed to continue to hold it on condition of paying up the price of it by instalments. I think the latter. He was proprietor of the furniture on a contract to pay the price by instalments, and that contract could have been enforced while he was in a position to admit of anything being enforced against him, and on the other hand he could retain the furniture against Robertson so long as he continued to pay his yearly instalments. There is no doubt of that whatever. He is a debtor on that contract so far as it remains unimplemented—to what extent does not signify—and the claimant here is just a creditor. I know of no principle in the law of Scotland on which he can say that his debt is secured by lien or pledge, or by any other form of security. He has simply a claim for the balance of the debt due to him by the bankrupt under the contract expressed in the letter of 26th October 1878, and he must rest content with his dividend like the other creditors.

Lords Rutherfurd Clark and M'Laren concurred.

The Lord Justice-Clerk and Lord Craighill were absent.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Appellant (Real Raiser and Claimant)—Mackintosh—Lang. Agents—W. & J. Burness, W.S.

Counsel for Respondents—R. V. Campbell. Agent—A. Gordon, S.S.C.

Tuesday, July 3.

FIRST DIVISION.

[Lord Fraser, Ordinary.

M'LARENS *v.* SHORE.

(*Ante*, p. 638, 7th June 1883.)

Proof—Reference to Oath—Judicial Reference.

The parties to a petitory action referred the whole cause to a judicial referee. The referee after hearing parties issued a report sustaining a plea for the pursuers that the defender was barred from defending the action by his own actings and the actings of his trustee and creditors, and finding a balance due to the pursuers. The Lord Ordinary decerned for that balance in terms of the report. *Held* incompetent for the defender thereafter to refer it to the oath of the pursuers whether he was resting-owing to them the sum sued for.

Opinion (*per* Lord Shand) that after a cause has been referred to an arbiter reference to oath is incompetent.

This was an action at the instance of T. & W. A. M'Laren, W.S., Edinburgh, against John Shore, sole partner of the firm of John Shore & Co., builders, Grindlay Street, Edinburgh, to recover the sum of £151, 13s. 5d. This amount included compositions due by the defender's bankrupt estate paid by the pursuers, remuneration to his trustee, and the expenses of his sequestration, together with law charges and disbursements in connection therewith.

The Lord Ordinary (Fraser), after hearing parties in procedure roll, in respect of a minute for both parties in which they stated that they "had agreed to refer the whole cause, and the question of expenses therein, to Mr Edmund Baxter, W.S., Auditor of the Court of Session, as judicial referee, and they accordingly moved the Lord Ordinary to interpone authority hereto," pronounced an interlocutor interponing authority to the minute of reference, and remitting in terms thereof to Mr Baxter, with power to him to take such probation as the justice of the case might require.

The judicial referee accepted the reference, and after hearing parties issued his report, by which he sustained the first plea-in-law for the pursuers, which was to this effect—"The defender, by his own actings and the actings of his trustee and creditors, is barred from defending this action," repelled the defences, and found that the defender was liable to the pursuers in the sum of £146, 19s. 4d. and £48, 15s. 2d. of expenses. The terms of this report are fully quoted in the opinion of the Lord President.

On 12th May 1883 the Lord Ordinary pronounced this interlocutor:—"Having heard counsel on the report by the judicial referee, approves of said report, interpones authority thereto, and in terms thereof ordains the defender to make payment to the pursuers of the sum of £146, 19s. 4d., with interest thereon at 5 per cent. from 3d June 1882, the date of citation: Ordains the defender further to make payment to the pursuers of £48, 15s. 2d. of expenses of process and of the judicial reference, and decerns: Finds the defender liable to the pursuers in the sum of £2, 2s. of modified expenses occasioned by this discussion, and decerns against him therefor accordingly."

Thereafter the defender lodged a minute of reference to the oath of the pursuers in these terms—"The defender refers it to the oath of the pursuers whether he is resting-owing to them the sum of £151, 13s. 5d., except to the extent admitted by him in the record."

The Lord Ordinary refused to sustain this minute of reference.

The defender reclaimed—*Gordon* v. *Glen*, January 19, 1828, 6 S. 393; Dickson on Evid. 1554–55; *Clark* v. *Hyndman & Others*, November 20, 1819, F.C.; *Watmore* v. *Bruce*, May 17, 1839, 1 D. 743.

The pursuers replied that the reference to oath was incompetent—*Shiels, &c.* v. *Shiels' Trustees*, February 11, 1874, 1 R. 502.

At advising—

Lord President—In this case, after the record had been closed and parties had been heard in

the procedure roll, they agreed that the whole cause should be referred to a judicial referee, and they lodged a joint-minute to that effect, to which the Lord Ordinary interponed authority by interlocutor dated 15th July 1882, and remitted the process to Mr Baxter as judicial referee, with power to him to take such probation as the justice of the case might require. The case accordingly went before Mr Baxter, who accepted the reference, and after a variety of procedure issued a report dated 10th May 1883, the terms of which are important. Mr Baxter reports—"Having carefully considered the closed record and whole productions, the judicial referee on 4th inst. issued an order sustaining the first plea-in-law for the pursuers, repelling the defences, and finding the pursuers entitled to the expenses of process and reference, and appointing the pursuers forthwith to lodge an account of said expenses, and the parties or their agents to meet him for the purpose of fixing the amount of said expenses." And then he goes on to say that "Against this order a representation and protest was lodged for the defender on 7th inst., on considering which the judicial referee refused the renewed crave for proof therein contained (the same having been fully argued before him, and having also been subsequently urged in a minute lodged for the defender), and adhered to his order of 4th inst., and of new appointed the parties or their agents to attend in terms of said order, with certification that he would proceed to dispose of the reference. Being well and ripely advised in the whole matter," he of new sustained the first plea-in-law for the pursuers, and repelled the defences, and found the defenders liable in certain sums which are there specified. Now, this report was laid before the Lord Ordinary. Counsel were heard on it, but it does not appear that any objection was then stated on the ground of incompetency or on any ground on which, according to well-settled practice, objection may be made to the award of a judicial referee. And accordingly the Lord Ordinary on 12th May interponed authority to the report, and ordained the defender to make payment to the pursuers of the sum of £146, 19s. 4d. together with interest and the expenses of process and of the reference. Now, after this judgment of the Lord Ordinary, which really exhausted the cause by giving effect to the report of the judicial referee, the defender lodged a minute of reference to the oath of the pursuers, which is in these terms:—"The defender refers it to the oath of the pursuers whether he is resting-owing to them the sum of £151, 13s. 5d. (that is, the sum sued for) except to the extent admitted by him in the record." The Lord Ordinary has refused to sustain that minute of reference, and the question is whether he has done rightly in so refusing. I am of opinion that he has. The case is in some respects a peculiar one. The judicial referee has sustained the first plea-in-law for the pursuer. Now, the first plea-in-law is in these terms—"The defender by his own actings, and the actings of his trustee and creditors, is barred from defending this action." It is therefore a matter finally determined between the pursuers and the defender that the defender is barred from defending the action. But for what purpose the defender is to refer to the oath of the pursuers except to enable him to extract facts on which he may found from their oath on reference, and so to defend the action, I am quite unable to see, and if he is allowed to do that he will simply be getting round the judicial referee's award, by which he was found to be barred from defending the action at all. Therefore, without determining any general question of competency, I am of opinion that the Lord Ordinary was right in refusing to allow this reference to oath.

Lord Deas—I have never had any doubt about this case. I think that when the judicial referee sustained the first plea-in-law for the pursuers the whole case was substantially at an end. The judgment of the judicial referee may be a very bad judgment, but it is his judgment, and is the final settlement of the whole matter. I therefore agree with your Lordship that we do not require to enter into any of the general questions which were debated before us, and that the judgment of the Lord Ordinary should be affirmed.

Lord Mure—I am of the same opinion. Both parties agreed that the whole cause should be referred to the Auditor of Court as judicial referee, and we have Mr Baxter's report in which he states that after hearing parties fully on the whole cause he sustained the first plea-in-law for the pursuers.

The Lord Ordinary interposed the authority of the Court to that report, and in this way it became an operative part of the process. In these circumstances the question comes to be, whether a minute of reference to the oath of the pursuers is a competent proceeding? Now, taking it as an abstract proposition, it is certainly a novelty. We were referred to no case in which an attempt was made to refer the case to the oath of the pursuers after the parties had made a judicial reference, and on the abstract question of competency I should be disposed to hold that a reference to oath is not open after the parties have themselves called on a judicial referee to settle the whole case. But it does not appear to me to be necessary to deal with the case as an abstract question, because, as your Lordship has pointed out, the reference to oath is excluded by the nature of the plea disposed of by the judicial referee. After the referee has sustained the pursuers' first plea, and the Lord Ordinary has interponed the authority of the Court to the referee's award, I do not think that it is possible to rear the case up again by a reference to the oath of the pursuers.

Lord Shand—I agree in thinking that the Lord Ordinary was right in refusing to sustain this minute of reference, but I am not sure that I can put my opinion on the precise grounds taken by your Lordships. If this judgment of the arbiter had been a judgment pronounced by the Lord Ordinary in the usual course of the case, I am not prepared to say that it would have been incompetent to refer the case to the oath of the pursuers. The plea which the arbiter has sustained is a plea to the effect that the defender is barred from defending the action by reason of his own actings and the actings of his trustee and creditors, and it may be that by means of a reference to the oath of his opponents the defender could show that there had been no such actings, and thus obtain a different judgment on review. I am therefore not satisfied that a reference to oath would be incompetent merely because the case

has been thrown out on such a preliminary plea, and consequently I have some difficulty in concurring with your Lordships. But on the general question I am of opinion that it is incompetent to refer to the oath of a party a case which has already been referred to the determination of an arbiter. We were referred to no example of that sort in the books. The proposal seems to be made now for the first time, and it appears to me to be a sufficient objection to such a proposal that the parties by seeking the interposition of an arbiter have taken the case entirely out of the hands of the Court. The interposition of the Court is thereafter necessary only to the effect of giving formal decerniture in terms of the arbiter's judgment. I do not think that it is necessary to any other effect. It is the arbiter's judgment, not the judgment of the Court. He is the person whose duty it is to determine whether there should be a reference to oath or not. Suppose that we were to sustain this minute of reference, before whom is the oath to be taken, and who is to decide as to its effect? I put these questions in the course of the discussion, but I am not sure that I got any very decided answers. If we remit the matter to the arbiter that would virtually be to take the case out of his hands, by tying him down to a mode of procedure to which he might object. If, on the other hand, we decide that the oath is to be taken before the Court, that would in an even more obvious way withdraw the case from the arbiter; and I am consequently of opinion that after a case has been sent to an arbiter it is incompetent to refer it to the oath of any of the parties. I think that we should not sustain this minute of reference.

The Court adhered.

Counsel for Pursuers — Brand — M'Kechnie. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defender—J. P. B. Robertson—Shaw. Agents—Paterson, Cameron, & Co., S.S.C.

Tuesday, July 3.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

M.P.—ANDERSON AND OTHERS *v.* HOLLEBONE.

Process — Multiplepoinding — Lodging Claim — Reclaiming-Note.

In a multiplepoinding a reclaiming-note against a judgment of the Lord Ordinary approving of a condescendence of the fund for the raisers, and in respect of a joint minute for the claimants then competing, ranking them in certain proportions, was presented by two sets of reclaimers. One set had appeared in the Outer House and lodged a claim which was afterwards withdrawn; the other had never appeared in the process. The Court *allowed* the reclaimers to lodge condescendences and claims on payment of all expenses not available at future stages of the cause.

In this action of multiplepoinding the Lord Ordinary pronounced an interlocutor approving of the condescendence of the fund, and in respect of a joint minute for certain claimants, ranking and preferring them upon the fund *in medio*. A reclaiming note was then presented by (1) Matthew Henry and another, the trustees acting under the marriage-contract entered into between E. W. Henry and Mary Guthrie Craig, and the children of the said E. W. Henry and Mary Guthrie Craig; and (2) Robert Anderson and others, trustees under the contract of marriage between James Brook and Isabella Craig, and the said James Brook as tutor-at-law for his pupil children. The first set of reclaimers had been called in the action, had appeared in the Outer House, and had lodged a claim, which was, however, afterwards withdrawn. The second set of reclaimers had also been called, the pupil children being represented by their tutor-at-law, but had never lodged a claim or appeared in the process.

The reclaimers now asked to be allowed to lodge claims.

Authorities—*Duncan's Factor* v. *Duncan*, June 3, 1874, 1 R. 964; Beveridge on Process, i. 383; *Clyne* v. *Reid*, July 5, 1828, 6 S. 1085; *Dinsdale* v. *Ware*, December 17, 1829, 8 S. 262; *Johnstone* v. *Elder*, January 17, 1832, 10 S. 195; *Morgan* v. *Morris*, March 11, 1856, 18 D. 797; Shand's Practice, 600.

The respondents objected — *Gallie* v. *Wylie*, January 25, 1845, 7 D. 301; *Jaffé* v. *Carruthers*, March 3, 1860, 22 D. 936; *Geikie* v. *Morris* (Lord Chancellor in 3 Macq. 353).

At advising—

Lord President—I am satisfied that according to the practice of this Court, and indeed according to express decision, we are bound to let in the claims of these reclaimers. The two sets are in a different position, for the one set, consisting of these pupil children, who are represented by their tutor-at-law, never appeared in the process in the Outer House; they did not appear because they were not cited; but whether they were cited or not is of little moment, for the point is that they did not appear. The other set did lodge a claim at the commencement of the process, but it was withdrawn before the record was closed, so that the only closed record in the case is one in a competition between the parties whose claims were sustained by the interlocutor of 26th May. There is no competition and no decision in this case between those who are preferred by that interlocutor and any other claimants. The object of this reclaiming-note is to have such a competition between the parties who have been preferred to the entire fund and the parties who have now come forward as claimants. And the fund being still in the hands of the Court, I do not think we can refuse these claims, but at the same time they cannot be received except upon such conditions as the Court think reasonable.

I think the course we should take is to recal *in hoc statu* the interlocutor of the Lord Ordinary, and remit to his Lordship to receive these claims, but on condition of the claimants paying all expenses incurred by the respondents, which shall not be available for the subsequent stages of the case. That was the condition considered reasonable in the case of *Jaffé* v. *Carruthers*, and I think we should follow the rule laid down in that