LORD TRAYNER—In view of Lord Young's remarks I should like to say that, in my view if there was reason to believe that risk to life or permanent deterioration to health would be occasioned by this operation I do not think that the appellant would be bound to submit to it in order to entitle him to a continuation of his compensation. But where, as here (according to the Sheriff's finding), the operation is one not attended with serious risk or pain, I am of opinion that if the appellant refuses to submit to a remedy that would remove or lessen his incapacity for wage earning he must take the consequences.

The Court pronounced this interlocutor—

"Having heard counsel for the appellant in the stated case, Of consent recal (*in hoc statu*) the decision of the arbitrator; remit to him to allow the appellant the sum of one penny weekly until the further order of the Court."

Counsel for the Claimant and Appellant—Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Campbell, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Friday, January 16.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

M'MILLAN & SON, LIMITED *v.* ROWAN & COMPANY.

Arbitration—Reference "to Arbitration"—Application to Court to Name Arbiter—Number of Arbiters not Specified—Arbitration (Scotland) *Act* 1894 (57 *and* 58 *Vict. c.* 13), *secs.* 2 *and* 3.

Where the parties to a contract agreed to refer disputes "to arbitration," but there was no provision as to the way in which the arbitration was to be carried out, and one of the parties refused to proceed to arbitration, *held* (*aff.* Lord Stormonth Darling, Ordinary), in a petition under the Arbitration (Scotland) Act 1894 for the appointment of an arbiter by the Court, that the Court had no jurisdiction under that Act to name an arbiter or arbiters where the contract provides simply for reference "to arbitration," and not for reference either to a single arbiter or to two arbiters.

This was a petition under the Arbitration (Scotland) Act 1894 by Archibald M'Millan & Son, Limited, shipbuilders, Dumbarton, praying the Court to name a single arbiter to act under a clause of reference contained in a contract between the petitioners and David Rowan & Company, engineers, 231 Elliot Street, Glasgow.

The Arbitration (Scotland) Act 1894 (57 and 58 Vict. c. 13) enacts as follows—section 1—"An agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named." Sec. 2—"Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court on the application of any party to the agreement."

Section 3 of the Act contains similar provisions with regard to an "agreement to refer to two arbiters."

In March 1898 a contract was entered into between the petitioners and Rowan & Company whereby the latter firm contracted to construct for the petitioners the engines, boilers, and machinery of certain steamers.

One of the articles of the contract provided, *inter alia*, as follows:—"In case any dispute shall arise between the parties hereto or their representatives concerning the meaning or construction of these presents, or any clause or agreement herein contained, or any other matter or thing whatever in any way relating to the said engines, boilers, and machinery, all such disputes shall be referred to arbitration."

Certain questions having arisen between the petitioners and Rowan & Company in connection with the contract referred to, the petitioners sought to have those questions determined by arbitration, but Rowan & Company declined to name or join with the petitioners in naming an arbiter or arbiters.

The petitioners thereupon presented the present application to the Court.

Answers were lodged for Rowan & Company. They stated certain objections which it is unnecessary to refer to particularly. They also averred as follows:—"The said clause of arbitration is invalid and ineffectual both at common law and under the statute referred to. Further, the prayer of the petition is incompetent, as it does not set forth what matters of dispute the arbiter is to be appointed to determine."

On 22nd November 1902 the Lord Ordinary (STORMONTH DARLING) refused the prayer of the petition.

Opinion.—[*After narrating the facts and dealing with certain of the respondents' grounds of objection, which it is unnecessary to refer to for the purposes of this report, his Lordship proceeded*]—"But then the respondents have an objection to the petition which goes to the root of my jurisdiction. They say that the only power a court has to appoint an arbiter is either, under section 2 of the Act, where there has been an agreement to refer to a single arbiter and one of the parties to the agreement has refused to concur in nominating him, or, under section 3, where there has been an agreement to refer to two arbiters and one of the parties has refused to name his arbiter. They further say that this case falls under neither of these heads, because it is impossible to tell from the contract here which mode of arbitration was agreed to by the parties.

"Now, the only case since the date of the Act which touches this point is *Douglas & Company* v. *Stiven*, February 2, 1900, 2 F. 575. That was not a petition like the present asking the Court to appoint an arbiter, but was an action for the price of goods, met by the defence that the matters in dispute ought to be remitted to arbitration, The peculiarity of the case was, that although the clause in the contract did not define whether the dispute was to be referred to a single arbiter or to two arbiters and an oversman, it did define that the dispute should be 'referred to arbitration in the customary manner of the timber trade.' The First Division held that the first thing to do was to ascertain by evidence what the customary manner was. The result of the proof was to determine that the customary manner of arbitration in the trade was to have two arbiters and an oversman, and the action was sisted till the matters in dispute had been determined in that way. Accordingly the case was dealt with in the end exactly as if there had been an express contract that each party should choose an arbiter with power to the arbiters to appoint an oversman. It was never necessary for the Court to exercise the powers conferred by section 3 of the Act, because once the question was decided the party resisting arbitration agreed, I presume, to name his arbiter. But if he had refused to do so the way would have been clear for the Court to exercise its powers.

"Here, however, there is no reference to custom nor any other equivalent for an express provision defining the mode of arbitration. The clause is absolutely blank in that respect, and merely says that disputes 'shall be referred to arbitration.' It cannot therefore be said of this contract that it is either an 'agreement to refer to a single arbiter,' so as to let in section 2, or an 'agreement to refer to two arbiters' so as to let in section 3. And if it is neither the one nor the other the Court has no power of appointment under the Act, and certainly it has none at common law. In *Douglas & Company's* case it was pointed out, both in the Outer House and by Lord M'Laren, that our Act does not contain a provision which is to be found in the English Act, to the effect that 'if no other mode of reference is provided the reference shall be to a single arbitrator.'

"It is said that in my first opinion as Lord Ordinary in that case (at p. 577) I stated the leading purpose of the Scotch Act to be that where parties to a contract had agreed to arbitration, even in the most general terms, they should be held to their bargain, and that if either party refused to carry it out the Court should do so for him. Perhaps there is no great fault to be found with that as a general statement of the purpose of the Act, but if it were to be taken as implying that the Court had power to carry out each and every bare reference to arbitration, I must, of course, admit that it went too far. This, however, is of very small consequence, because my first interlocutor was recalled, and the case was ultimately decided, as I have already pointed out, entirely on the view that the parties had themselves provided for a particular mode of carrying out the arbitration.

"In the case of *Smith & Service* v. *Nelson & Sons*, L.R., 25 Q.B.D. 545, the Court of Appeal in England held that they could not order one of the parties to appoint an arbitrator, it being conceded that the Court had no power under sections 4, 5, or 6 of the English Act itself to appoint an arbitrator in the particular circumstances. This serves to show how strictly a statutory power like that which is here invoked ought to be construed.

"I must therefore refuse the prayer of the petition."

The petitioner reclaimed.

Counsel for the respondents objected to the competency of the reclaiming-note, on the ground that under the Act there was no jurisdiction in the Inner House—Arbitration (Scotland) Act 1894, sec. 6; *Strain* v. *Strain*, June 26, 1886, 13 R. 1029, 23 S.L.R. 739.

The petitioners were not called upon to reply.

On the reclaiming-note the petitioners argued — A reference "to arbitration" meant a reference to a single arbiter. A reference to two arbiters would be unobjectionable, but the respondents did not suggest any construction that was preferable to that suggested by the petitioners; and the Court would attach some meaning to the clause in question rather than none. The cases of *Smith & Service* v. *Nelson & Sons* (1890), 25 Q.B.D. 545, and *Douglas & Co.* v. *Stiven*, February 2, 1900, 2 F. 575, 37 S.L.R. 412, did not affect the present question.

Argued for the respondents—The Act only applied when the parties had agreed to refer to one arbiter or to two arbiters—*Smith & Service* v. *Nelson & Sons*; *Douglas & Co.* v. *Stiven*, *cit. sup.* This was conceded by the argument for the petitioners.

At advising—

LORD TRAYNER—Before the passing of the Arbitration (Scotland) Act 1894 the clause of reference before us would have been ineffectual in respect the name of the arbiter or arbiters is not given. But the provisions of that Act have made such a clause effectual, and I have no doubt we have here a valid and effectual clause of reference which as matter of contractual obligation either party may enforce against the other. It is, however, another question whether the proceedings authorised by the Act for enforcing or carrying out a clause of reference can be here resorted to. The Lord Ordinary thinks they cannot, and I agree with him. The Act provides certain procedure, but only in the cases specified, namely, where the clause of reference submits the question to be determined to one arbiter or to two with an oversman. The clause before us does not say that the parties had agreed to submit their differences to the determination of one arbiter or two arbiters and an overs-

man, but simply that they have agreed to arbitration—which might be to one or to any number of arbiters. The procedure authorised by the Act therefore, does not, as the Lord Ordinary has held, apply to the case before us. The petitioners practically admitted that the case did not come within the precise terms of the Act, but contended that it might be held to do so because an agreement to submit "to arbitration" primarily meant to submit to one arbiter. I do not assent to that. An agreement to submit to arbitration simply means that the parties have agreed to have their differences determined otherwise than by a court of law, but does not even suggest whether the court they have chosen for themselves shall consist of one member or many or how many members.

The Lord Ordinary has expressed an opinion to the effect that the petitioners' claim is one which falls within the question agreed to be referred. I wish to say that upon that question (which was not argued before us) I reserve my opinion.

LORD MONCREIFF—Before the passing of the Arbitration (Scotland) Act 1894 the arbitration clause in question would have been ineffectual, as it merely contains an agreement to refer all such disputes to arbitration without naming an arbiter or arbiters. The clause not being intended to expiscate a term of the contract would not have been held to fall within the exception which was recognised in the cases of *Merry & Cuninghame*, 21 D. 1337, and *Caledonian Insurance Company* v. *Gilmour*, 20 R. (H.L.) 13, 30 S.L.R. 172.

But probably the effect of the 1st section of the Act of 1894 is to render such an arbitration clause valid, and it may be that the petitioners may be able with the aid of that enactment to compel the respondents to go to arbitration.

But that is not the question raised in this process. This is an application to the Court to name an arbiter. Such an application is only competent under the 2nd and 3rd sections of the Act—not under the 1st. Now, I agree with the Lord Ordinary that the Court have no jurisdiction to interfere in this case, because the agreement to refer to arbitration is in general terms, and is not an agreement to refer either to a single arbiter or to two arbiters.

I therefore think the interlocutor should be affirmed, without prejudice to any other steps which the petitioners may be advised to take.

LORD YOUNG concurred.

The LORD JUSTICE-CLERK, who was absent at the hearing, gave no opinion.

The Court adhered.

Counsel for the Petitioners and Reclaimers — Ure, K.C. — Horne. Agent — A. S. Douglas, W.S.

Counsel for the Respondents—Younger. Agents—Webster, Will, & Co., S.S.C.

REGISTRATION APPEAL COURT.

Friday, November 28.

(Before Lord Kinnear, Lord Trayner, and Lord Kincairney.)

WATSON *v.* LIVINGSTONE.

Election Law—Objection to Claim for Enrolment—Mandate—Sufficiency of General Mandate—Lodger Franchise—Burgh Registration Act 1856 (19 *and* 20 *Vict. c.* 58), *secs.* 22 *and* 36.

The Burgh Registration Act 1856 (19 and 20 Vict. c. 58), sec. 36, enacts—"Any claim, objection, notice of appeal, or other writ may be signed, and any proceeding under this Act may be prosecuted, by any person as agent or mandatory for the party thereto, and any mandate bearing to be signed by such party shall be *prima facie* a sufficient mandate."

Held (1) that an objection to a claim for enrolment as a lodger can be received at a Registration Court at the instance of an elector who (having previously given notice of an objection) did not attend personally to state and support his objection but was represented by a mandatory, and (2) that a mandate which did not state a specific objection to the particular claim, but gave a general authority to the mandatory to take objection in the name of the mandator to "parties appearing on the assessor's list who have not a valid claim to be enrolled," was sufficient.

Election Law—Objection to Claim for Enrolment—Citation of Claimant—Informality of Citation not Ground of Repelling Objection—Lodger Franchise.

An objector to a claimant for enrolment as a lodger obtained a warrant "to cite parties witnesses and havers in support" of his objection. A citation was served on the claimant citing him to attend "so that you may be examined on oath as to the validity of the claim made by you." The claimant appeared in person at the Registration Court. The Sheriff-Substitute repelled the objection on the ground that the claimant was incompetently cited in respect that the citation was not conform to the warrant, and admitted the claim.

Held (1) that the citation was not disconform to the warrant, and (2) that an irregularity in the citation, while it might afford an excuse for the claimant not attending the Court, could not disentitle the objector from being heard, or, the claimant being present, prevent the objector from examining him on oath.

At a Registration Court for the Partick Division of Lanarkshire, held at Partick on October 2nd 1902, Archibald Duncan Livingstone, Waterworks Cottage, claimed to be enrolled on the register of voters for the Partick Division of Lanarkshire as a voter.