foresaid, has the only good and undoubted title to the whole cattle, sheep, stock, crop, implements of husbandry, household furniture, and other effects of every description, situated on the said farm of Platchaige, and also to the said lease thereof, and to possess and labour the said farm, and reap the crops thereof during the present year 1870, subject always to the rights of the said Right Hon. Thomas Alexander Fraser, Lord Lovat, as landlord of said farm; and the said Donald Fraser ought and should be decerned and ordained by decree foresaid, instantly to remove from the said farm, and to cede to the said pursuer the possession of the cattle, sheep, stock, crops, implements of husbandry, household furniture, and other effects of every description situated thereon, in order that the pursuer, the said Colin Lyon Mackenzie, may have access to the same, for the purposes of the said trust, and to labour, sow, and reap the crops of the said farm, as aforesaid, for the purposes of said trust, subject always to the rights of the landlord, as aforesaid." Now it must be kept in view that there are three defenders in the action of reduction, &c.—First, John Fraser, the bankrupt; second, Donald Fraser, his brother; and third, Lord Lovat, the landlord of the farm, and these three are all called to "hear and see the same and all that has followed or may follow thereon." Lord Lovat does not appear in the action, and does not think it necessary to appear. I can quite understand that he does not choose to say what he will do as regards either party as tenant of his farm. But if there had been a conclusion that, whatever the defender Donald Fraser might be found entitled to, he would be ordered to give over the stock and other furnishings of the farm; in that case, I have no doubt that Lord Lovat would have put in an appearance in this action. I do not think that there is anything like such a conclusion as I have hinted at in this action. I think that under this summons the stock is meant to go along with the farm, and the conclusion which I have quoted fully carries me out in this opinion. In it Donald Fraser is called upon to remove from the farm, and to cede to the pursuer the possession of the stock and other furnishings of the farm. Does that mean that the two are to be separated? No, the pursuer concludes to get into possession of a stocked farm, and that is the clearer on account of the words "in order that the pursuer may have access to the same," &c. I am therefore of opinion that this interlocutor is incompetent as *ultra petita;* and though the question as to whether it was expedient does not accordingly arise, I am also of opinion that it was inexpedient at the stage of the case at which it was pronounced.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I think it clear that, whatever the terms employed, this is a judgment on the merits—though the wording of the interlocutor is peculiar. I am of opinion that this judgment was pronounced at an improper stage. There is still an objection to the pursuer's title to sue standing undecided—the result of discussing which may be that the action is dismissed. The conclusions of the summons are complicated; and though I do not say that they cannot be unravelled, still it would be a matter of difficulty to do so satisfactorily at present.

Lord Ordinary's interlocutor recalled, and the pursuer's motion refused.

Agents for Reclaimers—Murdoch, Boyd & Co., S.S.C.

Agents for Respondents—Mackenzie, Innes & Logan, W.S.

Friday, December 2.

SECOND DIVISION.

DALGLEISH & FORREST *v.* MILLER.

Sale—Double Distress—Multiplepoinding. A having purchased certain articles of furniture for £156, for which he granted a promissory-note payable one month after date, his mother a few days afterwards sold them to an auctioneer for £50. After delivery, and before payment, the auctioneer discovered the previous transaction, and received notice from the creditor in the promissory-note, which was dishonoured, that he must not pay over the £50. Arrestment was also used in his hand of any sum due by him to A; and, instead of paying, he raised an action of multiplepoinding. *Said action dismissed,* on the ground that there was no double distress; that the arrestment did not attach the sum of £50 due to the mother of A; and that the sale was for ready money.

This was an action at the instance of Mrs Millar to recover the sum of £50, said to be due to her as the price of certain articles of furniture which she had sold to the defenders, who were auctioneers in Edinburgh. The defence to the action was, that the defenders had been interpelled from making payment by other parties in the following circumstances:—They alleged that immediately after they got delivery of the articles in question, they ascertained that they formed the greater portion of furniture bought by the pursuer's son from Messrs Finlay & Son, cabinet makers, a few days before, at the price of £156, 6s. 7d., and for which he had granted a promissory-note payable one month after date.

They alleged further:—"Messrs Finlay & Son claimed the price of the articles sold by the pursuer, on the ground *inter alia* that the price was due to their debtor to whom the articles of furniture belonged. On 8th April 1870 Messrs Finlay & Son protested the said promissory-note, and in virtue of a warrant to arrest contained in the extract registered protest of that date, arrested in the hands of the defenders the sum of £200 sterling, less or more, due and addebted by them to the said William Waddell Millar, or to any other person or persons for his use and behoof. The object and effect of this arrestment was to attach in the defenders' hands the sum now sued for. On 11th April 1870 the estates of the said William Waddell Millar were sequestrated in terms of the 'Bankruptcy (Scotland) Act 1856,' and at the meeting for the election of a trustee Mr James Hogarth Balgarnie, C.A., Edinburgh, was elected trustee, and he has since been confirmed by the Sheriff of Edinburgh. On 27th April current, Mr James Knox Crawford, S.S.C., as agent for Mr Balgarnie, wrote the defenders, intimating that he, Mr Balgarnie, as trustee foresaid, claimed the price of the furniture from the defenders. Messrs Finlay and Mr Balgarnie both maintain that the furniture did not belong to the pursuer, but to her son, and that no change of possession had taken place to the effect of transferring the property from him to the pursuer. The defenders

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.