by the trade names of Stubbs & Company and certain other names, and the book debts and bank balances and cash in hand belonging to them as the same should appear in the balance-sheet of 1893, together with the goodwill of the business and the right to use the trading names, all at the price of £113,955, 10s. 4d., payable as therein mentioned.

The purchase was to take effect as from 31st December 1893, and the profit up to that date was to belong to the vendors.

By the 4th article of the agreement the defenders undertook to pay and discharge all present and future liabilities of the Trade Auxiliary Company in connection with the business agreed to be sold, and to indemnify them from all liability in respect of the same.

It appears, accordingly, that the defenders, who are in no way identified with the Trade Auxiliary Company, purchased and presumably paid a full price for the business and assets of that company. I know no authority or principle for saying that, where one firm purchases the business and assets of another firm, they by doing so become liable for the debts of the firm from whom they purchased. The creditors are in no way injured by the transaction, because they can have recourse for payment of their debts to the price, which presumably is in the hands of their debtors.

The case of *Heddle's Executrix* and the cases there cited, which are referred to by the Lord Ordinary, do not appear to me to have any bearing on this case, the facts on which they proceeded being quite different. Lord Shand in the subsequent case of *Macdougall & Co's Trustee*, 16 R. 779, correctly notes the grounds on which these cases were decided. "The judgments," he says, "proceeded on the view that there had been no real change in the copartnery beyond the assumption of a partner, who obtained a small share of a going business without putting in new capital, and where the new firm went on to trade with the stock and assets of the old firm, taking these over without any arrangement for the winding-up of the old company's affairs, or for an accounting with the old firm or its partners, but taking liability for all the old company's debts and obligations."

It appears to me, therefore, that the defenders' liability must depend upon the effect which is to be given to the fourth article of the agreement, and whether they thereby became bound to the pursuer and the other creditors of the old firm to pay their debts. No doubt the defenders undertook to pay and discharge all present and future liabilities of the vendors in connection with the business sold, and to indemnify them for all liability in respect of the same, and no doubt they are bound to do so in a question with the Trade Auxiliary Company. But the pursuer is no party to this contract. He is not named or designed in it. The stipulation in question was not entered into in his interest or for his benefit, but in the interest of the contracting parties. They could alter or revoke it at any time if so advised, and I do not see that there was any *jus quæsitum* to the pursuer under it.

That being so, it appears to me that the pursuer has not set forth any relevant case against the defenders, and that they ought to be assoilzied.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer—Ure—Cooper. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders—N. J. D. Kennedy — M'Lennan. Agent — Robert Broatch, Solicitor.

Friday, November 16.

FIRST DIVISION.

[Sheriff of Lanark.

M'DOUGALL *v.* LAIRD & SONS.

Arbitration—Arbiter Judge in his Own Cause—Disqualification.

By the "conditions of sale," under which certain subjects were sold by public auction, the purchaser was taken bound to deposit a specified sum with the auctioneers as security that he would duly implement his obligations. The "conditions" also provided that, in the event of any difference arising as to the implement thereof, the same should be referred to the decision of J. L., one of the auctioneers' firm.

The purchaser having brought an action against the auctioneers for recovery of the deposit money, the latter lodged defences, wherein they denied that the purchaser had implemented the "conditions of sale," and pleaded that the action was excluded by the clause of reference.

Held that, as the auctioneers had taken upon themselves the defence of the action, J. L., being a partner of their firm, was barred from acting as arbiter in regard to the questions in dispute.

On 4th December 1893, Peter Glass bought at a public auction, conducted by Messrs James Laird & Son, auctioneers, certain building materials. These, which consisted of old houses in Princes Street and Saltmarket, Glasgow, were sold on behalf of the City of Glasgow Improvement Trust under certain "conditions of sale." It was prescribed by these conditions that the purchasers of each tenement should make a deposit of £10 with the auctioneers, as security for the due removal of the materials within the time allowed under the conditions. In case of the non-fulfilment of this obligation by the purchaser, the work was to be done by the exposers of the tenements, and the expense was to be paid out of the deposit money. The conditions also contained the following clause of reference:—(7) "The build-

ings to be taken down, and the materials removed within the time specified, and at the sight and to the satisfaction of James Laird, auctioneer, who is hereby appointed for that purpose, as well as judge of the roup; and in the event of any question or differences arising between the exposers or purchasers, or among the purchasers themselves in regard thereto, or in regard to the subject-matter of these presents, or execution or implement thereof, the same shall be determined by the said James Laird to whom the same are hereby referred, and whatever he may determine shall be binding and conclusive on the parties."

The price obtained for the materials was £243 sterling. They were subsequently re-sold by Peter Glass to Alexander M'Dougall, who on 8th December 1893 paid to the auctioneers the purchase money, and deposited with them a sum of £30, in accordance with the stipulation contained in the conditions of sale.

The greater part of the material was again sold by Alexander M'Dougall to Thomas M'Dougall, who took over the obligation to clear away the rubbish, and was to be entitled to uplift the deposit from Messrs Laird & Son. Having — as he alleged — cleared away the rubbish and left the place in proper order, Thomas M'Dougall applied to Messrs Laird & Son for repayment of the deposit, and on their refusal to repay it, instituted the present action in the Sheriff Court at Glasgow for recovery of the amount.

The defenders averred that the conditions of roup had not been fulfilled; that the pursuer through his neglect to carry out these conditions, was bound to pay them sums amounting to £44, 19s. 4d. as expenses due to the City of Glasgow Trust for work thus thrown upon it, and to themselves personally for time and trouble; that they were entitled to set off this sum against the £30; and that in any view the question fell to be decided by James Laird in accordance with the clause of reference.

The pursuer pleaded that as James Laird was a partner of the defenders' firm the reference was ineffectual.

On 29th May 1894 the Sheriff-Substitute (BALFOUR) pronounced the following interlocutor:—"Finds that the claims made by the pursuer in this action are embraced by the clause of arbitration to James Laird in the seventh article of the conditions of sale referred to on record: Finds that the said James Laird is not disqualified from acting as arbiter under the said clause of arbitration: Therefore supersedes further procedure *in hoc statu* in order that the parties may have the pursuer's claims forthwith submitted to arbitration as aforesaid, reserving in the meantime all questions of expenses; and grants leave to appeal."

On appeal the Sheriff (BERRY) adhered.

The pursuer appealed to the First Division of the Court of Session, and argued—Glass was the original purchaser, and was bound by the conditions of sale, but the pursuer had an independent contract with him, and was not bound by these conditions. The defenders would have a remedy against Glass if the pursuer did not implement the conditions, but had none against the pursuer. In any case, this question did not fall under the arbitration clause, being one between a purchaser and the auctioneer. The latter could not act as arbiter, being a member of the defenders' firm. The defenders had taken the responsibility of defending the action for the Glasgow Trust, and had pleaded a counterclaim of money alleged to be due both to the trust and to themselves. The auctioneer could not act as a judge in his own case, and therefore the cases quoted by the other side did not apply—*Smith* v. *Liverpool and London Globe Insurance Company*, July 15, 1887, 14 R. 931.

Argued for the defenders—The pursuer was merely an assignee, and must take under his author's liabilities and duties. The sum had been admittedly deposited with the defenders as security for fulfilment of the conditions of sale, and fell to be forfeited on the pursuer's non-compliance with these conditions. The auctioneer was merely an individual partner of the defenders' firm, and a separate *persona*. The mere fact of the firm defending the action should not therefore bar him from acting under the clause of reference—*Trowsdale & Son* v. *North British Railway Company*, July 12, 1864, 2 Macph. 1334; *Trowsdale & Son* v. *Jopp*, Nov. 15, 1865, 4 Macph. 31; *Scott* v. *Carluke Local Authority*, Feb. 1, 1879, 6 R. 616; *Addie & Sons* v. *Henderson & Dimmack*, Oct. 24, 1879, 7 R. 79.

At advising—

LORD PRESIDENT—On two of the points raised in argument I am in agreement with the defenders. The first is that the pursuer truly stands in the shoes of Mr Glass, and is liable to be met by any defence competent as against Mr Glass. The second point in which I agree is this—If the question had been between the pursuer on the one hand and the City Improvement Trustees on the other, the mere fact that Mr Laird was a member of the firm who acted as auctioneers would not at all have disqualified him from acting as arbiter. But then we have to consider a very different question. This pursuer bethought him to sue the firm of Messrs Laird & Sons for recovery of the money which he had deposited with them under the articles and conditions of roup. In these circumstances Messrs Laird & Sons might have said, had they chosen, "We were acting merely as agents—as auctioneers—for the City Improvement Trust, and this is a question between you and them. It is true that we hold the £30 you claim, but only as stakeholders, and your proper contradictors are the City Improvement Trustees." If they had followed that course then, as at present advised, I can see no objection which could have been successfully taken to setting up Mr Laird, under the reference clause, as judge of the matters in dispute between the parties. But unfortunately Messrs Laird & Sons, instead of pointing to the City Improvement

Trustees as the proper contradictors, have chosen to come forward and identify themselves with the trustees defending the action in their interest. Now, when Messrs Laird & Sons come forward in that capacity, Mr Laird, the partner, cannot dissociate himself from the action of the firm and claim to act as arbiter in the controversy in which his firm represent the trustees. I think it impossible, his firm having elected to take up this position, that Mr Laird can continue qualified to act as arbiter. He would be deciding in a question between his own firm and the pursuer. That appears to me to be a most difficult and improper position for anyone to be placed in. But the ground of my judgment is, that the position is one which the law does not allow, and that the firm of Messrs Laird & Sons, having identified itself with the City Improvement Trustees in defending this action, Mr Laird is no longer qualified to act as arbiter under the reference clause.

LORD ADAM—By the interlocutor now under review the Sheriff finds that "the claims made by the pursuer in this action are embraced by the clause of arbitration to James Laird" in the conditions of sale. The pursuer pleads that James Laird has disqualified himself from acting as arbiter. Now, there is no doubt that James Laird is a partner of the firm of James Laird & Sons, and the proposition is that we are to refer a case in which James Laird & Sons are the defenders to the arbitration of a member of the defenders' own firm. This appears to me to be a perfectly hopeless proposition. It was not necessary for the defenders to have taken up the position which they have, for they were merely the holders of the fund. If they had said, "You must make the City Improvement Trustees, who are the true contradictors of your claim, parties to the case," then there would have been nothing to disqualify Mr Laird from acting as arbiter under the seventh article of the conditions of sale. But they did not do so. It is evident that the firm may become liable in the expenses of the proceedings, which of itself shows that they have a material interest in the result. We cannot therefore allow one of the firm to act as arbiter.

LORD M'LAREN—I assent unreservedly to the grounds of judgment indicated by your Lordship in the chair. It is a very usual stipulation in executory contracts of all kinds that the engineer or architect, or other skilled person who is the responsible adviser of the undertaker of the work, should act as arbitrator between the undertaker and his contractors in regard to practical questions which may arise in the course of the execution of the contract. Experience shows that such references can be carried out in a manner satisfactory to both parties, and that an architect (who is not to be considered as a person in the service of the employer but is an independent adviser) may be trusted to act fairly as an arbiter. I am not prepared to say that the same principle does not cover the case of an auctioneer and agent for sale. An auctioneer is not very closely identified with his employer, who is probably only one of a class of persons whose goods he undertakes to sell, and I see no reason why in the ordinary case he should not be able to act impartially as an arbiter in matters arising out of the sale. But it is an essential condition of the duty and action of an arbiter that he must keep himself neutral. He must not identify himself with either of the parties by taking an active interest in the prosecution of his claim, and any interference of this kind is sufficient to disqualify him. Now, it is as plain as any fact can be, that, when an arbiter takes upon him the active conduct of a litigation on behalf of one of the parties to the reference, especially where that litigation relates to the subject-matter on which he is called upon to give a decision, he ceases to be qualified to act impartially and without a prepossession in favour of the party whom he represents in the litigation. It follows that the pursuer is not bound to submit his claim to the defender.

LORD KINNEAR concurred.

The Court recalled the judgments of the Sheriff-Substitute and Sheriff, and remitted the case to the Sheriff Court for further procedure.

Counsel for the Pursuer—Sol.-Gen. Shaw, Q.C.—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Defenders—A. Jameson—Guy. Agents—Macpherson & Mackay, W.S.

Friday, November 16.

SECOND DIVISION.

WILSON'S TRUSTEES *v.* WILSON.

Succession—Shares of Residue—Accretion—Intestacy.

A testator directed his trustees "to hold the residue of my estate for behoof of my whole children equally in liferent for their liferent alimentary use allenarly, and for behoof of their respective issue in fee, declaring that the issue of any of my children who may die shall succeed always to the share the liferent of which is hereby provided to their parent." The testator was survived by five children.

One of these children having died without issue—*held* that the share of residue liferented by him fell into intestacy, and belonged to the heirs *ab intestato* of the testator as at the date of the testator's death.

Paxton's Trustees v. *Cowie*, July 16, 1886, 13 R. 1191, *followed.*

Lyon Wilson, builder, Glasgow, died on 20th July 1888, leaving a trust-disposition and settlement dated 15th March 1880,