may arise from mere silence, whether followed or not followed by prejudice to other persons. That distinguished Judge, after explaining the liabilities arising by way of estoppel from actual representations, proceeds thus—"And conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect. As for instance, a retiring partner omitting to inform his customers in the usual mode of the fact that the continuing partners are no longer authorised to act as his agents, is bound by all contracts made by them with third parties on the faith of their being so authorised." It appears to me that if any doubt existed as to what Baron Parke meant by the words "duty cast upon a person by usage of trade or otherwise," the illustration with which the sentence ends is fairly conclusive on that subject.

LORD STORMONTH DARLING—I agree with your Lordships and the Lord Ordinary.

When in a matter of this kind, turning largely on credibility, the Judge who saw and heard the witnesses declares his belief that what one of the parties to the case said in the witness-box was substantially true, it would be very difficult for a Court of Review to decide against that party, except upon some view of the law altogether independent of his testimony.

Now, there is no law, as it seems to me, which requires us to hold that a man whose name has been forged to a bill, and who knows nothing about it except that he has not signed it, incurs any legal obligation towards the holder by non-repudiation of that bill, and still less of former bills bearing the same name, in answer to notices requesting him to have them retired. I particularly concur in what the Lord Ordinary says about its being the right of every person, who receives a letter or other document regarding a matter with which he has no concern, to destroy that document at once, and take no further notice of it. He must not, it is true, do anything active to deceive or mislead the other person, as by adopting the bill in question in the knowledge that it was forged. But mere silence can never have that effect.

LORD LOW was absent.

The Court adhered.

Counsel for the Reclaimers — Younger, K.C.—F. C. Thomson. Agents—Mackenzie & Kermack, W.S.

Counsel for the Respondent — Scott Dickson, K.C.—Horne. Agents—Duncan Smith & Maclaren, S.S.C.

---

*Tuesday, March* 20.

## SECOND DIVISION.

[Lord Dundas, Ordinary.

## COOPER & COMPANY *v.* JESSOP BROTHERS.

*Arbitration — Process — Jurisdiction—Petition to Appoint Arbiter — Decision in Petition of Questions of Fact and Law—Allowance of Proof in the Petition—Competency of Proceedings and of a Reclaiming Note—Arbitration (Scotland) Act* 1894 (57 *and* 58 *Vict. cap.* 13), *sec.* 3.

In a petition to appoint an arbiter under section 3 of the Arbitration (Scotland) Act 1894 the Lord Ordinary without proof repelled objections that the Court had no jurisdiction, that there was no binding agreement between the parties, and that the reference clause relied on, viz., "any dispute arising from this contract to be settled by arbitration here in the usual way," was part of the agreement, and allowed a proof as to the "usual way." The respondents, who were English merchants, neither residing nor carrying on business in Scotland, reclaimed, on the ground that the Lord Ordinary had exceeded his jurisdiction, such proceedings in the petition not being in contemplation of the statute. The petitioners objected to the competency of the reclaiming note.

*Held* that in the circumstances (1) the reclaiming note was competent, and (2) the interlocutor of the Lord Ordinary should be recalled and process sisted until the questions at issue between the parties had been decided by appropriate proceedings in a competent Court.

The Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13), section 3, provides—"Should one of the parties to an agreement to refer to two arbiters, refuse to name an arbiter in terms of the agreement, 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 the other party, and the arbiter so appointed shall have the same powers as if he had been duly nominated by the party so refusing." Section 6—"For the purposes of this Act the expression 'the Court' shall mean any sheriff having jurisdiction or any Lord Ordinary of the Court of Session."

On December 19, 1905, H. G. Cooper & Company, merchants, Glasgow, presented a petition, under section 3 of the Arbitration (Scotland) Act 1894, to appoint an arbiter to represent an arbiter whom they averred Jessop Brothers, Ossett, Yorkshire, ought to have appointed under an alleged agreement.

Jessop Brothers lodged answers. The following paragraph therefrom summarises their objections to the granting of the prayer of the petition:—"The respondents

respectfully submit (*a*) that the Court has no jurisdiction to entertain this petition; (*b*) that there is no binding agreement, and accordingly no agreement to refer to arbitration; (*c*) that in view of the terms of the alleged arbitration clause the Court has no power to appoint an arbiter; and (*d*) that, as assuming the petitioners to be right in their contention, their claim is for damages which an arbiter would have no power to assess, it is unnecessary and inexpedient that an arbiter be appointed."

The circumstances of the case and the averments of parties are sufficiently given in the opinion (*infra*) of the Lord Ordinary (DUNDAS).

On 2nd February 1906 the Lord Ordinary pronounced the following interlocutor:—"Repels heads (*a*), (*b*), and (*d*) of the objections stated by the respondents in the last paragraph of their answers: Before further answer allows the parties a proof of the averments contained in the sixth paragraph of the petition and in the last sentence of the third paragraph of said answers, and to the petitioners a conjunct probation: Appoints the proof to proceed on a day to be afterwards fixed, and grants leave to reclaim."

*Opinion*—"This is a rather peculiar application. The petitioners, merchants in Glasgow, aver that in August 1905 they contracted to buy from the respondents, Jessop Brothers, Ossett, Yorkshire, a considerable amount of 'shoddy' for manure purposes. The alleged contracts were made by correspondence. The first point, in my judgment, is to ascertain the true scope and terms of the contract as disclosed by the correspondence, in so far as these bear upon the respondents' objections to the jurisdiction of this Court to entertain the petition, and its power to apply the Arbitration (Scotland) Act 1894 to the facts of the case. On 28th July 1905 the respondents sent to the petitioners by post two separate samples of shoddy. On 8th August the petitioners wrote to the respondents enclosing copy of telegrams which had passed between the parties, 'accepting 120 tons shoddy, No. 2, as per sample received from you,' and awaiting confirmation. On 10th August the respondents confirmed the order. Then, on 11th August, the petitioners wrote to the respondents 'We duly received your telegram and letter of 10th inst., and we now beg to enclose sale note for the shoddy.' In a P.S. they suggested further dealings with the respondents. In this letter the petitioners enclosed the 'sale note' dated 10th August. This document, partly printed and partly typewritten, bears to confirm the purchase, and contains at its close the printed words 'Any dispute arising from this contract to be settled by arbitration here in the usual way.' The respondents in the succeeding letters, while they wrote as to further business dealing with the petitioners, took no notice of the words about arbitration above quoted, and did not repudiate or object to them. In these circumstances the petitioners aver that it was a part of the contract that disputes under it should be settled by arbitration at the place and in the manner indicated. The respondents, on the other hand, contend that the contract for the sale and purchase of the shoddy was completed by the letters between the parties dated 8th and 10th August to which I have referred, and that the subsequent transmission of the sale note by the petitioners' letter of 11th August was of no effect or consequence, and did not import into the already concluded contract any agreement to refer disputes to arbitration. I think that this contention of the respondents is unsound. Where the constitution of a contract depends upon a correspondence, one must, I apprehend, read the correspondence fairly as a whole (*Hussey* v. *Horne-Payne*, 4 App. Ca. 311), and further, I think that the respondents, by not in any way repudiating or objecting to the clause of arbitration, are personally barred from saying that that clause does not form a part or term of their contract. My view upon this point is fortified by the correspondence which passed between the parties in regard to the second of the two contracts which are now in question. On 19th August 1905 the petitioners offered to accept a further quantity of shoddy 'at same price and same terms as last,' and on the same day they sent to the respondents the sale note, which contains words identical with those in previous sale note as to the settlement of disputes arising under the contract. On 21st August the respondents accepted the order, making no reference or demur to the condition about arbitration. I hold, therefore, that the clause 'Any disputes arising from this contract to be settled by arbitration here in the usual way' is truly a part of both of the contracts in question between the parties.

"The next thing seems to me to be to ascertain the exact meaning of the words just quoted. There was not, and I think there could not have been, any doubt suggested that 'here' means in Glasgow. The petitioners maintain that the words 'to be settled by arbitration here in the usual way' are, upon a sound construction, equivalent to such words as 'to be settled by arbitration in the usual way in the shoddy trade in Glasgow.' I agree with this contention. The words used must, I take it, be held to mean something, and they occur in documents relating to commercial transactions in shoddy entered into by purchasers of that material carrying on business in Glasgow. Now, the petitioners state that they believe and aver that 'the usual way of arbitration in the shoddy trade in Glasgow is . . . for each party to nominate an arbiter, and for these parties to appoint an oversman.' They have therefore nominated an arbiter to act for them, and the principal crave of the petition is that the Court should 'appoint an arbiter to represent the arbiter whom Messrs Jessop Brothers fell to have appointed under the agreement;' and the petitioners found upon section 3 of the Arbitration (Scotland) Act 1894. It is important to observe that the respondents admit 'that disputes have arisen with regard to said

contracts.' They state, however, 'that there is no shoddy trade in Glasgow, and no practice in said trade either in Glasgow or in Yorkshire with regard to arbitration.' The respondents contend that assuming that the words in regard to arbitration form part of the contracts, they leave quite undetermined the form of tribunal or the mode by which the arbitration is contracted to be carried out, and therefore (*M'Millan & Son, Limited*, 5 Fr. 317) that the Court is not in a position to appoint an arbiter under the statute. But, as I have already said, I think that the construction of the words fairly imports an agreement to refer disputes to arbitration in 'the usual way' (if such there be) 'in the shoddy trade in Glasgow.' Upon this point therefore the petitioners are, in my judgment, entitled to a proof of their averments of such usage. A somewhat similar proof was allowed and was successful in the case of *Douglas & Company*, 2 Fr. 575. That was not a petition under the Act here in question, but the defender in the action proved what was 'the customary manner of the timber trade' in regard to arbitration, with the result of excluding, *primo loco* at all events, the intervention of the Court.

"Up to this point therefore I am of opinion that the respondents are contractually bound to refer disputes under the contracts to arbitration in Glasgow, and that if the petitioners can prove the alleged usage of the shoddy trade there, I am entitled and bound, in terms of section 3 of the Arbitration (Scotland) Act 1894, to appoint an arbiter to act on behalf of the respondents in the matter.

"I must now consider the other objections put forward by the respondents. They state in their answers that the disputes which have arisen under the contracts relate to which of two samples sent by them to the petitioners is the 'Sample No. 2' referred to in the correspondence; that the parties are at variance as to this; and that 'in these circumstances the respondents maintain that there was never any *consensus in idem*, and accordingly that there is no binding contract and no agreement to refer to arbitration.' In my judgment this objection affords no good ground for refusing the petition. The terms of the written contract between the parties disclose no ambiguity as to the samples sent, and if the dispute which has arisen is of the nature suggested by the respondents I think that their remedy would be by way of reduction or rescission of the contract. The case of *Buchanan* v. *Duke of Hamilton*, [1878] 5 R. (H.L.) 69, upon which they relied, and in which there was no completed contract in writing, appears to me to belong to a quite different category of law from the questions here under consideration. The only other objection stated by the respondent is to the effect that, if the petitioners' contention in regard to the question last dealt with is correct, the respondents would be unable to implement the contract; that the claim against them would resolve itself into one for damages; and that an arbiter has, apart from special stipulation, no power to deal with a claim of that nature. But even if matters should take the course indicated, I see nothing in that which should disentitle the petitioners to go (if otherwise entitled to do so) to arbitration, and to obtain such findings as the tribunal may think fit to pronounce. On the whole matter, I propose to repel heads (*a*), (*b*), and (*d*) of the respondents' objections, and before further answer to allow a proof upon the short point to which I have already referred."

The respondents reclaimed.

The petitioners maintained that the reclaiming note was incompetent, and on that point argued—The Lord Ordinary was final, since he acted here in a ministerial and not in his judicial capacity—*Magistrates of Glasgow* v. *Glasgow District Subway Company*, November 8, 1893, 21 R. 52, 31 S.L.R. 70. The ministerial character in which he acted was not affected by the fact that some incidental inquiry might be necessary—*Binning* v. *Easton & Sons*, January 18, 1906, 43 S.L.R. 312. The definition of Court in section 6 of the Act coupled a Lord Ordinary and a sheriff, and would seem to exclude appeal. The only similar section was section 5 of the Married Women's Property Act 1881 (44 and 45 Vict. cap. 21), where no appeal was given though inquiry was necessary. In all Acts where appeal was contemplated it was provided for, *e.g.*, as in section 6 of the Distribution of Business Act 1857 (20 and 21 Vict. cap. 56). In the case of *Robertson* (cited *infra*) there was not as here a special jurisdiction conferred, the Court in the Act there in question — the Law Agents Act 1873 — being defined as the Court of Session. The Lord Ordinary had not made, possibly might not make, any appointment; he could not accordingly (even assuming no agreement to arbitrate) until he did so be said to have exceeded his jurisdiction, as the Sheriff had in *Farquharson* v. *Sutherlands*, June 16, 1888, 15 R. 759, 25 S.L.R. 573. If any review were competent it should have been by suspension or reduction.

Argued for respondents—The reclaiming note was competent. Without proof the Lord Ordinary had repelled their objection that, being an English firm carrying on business in Yorkshire where the alleged contract was to be performed, they were not subject to his jurisdiction; without proof he had also repelled their objections that he had not authority to entertain the petition because there was no binding agreement, and because, in any event, on a just construction it included no agreement to arbitrate. A reclaiming note was the appropriate method of review. Assuming the Lord Ordinary was merely explicating his power under the Act it would have been urged, and probably rightly, that he was final, and under *Earl of Camperdown* v. *Presbytery of Auchterarder*, November 6, 1902, 5 F. 61, 40 S.L.R. 45, an action of reduction was incompetent. Assuming the mere making of an appointment was administrative, yet in repelling these objections the Lord Ordinary was acting in a judicial

capacity. In any event the petitioners were in a dilemma, for either in repelling the objections the Lord Ordinary acted in an administrative capacity, in which case by determining questions of right he had exceeded his jurisdiction, or in a non-administrative capacity, in which case appeal was competent, for unless a statute expressly excluded it, there was the right to appeal—*Robertson, Petitioner*, July 18, 1876, 3 R. 1104, 13 S.L.R. 665—but the Act here in question nowhere said the Lord Ordinary was to be final; on the contrary, the authority was primarily given not to him but "the Court." There was a case under this Act in each Division where a reclaiming-note had been allowed without opposition—*M'Millan & Son, Limited* v. *Rowan & Company*, January 16, 1903, 5 F. 317, 40 S.L.R. 265; *Hallpenny* v. *Dewar*, May 24, 1898, 25 R. 889, 35 S.L.R. 696; and in *Stewart* v. *Marquis of Breadalbane*, January 14, 1903, 5 F. 359, 40 S.L.R. 259, and March 3, 1904, 6 F. (H.L.) 23, 41 S.L.R. 373, the Sheriff-Substitute appointed an oversman and an appeal was taken to the Sheriff, the Court of Session, and the House of Lords. There had been appeals under the English Act (52 and 53 Vict. cap. 49), and the object of the Scotch Act was to assimilate the laws of the two countries. (Reference was also made to Russell on Arbitration, p. 49.)

The parties were then heard on the merits of the reclaiming note.

Argued for the respondents (reclaimers)—The proceedings before the Lord Ordinary were incompetent. He had no jurisdiction. The respondents were an English firm carrying on business in Yorkshire. Assuming a contract, it was made by correspondence, and the *locus* of it was England as the *locus solutionis*. Further, there had not been personal service. Moreover, the Lord Ordinary had no authority or jurisdiction, because there was no binding contract. For the labels of the two samples must have got mixed, possibly through their fault, but also possibly, as they maintained, either through petitioners' fault or in *transitu*; there was therefore no *consensus in idem*. The Lord Ordinary was not entitled to assume this against them without a proof—*Duke of Hamilton* v. *Buchanan*, January 25, 1877, 4 R. 328, 14 S.L.R. 253, June 8, 1877, 4 R. 854, 14 S.L.R. 545, *aff.* March 8, 1878, 5 R (H.L.) 69, 15 S.L.R. 513. Assuming a contract, it was completed before the sale notes were sent. A sale note was not the proper place to introduce a new term into a contract. A so-called reference clause to arbitration "in the usual" way printed on "merchant" sale notes could not be construed according to the nature of the goods. It was too vague to receive any effect—*M'Millan, cit. supra. Douglas & Company* v. *Stiven*, February 2, 1900, 2 F. 575, 37 S.L.R. 412, was not decided under this Act, and the reference clause was not as vague. In *Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. 311 (referred to by the Lord Ordinary), neither party thought the letters at the time contained the whole contract.

Argued for the petitioners (respondents)—This was a Scotch contract which they were seeking to enforce, but in any case the respondents had appeared, which cured any objection to the citation. There was a completed contract; the suggestion that the labels had been interchanged was a mere theory; and this idea was repudiated by the respondents in the correspondence. The sale notes were in each case acknowledged, and the clause of arbitration formed part of the agreement—*Jacques Serreys & Company* v. *Watt*, February 12, 1817, F.C. "Here" meant in Glasgow; there was accordingly prorogation of the jurisdiction of the Scotch Courts. "In the usual way" meant in the usual way in the shoddy trade in Glasgow—*Douglas* v. *Stiven, cit. supra*, and Lord Ordinary Stormonth Darling at p. 318 of *M'Millan* referring thereto. The Lord Ordinary was entitled to inquire into and decide incidental matters necessary to explicate his jurisdiction.

At advising—

LORD KYLLACHY—This is a petition presented to a Lord Ordinary under the Arbitration (Scotland) Act 1894, which Act among other things provides (in substance) that when there exists between parties an agreement to refer to a single arbiter, or an agreement to refer to two arbiters, and one of the parties refuses, in the one case to concur in naming the single arbiter, or in the other case to name one of the two arbiters, the nomination necessary may be made by a Sheriff having jurisdiction, or by "any Lord Ordinary of the Court of Session." The petitioners are merchants in Glasgow who allege that an agreement exists between them and the respondents, who are an English firm, to refer certain disputes between them to arbitration, one arbiter to be named by each. So alleging they have applied by petition to Lord Dundas to name the arbiter whom the respondents, the English firm, are, they say, bound but refuse to nominate.

The English firm have lodged answers to the petition in which they submit various points both of fact and law. They deny to begin with that the agreement, of which the alleged agreement to refer is said to be part, was a concluded agreement. They deny further that, supposing it was so, it included on its just construction any agreement to arbitrate. They further deny that, even assuming the alleged agreement to arbitrate to have been duly made, it was an agreement to arbitrate in either of the two ways required by the statute. They therefore deny in result the Lord Ordinary's jurisdiction to entertain the petition; and they do this also upon a separate ground, viz., that the respondents neither reside in nor carry on business in Scotland, and are not subject to the jurisdiction of the Scotch Courts.

The Lord Ordinary has apparently considered that he was bound to deal with all the questions thus raised as if they had occurred in an ordinary litigation between resident Scotsmen. He has decided them all with one exception against the respon-

dents; and with regard to the excepted question he has allowed a proof. As against this proceeding the present reclaiming note is directed, and the first question is as to the competency of the reclaiming note.

The petitioners maintain that the reclaiming note is incompetent, doing so on the ground, as I understood, that the Lord Ordinary's function under the statute is ministerial and not judicial, and that that being so his determinations are not subject to review. I cannot, however, assent to the proposition that this reclaiming note is incompetent. The Lord Ordinary at least professes to act judicially. He has not granted the application *de plano* making an appointment simply for what it is worth. He has decided various questions of mixed fact and law. He has also, as I have said, allowed a proof. And the respondent's complaint is that in so doing he has gone beyond the statute and exceeded his jurisdiction. I am unable to doubt that in such circumstances a reclaiming note is quite competent as a mode of redress.

We have therefore to consider whether the Lord Ordinary has in fact exceeded his jurisdiction—in other words, whether he has proceeded in a manner not contemplated and not authorised by the statute. And as to that, as already indicated, the case of the reclaimers, or as I shall continue to call them, the respondents, is two-fold. In the first place, they, the respondents, contend that the statute does not on its just construction contemplate that, in the case which occurs here, of the parties to an alleged agreement to arbitrate being *bona fide* at issue as to whether such an agreement exists, the Lord Ordinary shall on application under the statute by one of the parties set agoing an ordinary litigation for the purpose of determining, finally or provisionally, questions as to the existence, or as to the construction of the disputed agreement. They say, on the contrary, that although the Lord Ordinary, or the Sheriff if the application be made to him, may be entitled to consider whether there is *prima facie* an agreement satisfying the statutory conditions, and having done so may make for what it is worth, or in *hoc statu* refuse to make, the nomination asked, yet in a case like the present his proper course, and the course which the statute contemplates, is to sist process until the dispute between the parties has been settled by appropriate proceedings in a court of competent jurisdiction.

That is the first view of the matter, and one which would if correct be applicable although the parties (the petitioners and respondents) were both as I have suggested resident Scotsmen. But the respondents' second contention is this, that the above course (the sisting of process) is doubly appropriate, and indeed quite necessary, where one of the parties—the respondent in the application—is as here an Englishman, not subject in any way to the jurisdiction of the Scotch Courts—that is to say, not so subject unless he shall be held to have in effect prorogated the jurisdiction of the Scotch Courts by becoming a party to the alleged but disputed contract of reference.

Now, I must say that there appears to me to be undoubted substance in these contentions. We should not, I think, desire to lay down any hard and fast rule as to how far the Lord Ordinary or the Sheriff may go in making inquiries incidental to the discharge of his statutory function, even if it should be held (what we do not require to decide) that that function is purely ministerial. But I do not, I own, see my way to affirming that according to the scheme of this statute the Lord Ordinary or the Sheriff is bound, or indeed entitled, to initiate under the application made to him a judicial process with regard to such matters as are here in controversy—matters as to which he has, *prima facie*, no jurisdiction, and as to which confessedly his alleged jurisdiction depends wholly upon its being established—(1) that there was a concluded agreement between the parties; (2) that such concluded agreement includes a certain clause of reference which the one party maintains but which the other party denies to be part of the agreement; (3) that this clause of reference, which admittedly does not, *prima facie*, satisfy the conditions of the Arbitration Act, may yet be made to do so by proof of an alleged but disputed custom of trade in Glasgow; and finally (4) that said clause of reference, *ex hypothesi*, thus set up by proof amounts on its just construction to a prorogation by both parties of the jurisdiction of the Scotch tribunals.

It appears to me that these are all of them at least highly disputable propositions, and yet each of them must be affirmed before the Lord Ordinary has or can have jurisdiction to deal with the matters in question, particularly as between parties one of whom as has been said is an English firm not (apart from prorogation) subject to the jurisdiction either of the Sheriff of Lanarkshire or of the Court of Session.

I am not in such circumstances prepared to affirm the Lord Ordinary's interlocutor. On the contrary, I am of opinion and propose to your Lordships that the correct course is to recal the interlocutor, and to remit to the Lord Ordinary to sist process until the questions at issue between the parties as to the existence and construction of the alleged agreement of reference have been determined by appropriate proceedings in a competent court.

LORD LOW—The Arbitration Act provides that where there is an agreement to refer to arbitration, and where one of the parties refuses to concur in the nomination of an arbiter, or refuses to name an arbiter as the case may be, the Court (as defined by the Act) may, upon the application of the other party, appoint an arbiter. The jurisdiction conferred upon the Court therefore is merely to appoint an arbiter if the condition of matters described in the Act exists. There may, however, be questions which it is necessary to determine before an arbiter can be appointed, such as

questions of the competency of the application, and I see no reason to doubt that the Court constituted by the Act has power, within certain limits, to determine preliminary questions which are necessary to explicate its jurisdiction. I say "within certain limits," because it seems to me to be clear that the procedure authorised by the Act was intended to be of a summary nature, and that it was not contemplated that an application under the Act should be used for the determination of questions requiring investigation and procedure appropriate to an action in the ordinary Courts, but not appropriate to an application to a special tribunal constituted for a special and limited purpose, and whose statutory functions are ministerial rather than judicial.

It is probably impossible to formulate any precise rule defining upon the one hand the class of questions which may be competently dealt with in such an application as being necessary to explicate the jurisdiction of the Court, and those upon the other hand which must be determined by the ordinary tribunals. Each case, I imagine, must be dealt with according to its own circumstances, and in the present case I am of opinion that the questions raised in the petition and answers cannot competently be disposed of in the present proceedings.

The respondents are English, and they have not been made subject to the jurisdiction of the Scotch Courts unless they can be held to have prorogated jurisdiction by agreeing that any dispute arising from their contract with the petitioners should be settled by arbitration in Glasgow. But there is a question which appears to me to be one of considerable difficulty, whether the arbitration clause is part of the contract at all, and there is a further question, what is the meaning of the clause, and whether it is not so vague and indefinite that it is impossible to give effect to it. Again, the respondents aver (and I think relevantly) that there is no binding contract, or that it may be set aside on the ground that the parties were not at one as to its subject-matter. These are all questions which must be determined before it can be ascertained whether or not the circumstances exist in which alone an application can be made under the Arbitration Act, and it seems to me that to use such an application as if it included the action or actions necessary for the determination of these questions would be to go altogether outside of the scope and purview of the Act. I therefore agree with your Lordships that the most convenient course is to sist this application in order that the parties may have an opportunity of obtaining judgment upon the questions between them in an appropriate action and before a competent tribunal.

I may add that I entirely adopt the views expressed by your Lordship in regard to the competency of this reclaiming note.

LORD STORMONTH DARLING and the LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to sist process.

Counsel for the Petitioners (Respondents)—Younger, K.C.—Spens. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondents (Reclaimers)—Hunter, K.C.—Chree. Agents—Macpherson & Mackay, W.S.

---

*Tuesday, March* 20.

## FIRST DIVISION.

[Lord Dundas, Ordinary.

## STEWART *v.* STEWART.

*Husband and Wife—Divorce—Separation and Aliment—Process—Action of Separation and Aliment Raised Pending Action of Divorce on Same Grounds—Competency—Lis alibi pendens.*

A wife raised an action of divorce against her husband on the ground of adultery. Having changed her mind as to the remedy she desired, she thereafter raised an action of separation and aliment against him on the same grounds without having abandoned the divorce action. The defender pleaded—"The action is incompetent" and "*Lis alibi pendens.*"

*Held* that the action was competent, it being open to the defender in the event of the pursuer not proceeding with or abandoning the action of divorce to move that it be dismissed with expenses.

*Process—Abandonment—Minute of Abandonment—Minute not in Statutory Form—Crave as to Expenses—Expenses Carried by Minute in Statutory Form—Judicature Act* 1825 (6 *Geo. IV, cap.* 120), *sec.* 10.

A pursuer in an action of divorce, after a proof on the question of jurisdiction in which she had been successful, and the expenses of which had been paid her by the defender, changed her mind as to the remedy she desired, and with a view to bringing an action of separation and aliment lodged a minute of abandonment. The minute was not in statutory form inasmuch as it contained a crave that she should be allowed to abandon on payment merely of any expenses the minute itself had caused. *Held* that the minute of abandonment must be in statutory form.

*Opinions* that a minute in statutory form would carry payment of the full expenses, including repayment of the expenses already paid to the pursuer in connection with the question of jurisdiction.

Section 10 of the Judicature Act 1825 (6 Geo. IV, cap. 120), *inter alia*, provides that a pursuer has power "to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent."