

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—Multiplepoining—Lodging Claim—  
 Reclaiming-Note.

In a multiplepoining a reclaiming-note against a judgment of the Lord Ordinary approving of a condescence 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 One set had appeared in the Outer House and lodged a claim which was afterwards withdrawn; the other had never appeared in the process.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 condescences and claims on payment of all expenses not available at future stages of the cause.

In this action of multiplepoining the Lord Ord-

nary pronounced an interlocutor approving of the condescence 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—

LOLD 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

case, leaving it to the Lord Ordinary, who is much better able than we are, to determine what the amount of those expenses should be.

LORDS DEAS, MURE, and SHAND concurred.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming-note for Matthew Henry and others against Lord Kinnear’s interlocutor of 26th May 1883, Recall the interlocutor *in hoc statu*, and remit to the Lord Ordinary to receive the condescendences and claims tendered by the reclaimers on payment of all expenses hitherto incurred by the respondents, which will not be available at the future stages of the cause; But find no expenses due in respect of the discussion in the Inner House: And remit to the Auditor to tax the account of the said first-mentioned expenses, and to report to the Lord Ordinary, and remit to his Lordship to decern for said expenses when taxed.”

Counsel for Reclaimers and Claimants Matthew Henry and Others—M’Kechnie. Agents—Ronald & Ritchie, S.S.C.

Counsel for Reclaimers and Claimants Robert Anderson and Others—Jameson. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondents and Claimants Mr Anderson and Another—J. P. B. Robertson—Dickson. Agent—A. Morison, S.S.C.

Counsel for Respondent and Claimant the Curator *ad litem* to Bertha Mackenzie—Mackintosh—Graham Murray. Agents—Mackenzie & Black, W.S.

Tuesday, July 3.

## SECOND DIVISION.

[Sheriff of the Lothians.]

### SPALDING v. VALENTINE & COMPANY.

*Process—Interdict—Mistomer in Small Debt Summons—Error in giving Christian Name, and Error in stating Christian Name of Defender.*

A person carrying on business as “Mrs B. Spalding,” was cited before the Small Debt Court in an action in which she was designed as “Mrs Grace Spalding.” The summons was served upon her personally. She did not appear, and decree passed against her in absence. The pursuer, the debt not having been paid, executed a pouncing of goods in her premises. She then raised a process of interdict against the sale of her goods under the pouncing, her ground of action being that she had not been duly cited in the small debt action, and that the pouncing was therefore illegal. She did not deny that she was due the debt. The Sheriff-Substitute (HAMILTON) dismissed the action on the ground that it was excluded by the Small Debt Act, sec. 30. The Sheriff (DAVIDSON) adhered on appeal. She appealed to the Second Division. The Court, on the ground that there was no substance in the objection to the citation, and

that the debt was not denied, *affirmed* the judgment of the Sheriffs.

Counsel for Appellant—Salvesen. Agent—Alexander Clark, S.S.C.

Counsel for Respondents—Scott—Shaw. Agent—P. Morison, S.S.C.

Tuesday, July 3.

## FIRST DIVISION.

### PAGAN, PETITIONER.

*Parent and Child—Custody—Patria potestas.*

A father engaged in a profession which involved his residence in Africa, presented a petition in which he asked that his children, who were all in pupillarity, and resided in Scotland with their mother, should be removed from her custody and boarded and educated in the house of a person named by him. *Held* that the father was entitled as matter of right, without proof of disqualification of the mother, to regulate the place of residence and education of his children, and petition *granted* accordingly.

This was a petition by John Pagan, civil engineer, for the custody of his children. The petition set forth that he was married to Isabella Macgregor in September 1871, and that he was forty years of age, while his wife was thirty-eight. The surviving children of the marriage were three girls, aged respectively 10, 7, and 5, and one boy aged 4. At the date of the marriage, the petitioner, after filling several positions in England, went in 1879 to the Gold Coast as engineer and surveyor-general. The petitioner averred—“The petitioner has recently received information in regard to the respondent’s ill-treatment of her children, which makes it absolutely necessary, in the interests of the children, that they should be removed from their mother’s custody. The petitioner would himself have returned from Africa to make the needful arrangements, but the nature of his duties makes it impossible for him at present to obtain leave of absence.” The ill-treatment alleged was that the children were not properly clothed, that they were insufficiently fed and neglected, and treated with cruelty.

The petitioner further averred—“The petitioner has ascertained in addition that the respondent is systematically endeavouring to poison the minds of his children against him. She is training them up in the belief that the petitioner is a person of bad character, and she is trying to turn his children against him by making charges against him to them and in their presence which are utterly destitute of foundation. From her habits and the kind of company she is keeping she is not a suitable person to be entrusted with the custody of the children, either looking to their bodily wants or their moral and religious training.”

The petitioner detailed the arrangements he proposed to make for the board and education of the children.

Mrs Pagan lodged answers in which she denied the truth of the averments on which the pursuer sought to deprive her of the custody of the children.