COURT OF SESSION.

Saturday, March 17.

SECOND DIVISION.

[Lord Ardwall, Ordinary.

THE BRITISH LINEN COMPANY *v.* COWAN.

Bill of Exchange — Forgery — Adoption — Silence as a Personal Bar to Disclaiming Liability—General Right of Persons Receiving Letters regarding Matters with which not Concerned.

A person whose name had been forged to a bill, of the existence of which he was ignorant, *held* not to have incurred any legal obligation towards the holder, by adoption of his signature or otherwise, because of the fact that he had not repudiated a number of former bills, bearing the same forged signature, in answer to past-due notices requesting him to have them retired, even on the assumption that he fully understood the import of the notices he received.

Observed by Lord Ardwall, expressly approved by the Lord Justice-Clerk and Lord Stormonth Darling — "I consider it to be the right of every person who receives a letter or other document regarding a matter in which he has no concern, to destroy that document at once and take no further notice of it, and to countenance any other doctrine might, I think, be productive of most mischievous results, and might put honest people to a vast amount of annoyance, trouble, and expense."

The British Linen Company raised an action against Alexander Cowan, farmer, Spittalhill, Fintry, for (1) the sum of £450, with which the present report is not concerned, and (2) the sum of £70 contained in the following bill:— "Spittalhill,

"£70 stg. Fintry, 17th October 1904

"Four months after date, pay to me or my order, within the office of the British Linen Company Bank, Balfron, the sum of £70 sterling. ALEXANDER COWAN.

DAVID MOIR.

"To Mr David Moir, farmer,
Craigievern, by Balfron.

(Indorsed thus)—
Pay the British Linen Coy.,
or order.
ALEXANDER COWAN."

The bill was discounted with the pursuers, and on 20th February 1905 (when it fell due) presented for payment at their office, Balfron, and payment not having been made it was duly protested for non-payment. Notice of dishonour and that the bill had been protested for non-payment was sent to the defender on 21st February 1905, with a request that it should be retired. That request was not complied with and the present action was raised.

The defender's defence was that the bill was a forgery and neither of his signatures genuine. The pursuers originally maintained that they were genuine, but the Lord Ordinary (ARDWALL), after a proof upon the whole case, found that the signatures were forged by David Moir, and in the Inner House, when the case was heard upon a reclaiming note, the pursuers acquiesced in his finding upon this point. The case accordingly came to turn upon the following pleas stated by the pursuers:—"(2) The defender having homologated and adopted the signatures in question as his genuine signatures, is now barred from objecting that they are forged. (3) The defender having, as condescended on, by his failure timeously to intimate to the pursuers the alleged forgery, induced them to . . . discount the said bill, is barred from disputing his liability thereunder."

The facts disclosed at the proof in so far as they bore on these pleas were briefly as follows.

The bill of 17th October 1904 was forged by David Moir. The defender knew nothing of its existence until, shortly before it fell due and when David Moir was on the verge of insolvency, it was brought to his notice by a representative of the British Linen Company. He at once repudiated it and stated that his signatures were forgeries.

The bill of 17th October 1904 was, however, the last of one of two series of forged bills which had been running on since January 1891, bearing either to be drawn by the defender on David Moir and accepted by him, or drawn by David Moir on and accepted by the defender. The defender's signature was always forged by David Moir. When these bills became overdue, past-due notices in ordinary form were regularly sent to the defender, and during the period subsequent to January 1891 it was proved that the defender received some twenty-seven, of which the following is a specimen:—

"British Linen Company Bank
Balfron, 12th Feby. 1904.

"Mr Alexr. Cowan, farmer,
Spittalhill, Fintry.

"SIR,—Your bill on David Moir, dated 8th October and payable 4 m/ thereafter, for £70 sterling, is lying in my hand under protest for non-payment; be so good as order it to be retired immediately.—I am, Sir, your most obedient servant,

(Initl.) J. K. N. J. MACADAM, *Agent.*
" J. M."

The actual history of the bill sued on as given by the British Linen Company's agent at Balfron was as follows:—"As regards the history of the £70 bill, the one sued for in the present action, on 19th July 1902 a bill for £25 was drawn by the defender on Mr Moir and discounted with the bank. That fell due on the 22nd of September. On the following day a past-due notice was sent to the defender. There was a renewal of the bill on 24th September for £20. That renewal fell due on 25th October, and on 24th October it was paid. On 4th December 1902 Mr Moir discounted a bill for £70 drawn by the defender on him, which fell due on 7th January 1903. On 8th January I notified the defender

that that bill was past due. On the 23rd of January it was renewed for the same sum. On 10th March 1903 it became due, and on 11th March 1903 I notified the defender of that with a past-due notice. The bill was renewed on the 12th of March and again fell due on the 13th of April. On the 14th of April the defender was notified that it was past due. It was neither paid nor renewed until some time after the 14th of April. On the 16th of May Mr Moir renewed the bill for £25 by paying £45 in cash in two payments, £30 and £15. It was renewed to the extent of £25, the due date being the 19th of June. Before it become due, namely, on 4th June, that bill was paid and a new bill taken on the following day, the 5th of June, for the old sum of £70. That renewal fell due on the 8th of October. It was then renewed and fell due on the 11th of February, and the defender was notified on the 12th of February that it was past due. It was renewed twice and fell due on the 17th of October, and a past-due notice was sent to the defender on the 18th of October. It was again renewed and discounted on the 28th of October and fell due on the 20th of February 1905, and a past-due notice was sent on the 21st February 1905 to the defender. The bill was noted and protested in due course, and I produce the protest of the bill dated 20th February 1905. In carrying out these bill transactions Mr Moir called at the bank and saw me. He got the renewal bill drawn out and signed it. The practice always is that when a party to the bill is in, we get the signature. He took the bill away with him to get it signed by the defender. He either brought it back or sent it back duly signed. Mr Moir sometimes called back with it duly signed on the same day upon which he had taken it away."

Although the defender had received these notices he never paid any heed to them or took any steps, either by writing or orally, to disclaim his signature, although he was occasionally in person at the British Linen Company Bank. Similarly the British Linen Company never drew his attention to the fact that he had never in any way acknowledged the receipt of any of these notices. The defender's evidence amounted to this, that he remembered and knew nothing about these notices, and the Lord Ordinary accepted his statement as true.

On 5th July 1905 the Lord Ordinary pronounced an interlocutor in which he assoilzied the defender from the conclusions of the summons.

Opinion.—"This action concludes (*first*) for the principal sum of £450 and £21, 1s. 11d. of interest." [*His Lordship then dealt with the question.*] "The sum second sued for is the sum of £70 sterling contained in a bill dated 17th October 1904, and bearing to be drawn by the defender upon and accepted by the said David Moir payable four months after date. The defender alleges that his signature to this bill is also a forgery." [*His Lordship stated it as his opinion that it was a forgery.*] "It was maintained, however, for the pursuers that by his conduct the defender had homologated and adopted the signature in question as his genuine signature. It is proved that two series of bills, of one of which the bill in question is the last, have been running on from January 1891 down to the present time. All these bills either bore to be drawn by the defender on David Moir and accepted by him, or drawn by the said David Moir on and accepted by the defender, and are all set forth in a certified list of bill transactions, which shows the whole history of the bills in a very convenient form. The facts set forth in the certified list were completely proved by the evidence led for the pursuers. From this list it appears that over a period of between twelve and thirteen years some twenty-seven notices that certain of these bills were past due were sent to the defender, and that he took no notice of these notices. It is said that in this way he had rendered himself liable in payment of the bill in question. I cannot adopt this view, and I do not think it is supported by authority. On the contrary, I think the authorities all go to show that silence *per se* when a notice regarding a bill is sent to a person who did not sign it will not infer adoption against such person. The nearest case to the present which was quoted to me is the case of *Boyd* v. *Robertson*, 1854, 17 D. 159, in which an issue of adoption was refused to a charger on a bill, who averred that intimation had been sent to the suspender of the dishonour of certain bills of prior date in the same handwriting, of which intimation he had taken no notice, and the judgments delivered in the House of Lords in the case of *Mackenzie* v. *The British Linen Company*, 1881, 8 R. (H.L.) 9, seem to apply directly to the present case. The whole decisions of any importance on this matter are reviewed in that case by Lord Watson, and it would be presumption in me to attempt to go over the same ground. The case mainly relied on by the bank in that case, as well as the present, was *Urquhart* v. *Bank of Scotland*, 9 S.L.R. 508, and that decision is examined by Lord Watson and shown not to apply to *Mackenzie's* case. For the same reasons I hold that it does not apply to the present, being distinguished from it by these facts that in *Urquhart's* case it was proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June 1870 he had given the forger money to retire one of these bills which was known by him to be forged. No such circumstances exist in the present case. Upon general principles I cannot too strongly repudiate the idea that one person can fasten liability upon another with regard to a matter with which that other had no previous concern, by writing him letters or sending him documents which *ex facie* demand an answer, and afterwards founding upon the fact of no answer being received to them as inferring liability of some sort on the part of the person to whom they were sent. I consider it to be 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, and to countenance any other doctrine might, I think, be productive of most mischievous results, and might put honest people to a vast amount of annoyance, trouble, and expense. In the present case it appears from the proof that the defender never saw any of the bills mentioned in the list, never knew of their existence, and that he paid no attention to any of the past-due notices which were sent to him, and I think it would be monstrous to hold that by so doing he should be held to have incurred any liability whatever to the pursuers. But the fact of the pursuers founding upon his silence with regard to these past-due notices raises this inquiry—why did they never mention the matter of these bills during all these years, when, time after time, the defender took no notice whatever of the intimations which were sent to him, and, although he was passing constantly through Balfron, never once called at the bank to inquire whether the bills regarding which notices had been sent to him had been taken up or not. Surely that state of matters demanded in their own interest some attention from the bank, and I can only interpret their neglect in this matter and their carelessness with regard to the guarantees, by supposing that they did not want to interfere with a lucrative business by raising any questions about these bills, and that, if they had suspicions, they disregarded such in the confidence that should the guarantees or bills turn out to be forged, the well-to-do Mr Cowan would pay up rather than expose his brother-in-law to a prosecution for forgery.

"A strong attack was made by counsel for the pursuers on the credibility of both the defender and David Moir, and he specially founded on what he termed the defender's incredible evidence regarding the past-due notices which undoubtedly were sent to him by the bank. At first sight I must say that it seems somewhat extraordinary that the defender did not distinctly remember having received notices such as those shown him at the proof over and over again within the last twelve or thirteen years, but when it is considered that the average number of such notices was about two in the year, that the defender's attitude of mind was that he knew nothing about the bills to which these notices referred, and knew that he had never signed any such bills, and accordingly paid no attention whatever to the notices, but just threw them aside or destroyed them, it is not surprising that he says he does not know whether he received all these notices. I think his attitude of mind is very well expressed in the following question and answer:—'(Q) Do you say that you never received these various notices?—(A) I cannot say I never received them, but if I got any of them I would not know what they were.' He was thereafter subjected to a pretty stringent cross-examination, in which, although it appears to me that he was perhaps acting too much on the defensive, yet he did not impress me as saying what he thought or knew to be untrue, and I am bound to say that the manner in which both he and Moir gave their evidence impressed me with the belief that they were speaking the truth to the best of their knowledge and belief, and were credible witnesses." [*His Lordship then dealt with certain other objections to the defender's credibility, &c.*] "The result I have arrived at, accordingly, is that it is established by the proof that the signatures to the documents libelled are not the signatures of the defender, and that he is entitled to absolvitor with expenses."

The pursuers reclaimed, and argued—The defender's statement that he had not received or at any rate had not understood the notices was incredible. He ought to have informed the bank that the signatures were forgeries. He did not do so, and must accordingly be held to have homologated his signatures. They referred to the following authorities — Bell's Principles, sec. 27a; *Boyd* v. *Union Bank of Scotland*, December 12, 1854, 17 D. 159; *Maiklem* v. *Walker*, November 16, 1833, 12 S. 53; *Warden* v. *British Linen Company*, February 13, 1863, 1 Macph. 402; *Brown* v. *British Linen Company*, May 16, 1863, 1 Macph. 793; *Urquhart* v. *Bank of Scotland*, June 14, 1872, 9 S.L.R. 508; *Mackenzie* v. *British Linen Company*, February 11, 1881, 8 R. (H.L.) 8, 18 S.L.R. 333; *Freeman* v. *Cooke*, (1848) 2 Wel. Hurl. & Gordon, Exch. 654; *Ogilvy* v. *West Australian Mortgage and Agency Corporation*, [1896] A.C. 257.

Argued for the respondent—The Lord Ordinary was right in believing the respondent's statement that he knew nothing about the bills or his forged signatures. If that were so, the reclaimers' case was ended. Assuming, however, the contrary, a person might become liable on his forged signature in one of two ways, viz., by authorisation, or by adoption and consequent bar or estoppel from pleading the forgery. There was no suggestion here of authorisation. As to adoption, you could not adopt by mere silence, but must do something active, or at any rate before mere silence could suffice three things at any rate were requisite, none of them forthcoming in the present case; there must be knowledge on the part of the defender that his signature had been forged; knowledge that the pursuers were relying on it, and a change for the worse in the pursuers' circumstances caused by that reliance. The cases of *Boyd* and *Freeman*, *cit. sup.*, were altogether in respondent's favour. In the cases relied upon by the pursuers there was this important difference, that the bill had always actually been laid before the party; here nothing except vague notices.

At advising—

LORD JUSTICE-CLERK—The sole question now to be decided in this case is whether a bill, on which the signature of the defender is proved to be a forgery, can be founded

upon to make him liable in its amount in respect that the pursuers have proved that he homolgated and adopted the signature as being genuine.

The contention of the pursuers is founded on the following facts:—(1) that a series of bills bearing to be drawn by the defender and accepted by David Moir had been discounted by the pursuers, each being, although the amounts varied, practically a renewal of the bill preceding it; (2) that notices of the bills being past due were sent in ordinary form to the defender; (3) that the defender did not send any reply to or take any notice of the intimations; (4) that he never saw any of the bills or knew of their existence except in so far as he received the notices; (5) that there is no evidence that he ever knew that David Moir was forging his name. The case turns upon what the defender did or did not do, not as regards the bill founded on, but as regards previous bills, of which this one is in sequence. The fact is that he never saw or knew of this bill until his attention was specially called to it; he at once repudiated it as a forgery, which it was. Thus there is nothing to found upon as regards the bill in question. The case is that he had put himself in such a position as regards the course of bills previously that he has no right to plead that he is not liable on the present bill, though forged, because of what he had done or failed to do in regard to previous bills. I cannot assent to any such idea. But even if it were sound I am of opinion that it would have no application to this.

The case really comes to this test—Is a person who does nothing by word or deed liable to be held in law to have homolgated and adopted as his an alleged writing of his which has been forged by another? I am clearly of opinion that no such legal deduction can be drawn of homologation or adoption in such a case. Passivity can never constitute an unreal obligation into a real, can never make a man into a debtor who has neither said nor done anything to make him a party to the obligation, which has no existence apart from some action on his part. What action might be sufficient is a different question. It is possible that very little in the way of overt action, if it was unmistakable, might be sufficient. But here there is no action even of the most shadowy kind. I concur entirely in the words of the Lord Ordinary as regards the proposal to draw conclusions from the fact that a person who receives notices from which some obligation may be implied, and sends no reply, when his Lordship says—"I consider it to be the right of every person who receives a letter or other document regarding a matter in which he has no concern, to destroy that document at once and take no further notice of it, and to countenance any other doctrine might I think be productive of most mischievous results, and might put honest people to a vast amount of annoyance, trouble, and expense."

I demur entirely to the idea that an obligation can be set up against anyone by plying him with notices of which he takes no notice, or when it is found that he takes no notice, lying by and doing nothing, and then coming forward and saying "Silence gives consent." That saying is not a maxim in law, either criminal or civil, in cases where the parties have never been in joint contact in any way in regard to the matter in question, all communication having been from one side only.

In all I have said hitherto I have assumed that the party receiving the notices, read them and understood their import and effect to be as the pursuers maintain them to be. But in this case the pursuers have another difficulty to encounter even if their proposition in law were sound. For it is necessary to assume in order to the success of their contention in that view, viz., that it be proved that the defender knew and understood the notices which were sent to him. Mere proof that they were transmitted could never be sufficient. They must be brought home to him as committing him to their contents as understood and accepted by him as inferring obligation against him, before it could be held—even if that were the law—that inaction on his part after receiving the notices fastened on him an obligation which the document to which the notice referred did not do, seeing that it was forged. Now that, if a relevant subject for inquiry, would depend entirely on fact. But in this case we have the Lord Ordinary expressing a very strong opinion as to the defender's honesty and truthfulness, and accepting as undoubted fact the allegation of the defender that he did not understand the notices as referring to any obligation undertaken by him. In the general case the Court will always accept the view of the judge who tried the case on the trustworthiness of evidence, but of all cases in which his view as to credibility of a particular witness should receive effect this case is the strongest, where throughout the attention of the judge would be fixed upon the point of trustworthiness of a witness's testimony.

Therefore I have no doubt in this case in accepting the Lord Ordinary's opinion, the result of which is that it never was brought home to the defender's mind that he was being held by the bank as a debtor under the bills.

On both grounds therefore I am in favour of adhering to the Lord Ordinary's judgment.

Lord Kyllachy—In this case I agree entirely with the judgment of the Lord Ordinary. I agree with him in his view of the evidence, as to which, even if I inclined to differ, I should be slow to do so, considering that he saw and heard the witnesses, and formed, as he tells us, so decided an impression particularly as to the credibility of the defender. I agree with him also in his view of the law applicable to the case so far as it involves questions of law. In particular, I agree that the present case is really ruled by the case of *Boyd*, 17 D. 159, to which his Lordship refers, and by the opinions, if not the judgment, in the case of

Mackenzie, 8 R. (H.L.) 9, to which he also refers, not to speak of the carefully reasoned judgment of Lord Shand pronounced in the latter case in the Court of Session, a judgment which was approved without qualification in the House of Lords, and to every word of which I am glad to have the opportunity of subscribing.

In view, however, of the importance of the question and of the uncertainty which (if one may judge from the recent argument) seems still to prevail as to the state of the authorities, I may perhaps add one or two observations with respect to the bill for £70 as to which alone the pursuers reclaim.

The leading observation, and perhaps the most crucial, is I think this—that as regards the particular bill which is here in question, there is no impeachment whatever of the defender's conduct. It is not suggested that he saw or heard of it, or knew of its existence before at earliest the 7th of February 1905, when it was still current, and when the acceptor's insolvency being declared, he (the defender) at a meeting with the pursuers' accountant at once repudiated his signature.

Accordingly, the case against the defender is not that he adopted this particular bill, but that he (as it is said) adopted certain previous bills which were also forged, and of which, although retired by the acceptor, he got notice as they became due. That is really the only case made against the defender, and it rests upon this—not that he did anything, or wrote or said anything, but that he omitted to reply to the said notices, and to inform the bank, that he had signed no bills and denied liability. In other words, the proposition of the pursuers is really this—that although he (the defender) was not even their customer and owed them no duty beyond what he owed to every member of the public, he was yet bound to answer their notices, and, not doing so, must be held to have adopted the said previous bills, and by anticipation also adopted the subsequent bill to which this action relates.

Now, it must be acknowledged that this is a doctrine entirely novel. I think I am safe in saying that in no previous case in which, a defender's adoption of a particular bill being alleged, and his conduct with respect to that bill being found unimpeachable, he has nevertheless been held liable by reason of something imputed to him with respect to previous bills where his name had been used. There was certainly no such suggestion made in the case of *Mackenzie*, where the element in question existed, but where even in the Court of Session the only use sought to be made of it was that of supporting an averment that the particular bill there in question had been discounted with the defender's actual knowledge and authority. On the other hand, in the case of *Boyd*, which I have already mentioned, the proposition was advanced, and was by an unanimous judgment rejected. I was therefore throughout the debate somewhat anxious to ascertain the exact basis of the pursuers' argument, and doing my best to analyse it, it seemed to me to involve at least these four propositions—(1) That as matter of fact the defender had for some time known, or been bound to know, that his name was being forged by his brother-in-law upon bills discounted from time to time with the pursuers; (2) That so knowing, or being bound to know, he was also bound to anticipate that the same thing would or might continue indefinitely; (3) That being bound so to anticipate, he thereby incurred a legal obligation to warn the pursuers by informing them of what he believed or suspected; and (4) that being so bound, but remaining silent, he thereby accredited, and must be held to have accredited, his brother-in-law to the pursuers as a person who had his authority in time coming to discount bills bearing his signature.

Now, of course, if the Lord Ordinary is right in his view of the facts, and in particular of the defender's evidence, the basis of this whole argument is displaced. But assuming, *arguendo*, the contrary, I think it right to state—to do so as distinctly as possible—that in my humble opinion not one of the above propositions can be supported either on principle or authority.

In the first place, I consider that it is an arbitrary and quite illegitimate inference that the acquiescence in what is past involves acquiescence with respect of the future. That is just the kind of argument which was advanced and negatived in the recent case of *Carron Company* v. *Mercer Henderson*, 23 R. 1042, 33 S.L.R. 736, which we have lately had more than once to consider.

But further, and in the next place, I am quite unable to see upon what legal principle a person can be held legally bound to answer letters addressed to him by persons to whom he stands in no special relation, in order to warn such persons of errors under which they appear to labour, or risks which they appear to run. Moral duties of that kind there may be, although in such matters moral duties may be sometimes conflicting. But legal obligations and moral duties are different things. And if prejudice follows from reliance on people doing what they are under no legal obligation to do, I am afraid that persons so relying must just take the consequences.

I am quite aware that there was at one time in this Court a disposition in such matters to overlook, or rather ignore, the distinction between perfect and imperfect obligations. And the high water-mark of that tendency was, I humbly think, reached in the cases of *Urquhart* and *Mackenzie*. But as I have already said, the decision in the case of *Mackenzie* was reversed by the House of Lords; and I think that nobody reading the judgments in that case can fail to be satisfied that the reversal was opportune. It has since been, I think, quite recognised that the case of *Urquhart* was in effect overruled by the case of *Mackenzie*, and that the judgment of Baron Parke in the case of *Freeman* v. *Cooke* (2 Exch. 654) (referred to and approved in the House of Lords judgments) expresses correctly the limits within which liabilities

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