penses, and hoped that this case would not be a precedent.

LORD COWAN and LORD BENHOLME concurred with the Lord Justice-Clerk; and the Court reponed the appellant on condition of paying £10, 10s. of expenses, and delayed the case for a week till the expenses should be paid.

When the case was again called on the roll the expenses had not been paid, and the Court dismissed the action.

Agent for the Appellant—J. Y. Pullar, S.S.C.

Agents for the Respondent—J. & R. D. Ross, W.S.

Friday, June 16.

ABERDEEN TOWN AND COUNTY BANKING CO. *v.* JOHN DEAN & SON.

Judicial Factor—Power to submit. Held that a judicial factor cannot submit to arbitration, so as to bind the factory estate, a claim of damages arising out of his own personal delinquency.

Question, whether in the ordinary case it is *ultra vires* of a judicial factor to submit?

Opinion, per Lord Justice-Clerk and Lord Neaves, that a reference to arbitration under an executorial clause of submission in a contract is within the power of a judicial factor.

Mr John Brebner, railway contractor in Aberdeen, died on 2d January 1857. At the time of his death he was possessed of a large number of railway shares. He had also entered into various railway contracts, and, among others, one for the construction of the Alford Valley Railway. This contract, which was dated 11th January 1856, contained a clause of reference to Alexander Gibb, civil engineer in Aberdeen, as sole arbiter of all disputes and differences between the parties regarding the meaning of the contract or the execution of the works. Shortly after the death of Mr Brebner, Mr Charles Graham Monro, writer, Stonehaven, was appointed judicial factor on his intestate estate, with the usual powers; and he thereafter, with consent of the Alford Valley Railway Company, entered into a sub-contract with John Dean & Son, railway contractors in Aberdeen, for the construction by them of the railway and relative works which Mr Brebner had undertaken to execute. By this sub-contract Messrs Dean & Son became bound to execute the works for considerably less than Mr Monro, as representing Mr Brebner's estate, was to receive from the railway company. Mr Monro and Messrs Dean & Son also entered into a supplementary contract with the railway company for the execution of works not embraced in the original contract between Mr Brebner and the railway company. Both the subcontract and the supplementary contract contained a clause of reference to Mr Gibb, similar to that contained in the original contract.

Mr Monro, as judicial factor on Mr Brebner's estate, received the instalments payable by the railway company for the works executed by the sub-contractors, Messrs Dean & Son. The balance due by the railway company to Mr Monro and Messrs Dean & Son at the completion of the railway works was settled under a reference to Mr Alexander Gibb, who found Messrs Dean & Son entitled to £6000, with interest. That sum was accordingly paid by the railway company.

At the time the contracts above referred to were entered into, Mr Monro was the law agent and adviser of Messrs Dean & Son, and he continued to be so until after the railway was completed. He did not furnish them with any account of the sums he had received and paid on their account. In 1858, when they applied for payment out of the funds which he had been receiving from the railway company, he represented that he had paid away all the money belonging to them in his hands. Messrs Dean & Son's own funds having become exhausted, they were unable to provide workmen and materials sufficient to carry on the works of the contract, in consequence of which the works were taken entirely out of their hands. Messrs Dean & Son alleged that at this time Mr Monro had in hand a balance of their funds amounting to upwards of £13,000, which he illegally withheld from them, and they claimed damages for the loss and injury which they thereby suffered. Various disputes also arose between Mr Monro and Messrs Dean & Son, with reference to questions of accounting under the supplementary contract. It was ultimately arranged that these disputes should be settled by arbitration; and accordingly, by submission dated 15th December 1865, and 17th, 23d, and 25th January 1866, between "Charles Graham Monro, writer in Stonehaven, as judicial factor on the estate of the now deceased John Brebner, late railway contractor in Aberdeen, on the one part, and John Dean & Son, sometime railway contractors in Aberdeen," and the individual partners of the said firm, and the North of Scotland Banking Company, on the other part, the parties thereto submitted and referred "all demands, claims, disputes, questions, and differences depending and subsisting between them upon any account, occasion, or transaction whatever in relation to the Alford Valley Railway, and specially in relation to the railway and other works executed in connection therewith, to the amicable decision, final sentence, and decreet-arbitral to be pronounced by George Marquis, accountant in Aberdeen, as sole arbiter chosen by the said parties." Mr Marquis accepted of this submission, and on 10th June 1868 issued a decree-arbitral, whereby he *inter alia* found Messrs Dean & Son entitled to damages for the loss and injury suffered by them in consequence of the retention by the judicial factor of monies due and payable to them for works executed by them, and he modified the damages to the sum of £4159, with interest at 5 per cent. from various dates.

In the meantime several claims were made against the Aberdeen Town and County Bank with reference to a large number of railway shares belonging to the factory estate, which Mr Monro had transferred to the bank for a nominal consideration, for the purpose, as was alleged, of reducing a debt due by the firm of Kinnear & Monro, of which he was a partner. On 1st December 1868 Mr Monro's appointment as judicial factor was recalled, and Mr Adam Gillies Smith, C.A., Edinburgh, appointed in his room. In consequence of the competing claims the present action of multiplepoinding and exoneration was raised by the Aberdeen Town and County Bank. On 3d July 1869 it was conjoined with a process of reduction, at the instance of Messrs Dean & Son, of certain of the claimants' grounds of debt. In the course of the competition the question was raised, whether the decree-arbitral pronounced by Mr Marquis was binding on the factory estate.

In order to facilitate the decision of this question a joint minute was lodged in process, admitting that Mr Monro did not apply for or obtain from the Court any special powers, or any authority from the parties interested in the factory estate to enter into the submission in question, and Messrs Dean & Son also waived any right competent to them to insist in the validity of the decree-arbitral being challenged only in a process of reduction, and consented to the plea against its validity being disposed of in the same way as if a summons of reduction had been raised and held as repeated in this action. The question thus raised was debated before the Lord Ordinary (ORMIDALE), who thereafter pronounced the following interlocutor:—"Finds that it was *ultra vires* of Mr Munro, the former judicial factor on the deceased John Brebner's estate, to enter into the submission in which the decree-arbitral upon which the right and interest of Messrs Dean & Son is alone founded and maintained in the present process was pronounced, and that said decree-arbitral is consequently invalid and insufficient to support the reduction at their instance, and their claims in the multiplepoinding."

His Lordship in a long explanatory note, added:—"Is the Lord Ordinary right in holding that the decree-arbitral referred to is invalid? And this depends on the question whether it was or was not *ultra vires* of Mr Munro, the former judicial factor on the late John Brebner's estate, to enter into the submission in which the decree-arbitral was pronounced. In considering this question it is of importance to keep in view that it is not said that Mr Munro was invested by the Court or otherwise with any special or express power to enter into the submission in question. On the contrary, the proceedings show, and the parties have concurred in admitting in their joint minute, that 'Mr Munro, the judicial factor on the deceased John Brebner's estate, was appointed with the usual powers, and, during the time he held office, did not apply for or obtain from the Court any special powers or any authority from the parties interested in the factory estate, to enter into the submission in question.'

"The question therefore very purely arises, whether a judicial factor, appointed with the usual powers, or, in other words, competently, is empowered to enter into a submission involving the interests of his factory to a large extent, as unquestionably the submission in the present instance did?

"The parties opposed to Messrs Dean & Son maintained that it was *ultra vires* of Mr Munro to enter into such a submission, and in support of their contention they cited the case of *M'Dowal* v. *M'Dowal*, 8th July 1778, M. 4058, where it appears to have been held by the Court that a judicial factor has no power to enter into submissions.

"Nor can the Lord Ordinary discover anything in the circumstances of the case of *M'Dowal*, to prevent it being a precedent in point for the present. There, as here, a decree-arbitral, pronounced in a submission which had been entered into by a judicial factor appointed with the usual powers merely, was, on his death, challenged and set aside at the instance of the judicial factor who succeeded him. Neither can the Lord Ordinary see that the Court in deciding that case proceeded on any speciality whatever, or that there was anything in it to distinguish it from the present. On the contrary, he finds it stated in the report of the case, 'The Court were of opinion that, under the usual power of a judicial factor on a subject, that of referring claims is not included; and it was said by several of the Judges that the Court would not grant such a power on the application and consent of only part of the creditors; that even although there were an application from the whole of the creditors, it was not the province of the Court to grant such a power.' And the report, in conclusion, bears 'that the judgment was finding that the factor had no legal or sufficient powers to enter into the submission on which the decree-arbitral proceeded, and that the same was not sufficiently homologated by the creditors so as to supply said original defect.' Nothing could be more in point, or apparently more conclusive of the question in the present case.

"Just as little can the Lord Ordinary find any reason for holding that the decision in *M'Dowal's* case has been over-ruled or held to have been erroneously pronounced. So far from this being so, he finds that the case of *M'Dowal* is referred to in the work of Mr Montgomerie Bell as of standing authority (Bell on the Law of Arbitration, p. 107).

"On authority, therefore, the Lord Ordinary thinks his judgment could not have been otherwise than what it is; and, on principle, he thinks it is also well founded. The duty of a judicial factor is to manage and preserve the estate falling within his charge; and he cannot, without special authority to that effect, do anything that may have a contrary effect. But it is obvious that for a judicial factor, in place of resorting, when necessary, to the established tribunals to leave or delegate a matter most materially affecting and involving the estate under his charge, to the arbitrament of a private individual, is, to say the least of it, a very hazardous proceeding—such a proceeding as appears to the Lord Ordinary to be inconsistent with the essential nature of his office and position. It was accordingly held, on principle as well as authority, in the recent case of *Murray and Another* v. *Muir*, 13th December 1867, 6 Macph. 145, that, prior to the Trusts Act of 1867, testamentary trustees, under a deed which contained no power to refer, were not entitled to refer important claims of the trust to arbitration. The opinions of the Judges in that case are very instructive as regards the present, in particular as showing the distinction between compromising and submitting claims, and between the powers in some respects of tutors and trustees or factors.

"What would have been the result if the judicial factor in the present instance had entered into the submission after applying for and obtaining power to do so from the Court need not be inquired into, as no such application was made or power granted. The Lord Ordinary, however, may say, that it was at the very least the duty of the judicial factor, before entering into the submission in question, to have stated the circumstances to and applied for the authority of the Court. If he had done so, intimation of his application would have been made to the parties interested, and they would have had an opportunity of objecting or consenting to the power asked being granted."

Messrs Dean & Son reclaimed.

FRASER and LANCASTER, for the reclaimers, contended that the case of *M'Dowal*, relied on by the Lord Ordinary, was not decisive of the question regarding the power of a judicial factor to submit, as there were other grounds for the decision of that case; that a factor *loco tutoris* had power to submit, and that there was no reason for distin-

guishing between a factor *loco tutoris* and a judicial factor; and that Mr Monro had done rightly in submitting to Mr Marquis the claims against the factory estate.

Reclaimers' authorities — *M'Dowal*, M. 4058; *Falconer*, M. 16,380; More's Notes to Stair, p. 428; *Corson*, 13 S. 1093, 7 Jur. 501, 10th July, F. C. 891; *Anderson*, 17 D. 596; *Aberdeen Bank* v. *Blaikie*, 16 D. 470; *Bryce*, 6 S. 425; *Esson*, 18 D. 676; *Lin*, 5 Brown's Sup. 50; *Somerville's Factor*, 14 S. 451; *Vere* v. *Dale*, M. 16,389; *Howie*, 5 S. 77.

WATSON, SHAND, BIRNIE, and H. J. MONCREIFF, for the respondents, maintained that it was *ultra vires* of a judicial factor to submit claims affecting the estate under his charge, and that in any case Mr Monro was not entitled to submit claims of damages arising out of his own delinquency.

Respondents' authorities — *M'Dowal, ut supra;* Bell on Arbitration, p. 347; *Thomson*, 6 Macph. 145; *M'Dougal*, 15 D. 776; *Maconochie*, 19 D. 336; Ersk. iii. 3. 39.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has decided this question, which has incidentally arisen in the process of multiplepoinding, by finding "that it was *ultra vires* of Mr Monro, the former judicial factor on the deceased John Brebner's estate, to enter into the submission" in question; and he therefore, in the reduction at the instance of Dean & Son, repels the reasons of reduction. I am of opinion that he has done rightly, though I am not quite sure that I can agree with him in the view which he expresses in his note, that a judicial factor cannot submit to arbitration questions involving to a large extent the estate under his charge. We have listened to a very learned argument as to the effect of a general clause of reference in a contract, and also as to the specialties of the contract entered into by Mr Brebner, and carried out by Mr Monro. I do not think it necessary to decide those questions. As regards the general powers of a judicial factor, I shall only say that I am much impressed by the latter part of Mr Fraser's argument. The general question certainly requires grave consideration. In the second place, if the submission had been to Mr Gibb under the powers contained in the original contract or in the sub-contract, my impression is that the judicial factor would have been supported within the facts of that submission, inasmuch as it was necessary for the execution of that contract, for which his constituent was bound, and which he was therefore obliged to proceed with in the execution of the trust committed to him. There could be no good objection to the submission if the matters submitted were within the submitting clause either in the original contract or in the sub-contract. In the third place, I think Mr Fraser was successful in showing that, looking to Mr Gibb's position, it would be reasonable to substitute for him as arbiter some one who stood in an impartial position. But all those matters seem to me to be entirely out of this case. I think that what Mr Monro did was to enter into a submission to Mr Marquis of matters not submitted to Mr Gibb either by the original contract or by the sub-contract. He submitted, not matters arising under the contract or regarding the execution of the works, but generally "all demands, claims, disputes, questions, and differences depending and subsisting between them upon any account, occasion, or transaction whatever in relation to the Alford Valley Railway." I cannot doubt that those general expressions were chosen for the purpose of including the matters of Dean & Son. The submitting clause must be read in the light of their claim, which appears to me to contain little more than a statement that Mr Monro or his firm, who were agents of Dean & Son, had in that capacity abused their trust; that Mr Monro had, as judicial factor, received money which he improperly kept back from Dean & Son, and applied to his own purposes, and that he had systematically misrepresented the state of accounts. For these acts damages were claimed, and the arbiter gave effect to that claim by awarding more than £5000. Now, in the first place, I am clearly of opinion that such a claim for damages did not fall within the submitting clause of either the original contract or the sub-contract; and, in the second place, even supposing the estate to be liable in these claims, I doubt whether a question of that kind could competently be made the subject of reference by a judicial factor. But it is not necessary to decide even that point, because I think it manifest that the estate was not liable for the claims made under this submission, and that consequently the judicial factor in permitting them to be submitted clearly went beyond his powers. I think that the submission was illegal, since it had reference to acts of personal delinquency on the part of the judicial factor, and that the decreet-arbitral following upon it was consequently null. On that ground I am for adhering to the Lord Ordinary's interlocutor.

LORD COWAN—It is impossible to look at this record without seeing that very many important questions between the parties in this competition will remain for discussion and decision after the present question has been disposed of. I think, however, that the Lord Ordinary acted quite rightly in disposing of it in the first place, because he thus simplified the case, and cleared the way for the discussion of the various claims set forth on record. I think his Lordship has decided this question rightly, but I am not prepared to acquiesce in the ground on which he rests his judgment—viz., that it is *ultra vires* of a judicial factor to enter into a submission. The authority of the case of *M'Dowal*, upon which the Lord Ordinary relies, has been very much shaken by the explanations of that case which have been given at the bar, and particularly by the very interesting account which Mr Fraser has given us of the office of judicial factor. I do not wish, however, to impeach altogether the authority of that case, since it has been referred to in subsequent cases as an authority on the general question. Without saying, then, that it was ill decided and should be disregarded, I will merely remark that when the abstract question arises it will require very serious reconsideration.

The question, however, which we now require to decide is, whether this submission, in the circumstances in which it was entered into, was within the power of this judicial factor. I do not think that the decreet-arbitral can be separated from the submission on which it proceeds. In some instances it has been held that a decreet-arbitral may be *pro parte* sustained, and *pro parte* set aside; but having regard to all the circumstances of this case, I do not think that we can here adopt that course. I quite concur with your Lordship in thinking that we should affirm the plea put on record by several of the claimants, that it was *ultra vires* of Mr Monro to enter into the submission in question, and that we should accordingly

adhere to the findings of the Lord Ordinary's interlocutor.

I abstain from saying whether some of the claims submitted to the arbiter may not ultimately be found exigible from the estate under the factor's charge, or whether all are not claims merely involving personal liability on his part for acts outwith his factorial character. These are questions which remain to be decided in the competition, and therefore I will only say that the decreet-arbitral cannot be founded on to any extent as fixing a claim on the estate under the charge of the judicial factor.

LORD BENHOLME—After what your Lordship has said I think it unnecessary to express my opinion at any length. I concur with your Lordship in thinking that we are not called on to determine the general question whether a judicial factor has power to submit, for I am clearly of opinion that in the present case the matters submitted, and the terms of the submission, were *ultra vires* of the judicial factor. My opinion in this case rests on two grounds—(1)—That what was submitted was a claim of damages; and (2) that the damages were caused by the delinquency of the judicial factor, who could not thereby involve in liability the estate under his charge.

LORD NEAVES—I quite concur with your Lordship in thinking that the decreet-arbitral in this case must be set aside, and that it is not necessary to decide the general question as to the power of a judicial factor to submit. But I cannot help saying that the decision in the case of *M'Dowal* (whatever analogy it may have to the present case) was undoubtedly correct. A factor was appointed to manage a bankrupt estate, which had been brought into Court by a process of ranking and sale. Now, in such a case the factor represents the creditors and not the proprietor; his power of administration is of the simplest description, and may be brought to an end at any moment by a sale taking place. Though the price and the intermediate rents are paid over to him, it is not for him but for the Court to decide what creditors shall be ranked on the estate. It would be simply absurd to allow such a factor to withdraw the claims of the creditors from the cognizance of the Court, and submit them to a private person as arbiter.

The general question which has been discussed in this case is certainly attended with great difficulty. I am not prepared to say that factors of any kind possess an unlimited power of submission. Perhaps a factor *loco tutoris* is privileged in this respect, on the ground that greater powers are required by a factor who represents a proprietor incapable of acting for himself. The character of the submission may also afford a ground for distinction. Thus, a submission of an existing *lis* is in quite a different position from an executorial clause of submission in a contract. If in the course of a factor's administration he finds it necessary to enter into a contract, requiring for its extrication from day to day a reference to a standing arbiter, —if that be the only practicable way of carrying out such a contract, and if it is so usual that contractors will not bind themselves to a contract without such a clause—I should be sorry to say that the power of administration, which justifies the contract, does not also justify the arbitration, so essential to its execution.

As far, then, as I see just now, I am prepared to support the reference to Mr Gibb, the object being to save litigation and expedite the execution of the works. But this goes a very small way indeed to support the reference to Mr Marquis. We must judge of the claims which led to that submission by the claims actually made under it. Now, these are of such a nature that I very much doubt whether it was possible for any one to submit them in that way. They are personal claims against Mr Munro, mixed up with allegations of delinquency and malversation of every kind. It seems quite impossible to hold that they could be made the subject of a just or valid arbitration as against the innocent estate under the factor's charge. *Tenet culpa suos auctores.* On that ground alone, and without giving an opinion on the general question, I think that this submission and this decreet-arbitral are null and void.

The Court accordingly adhered to the Lord Ordinary's interlocutor, but reserved any claim competent to Messrs Dean & Son, not founded on the decree arbitral.

Agents for John Dean & Son—Renton & Gray, S.S.C.

Agents for A. G. Smith—Tods, Murray, & Jamieson, W.S.

Agent for Aberdeen Town and County Banking Company—John Auld, W.S.

Wednesday, June 28.

FIRST DIVISION.

MUIR *v.* WATSONS.

Husband and Wife—Legitimacy. Children of a pretended marriage between a man and the daughter of his deceased wife *declared* illegitimate.

The pursuer, Mrs Muir, is the only child of the marriage between Alexander Watson and Margaret M'Arthur or Taylor. The marriage took place in 1847, and Mrs Muir was born in 1848. Margaret M'Arthur, the pursuer's mother, had been previously married to William Taylor, and thus was the mother of Isabella Taylor. Upon her mother's marriage with Watson, Isabella Taylor, who was then about eight years old, came to reside with Watson, and continued to do so after her mother's death, which took place about three years after her marriage. Watson subsequently seduced Isabella Taylor, and thereafter went through a form of marriage with her at Gretna Green. The defenders are the children of Isabella Taylor by this connection. The object of the action was to declare the bastardy of the children, and that they are not entitled to the legal rights of lawful children of Alexander Watson, who was drowned in 1866.

The defences were (1) that it was not proved that Isabella Taylor was the daughter, or at least the lawful daughter, of Margaret M'Arthur or Taylor; (2) that even if she was, she was not aware that she was, and consequently married Watson *in bona fide*, in ignorance of the affinity between them.

The Lord Ordinary (ORMIDALE) found the facts proved which have been stated above; and, in addition, that Isabella Taylor, at the time of her marriage with Watson, was in the knowledge that he had been previously married to her mother, which rendered any discussion on the legal effect