nullity, or wilful failure to observe an imperative statutory requirement. There are recent cases in which such actions of reduction have been entertained—*Black* v. *Tennant*, 1 F. 423; *Boag* v. *Teacher*, 37 S.L.R. 578.

It is essential to the validity of a certificate not only that the applicant shall have timeously lodged, filled up, and signed the application in the schedule, but that he shall have done so *truly*. This word is emphasised; it occurs twice in section 8 of the Public Houses Act 1862, and is repeated in the schedule. The original application, there enjoined, is really an affirmation. In this case the reclaimer did not answer truly as to his age—a fact within his knowledge. This failure appears to have been wilful as no intelligible explanation is given; at least it was made recklessly and without any steps being taken to ascertain whether it was correct. He was only 19½ years of age, while he affirmed that he was 21. Therefore it was not a trifling inaccuracy which might not have had the effect of annulling the certificate.

The Magistrates and their reporter were entitled to rely on the truth of the answer, and the false affirmation having been made by the applicant himself the certificate granted on the face of it cannot stand.

The Court adhered.

Counsel for Pursuers—Salvesen, Q.C.—Cook. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for Defender M'Farlane—Baxter—Guy. Agents—Snody & Asher, S.S.C.

Tuesday, June 19.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

WILSON'S TRUSTEES *v.* LANDALE.

(*Ante*, March 14, 1900, p. 545.)

Process—Multiplepoinding—Claim—Competency—Claim put forward after Decree of Ranking and Preference by Parties Called as Defenders.

In an action of multiplepoinding a decree of ranking and preference, which disposed of the whole fund *in medio*, was pronounced in the Inner House, and the cause was remitted to the Lord Ordinary to proceed therein as accords. Thereafter certain parties, called as defenders in the action, moved the Lord Ordinary to receive claims, founded upon the ground of judgment which had been sustained in the Inner House. One party had claimed in the original competition upon other grounds and had acquiesced in the interlocutor of the Lord Ordinary repelling his claim. The other parties had not hitherto appeared in the process.

The Court *refused* to receive these claims.

Dymond v. *Scott*, November 23, 1877, 5 R. 196, *distinguished* and *commented on*.

This case was a sequel to the case of *Wilson's Trustees* v. *James Watson & Company*, reported *ante*, *ut supra*.

After the interlocutor of the Second Division of March 14, 1900 (there quoted) had been pronounced, David Guild Landale and others, who had been called as defenders, but had not appeared or claimed, moved the Lord Ordinary to receive claims, founded on the principle sustained by the judgment of the Inner House in the case of the claimants James Watson & Company. The Bank of Scotland, whose claim, founded on another ground, had been repelled by the Lord Ordinary, and who had acquiesced in his judgment, also moved to be allowed to lodge a claim founded on the same principle. On 22nd May 1900 the Lord Ordinary (Stormonth Darling) refused the motion.

Opinion. — "The competition in this multiplepoinding has hitherto been tripartite, the claimant Wilson claiming the whole fund *in medio*, and the Bank of Scotland and James Watson & Company claiming specific sums out of it. On 1st July 1899 I repelled the claims of the Bank of Scotland and James Watson & Company, and ranked and preferred Wilson to the whole fund. James Watson & Company reclaimed; the bank did not. The result of the reclaiming-note was that their Lordships of the Second Division recalled my interlocutor so far as James Watson & Company were concerned. They ranked and preferred these claimants *primo loco* to the fund *in medio* in terms of their claim and gave them decree for payment of the sum of £1420, 17s. 3d. with interest. They then, in express terms, ranked and preferred the claimant Wilson 'to the whole balance of the fund *in medio*;' they made corresponding changes in the findings about expenses; *quoad ultra* they affirmed the interlocutor reclaimed against, and they remitted the cause to me to 'proceed therein as accords.'

"I am now asked by certain parties who were called as defenders, but did not at first appear, to allow them to lodge claims founded on the principle given effect to in the case of James Watson & Company; and I am also asked by the Bank of Scotland to receive a claim by it, founded on the same principle, which differs from that on which their original claim was based. Now, of course it would be useless for me to receive claims if I could not afterwards give effect to them, and I do not see how I could consistently with the forms of process.

There can be no doubt that the process of multiplepoinding admits, and conveniently admits, of very great latitude in the lodging of claims, both by those who have been called as defenders and by those who have not. Claims are constantly received long after the prescribed time for lodging them has expired. There have also been

numerous cases in which, after a competition has been practically decided between two or more sets of claimants, others have been allowed to come in and claim, the question in each case being one of discretion, and being generally solved by the imposition of terms with regard to expenses already incurred. But the cases to which I was referred as illustrations of this course, all (with one exception) present the feature that no formal barrier existed in the shape of a final decree of ranking and preference. Thus in *Binnie's Trustees*, 10 R. 1075, the motion by the new claimants was made in the Inner House, when the only standing decree of preference was one pronounced by the Lord Ordinary; and the Court in remitting to the Lord Ordinary to receive new claims recalled his interlocutor *hoc statu*. Again, in *Cowan's Trustees*, 16 R. 7, at the time when the motion was made, there had no doubt been a judgment of the Inner House, but it merely consisted of a finding that the undisposed-of residue fell to be divided between the competitors, the heirs and executors of the testator, and there was no ranking and preference in favour of particular claimants. In these cases, therefore, the whole question was formally open, and nothing had to be considered except the question of terms.

"The case of *Dymond* v. *Scott*, 5 R. 196, which forms the exception to which I have referred, stands undoubtedly in a somewhat different position. There the Lord Ordinary had pronounced an interlocutor ranking and preferring the claimant Dymond for a particular sum, *quoad ultra* repelling his claim, and ranking and preferring the claimant Scott and others for the whole balance of the fund *in medio*. To that interlocutor the Court had adhered. In that state of matters the claimant Dymond arrested the fund to a certain extent upon a decree which he had obtained in a separate action, and he tendered in the Inner House a new claim in the multiplepoinding to be preferred for the sum so arrested. The Court allowed the claim to be admitted on terms as to expenses. Now, I do not doubt that Lord President Inglis, who was a master of process as well as of other more important things, must have seen his way to some mode of giving effect to the claim if the Court should afterwards think fit. I do not myself at this moment see how the new claim could have been sustained without recalling the ranking and preference in favour of Scott, unless, as Mr Chisholm suggested, the new claim could have been treated as a rider on Scott's. I inquired what the subsequent history of the case was, but I was informed that it went no further, owing, I think, to the condition as to expenses not having been fulfilled.

"It may be that in this case, if it ever reaches them, their Lordships of the Second Division may find some means of entertaining the claims now preferred without doing violence to their former interlocutor. Such a course would certainly have the advantage (if the statements of the claimants are well founded) of dealing equitably with all who are in the same position as Watson & Company, though I do not know that the persons making the present motion are entitled to very great consideration, because they could so easily have obviated the whole difficulty by appearing, even at the last moment, in the Inner House, and asking that some reservation should be inserted in the interlocutor. But it seems to me that in the Outer House at all events the formal obstacle is insurmountable. The remit to me 'to proceed as accords' means that I am to do everything necessary to carry out the judgment of the Inner House, but not that I am to do anything, either in form or substance, which will impair its effect.

"I must therefore refuse the motion to have the new claims received, and will only add that the Bank of Scotland is in an even more unfavourable position than the other claimants, because it has already joined issue with the claimant Wilson and has been cast."

David Guild Landale and the Bank of Scotland reclaimed, and argued—The Lord Ordinary was wrong in refusing to receive the claims, and in any view the Court should receive them now. There had been no competition and no decision except between the parties who appeared and claimed. It was now proposed to raise a new competition with other claimants—*Binnie's Trustees* v. *Henry's Trustees*, July 3, 1883, 10 R. 1075. It was not necessary to recal the interlocutor of the Inner House, because that had been pronounced in a different competition. But if it were necessary for the Court to recal its own interlocutor, that was not incompetent in a multiplepoinding, where a decree of preference did not necessarily determine the rights of parties, who were not in the process. Persons called as defenders, but not appearing, were not held as confessed, as in an ordinary action. If they did appear, they were rather in the position of a pursuer who could always raise a new action upon different *media concludendi*. When a claim was founded upon grounds which had been already sustained by the Court, the practice was to admit it at any time. An interlocutor of ranking and preference was no bar to its admission so long as there was no decree for payment, and the fund was still *in manibus curiæ*—*Morgan* v. *Morris*, March 11, 1856, 18 D. 797, and 3 Macq. 347; *Clyne* v. *Reid*, July 5, 1828, 6 S. 1085; *Mackay* v. *Murray*, Nov. 23, 1826, 5 S. 31; *Dymond* v. *Scott*, Nov. 23, 1877, 5 R. 196, the last-named being a case where a claim was received after final decree in the Inner House. The matter was entirely in the discretion of the Court, and where the claimants came forward as soon as they knew their legal rights, which was the case here, the Court ought to allow the claim to be received.

Argued further for the Bank of Scotland—The claim now put forward was not an amended claim, but a new claim founded upon wholly different grounds. The bank was therefore in the same position as if

they had lodged no claim. But an amended claim by a party already in the process might be admitted—*Elder's Trustees* v. *Elder*, March 16, 1895, 22 R. 505.

Argued for the claimant Wilson—The Lord Ordinary was right in refusing to receive the claims, and the Court should not receive them now. The Court could not recal its own interlocutor, and that was an essential step before these new claims could be received. But even if competent it was not reasonable that they should be received. The claimants had twice had notice of the action. In *Morgan* the claimants admitted had not been called as defenders, and the Court only admitted them on proof that they had not had notice of the action. There was no case in the books where a claim had been received after a final decree of ranking and preference had been pronounced in the Inner House. In *Dymond* the claim admitted was a rider upon a claim which had been sustained in the original competition, and that case was therefore not an authority for receiving a claim at this stage. It was settled that a decree of preference was a decree of exclusion of those not preferred—*Duncan's Factor* v. *Duncan*, June 3, 1874, 1 R. 964; *Haig* v. *Colquhoun's Creditors*, May 26, 1812, F.C.; *Graham's Trustees* v. *Graham*, March 20, 1868, 6 Macph. 820. In the last-named case the Court refused to receive a new claim tendered by a party whose first claim had been repelled. That was the position of the claim tendered by the Bank of Scotland.

LORD JUSTICE-CLERK—This is a case of a voluntary trust for payment of creditors. In the litigation which took place all parties had ample opportunity to state their claims and pleas. When the case was formerly before this Division of the Court it stood in this position. Two creditors, the Bank of Scotland and Messrs James Watson & Company, in their claims demanded that the trustee should be ordained to pay them interest on their debt, not in the form only of interest calculated as simple interest. The bank demanded that a decerniture should be given as for compound interest, and Messrs Watson & Company put their demand in the form that they were entitled to impute payments received by them to extinguish interest in the first instance. The Lord Ordinary repelled these pleas, and against his interlocutor James Watson & Company only took a reclaiming-note, which was successful. Following upon that decision of this Division the bank and certain other parties, who were originally called as defenders but did not appear, proposed to put in new claims based upon the successful plea of Watson & Company, maintaining that it was still competent for them to do so.

It is important to see what was the position of the process at the time when these parties came before the Lord Ordinary with their motions. The Court had by their interlocutor done four things—(1) Ranked and preferred Watson & Company in terms of their claim, (2) ranked and preferred Wilson, the original debtor, to the whole balance of the fund *in medio*, (3) *quoad ultra* affirmed the interlocutor, and (4) directed how expenses were to be disposed of, and remitted to the Lord Ordinary to proceed as accords, with power to decern for all the expenses found due.

Now, upon the face of it that interlocutor disposed finally of the whole fund *in medio*, which is disposing of the whole cause. The question is, whether thereafter the Lord Ordinary could receive new claims not before stated by parties who either entered the process as litigants when summoned, or being summoned did not appear. It is not disputed that at any time before that interlocutor was pronounced they could competently have come forward, and might, in the discretion of the Court, have been allowed to put in their claims and state their pleas. But here what is proposed is, that a Lord Ordinary, who can proceed only to do what is necessary to carry out the judgment of the Inner House, can receive claims, which if they are given effect to can only be given effect to by his dealing with the fund otherwise than the Court has ordered it shall be dealt with. In my opinion the Lord Ordinary was right in holding that he could not. There was no fund *in medio* with which he could deal. The judgment under which alone he could act expressly bore that the whole fund had been dealt with by ranking and preference. It is true that there was no decerniture ordaining payment to Wilson, but the holder of the fund was Wilson's own trustee, and the right he had to retain the fund was a right which necessarily ceased as regards any part of it to which the truster was judicially ranked and preferred. Any action by the Lord Ordinary by which new claims were allowed to be put in would have been action contrary to that interlocutor, the terms of which were to him the law of the case. No case was quoted to us in which such a thing was done in circumstances truly resembling the present case except that of *Dymond*. I shall only say about that case that I concur with the Lord Ordinary's observations upon it. But there is this marked difference between it and the present case, that the party coming in to claim was not presenting a new claim never before mooted in Court. His demand was to get at the fund in respect of a decree he held against the party who had been preferred, which decree he had obtained in another action. Accordingly the view may have been that the claim was a rider on that of the party who had been preferred.

On the whole matter I am of opinion that the Lord Ordinary's judgment is right, and ought to be adhered to.

LORD YOUNG concurred.

LORD TRAYNER—The only claimants who appeared in this process before the Lord Ordinary to discuss their rights and preferences to the fund *in medio* were three, viz., The Bank of Scotland, Messrs Watson

& Company, and Mr Wilson. After hearing parties and considering the cause, the Lord Ordinary repelled the claims of the two claimants I have first named, and ranked and preferred Mr Wilson to the whole fund. In that judgment the Bank of Scotland acquiesced, but Messrs Watson & Company reclaimed, and on their reclaiming-note we recalled the interlocutor of the Lord Ordinary in so far as he repelled Watson & Company's claim, and ranked and preferred Watson & Company *primo loco* in terms of their claim, and ranked and preferred Mr Wilson "to the whole balance of the fund *in medio*." *Quoad ultra* we adhered to the Lord Ordinary's interlocutor and remitted the cause to him to proceed therein as accords, and to decern for the taxed amount of expenses which we found due to Watson & Company.

In that state of the process the present reclaimers moved the Lord Ordinary to receive certain claims on the fund *in medio*, which they desire now to maintain with a view to obtain a ranking on the fund preferably to the claim of Mr Wilson. It is quite clear that the Lord Ordinary was right in refusing to receive these claims. He was *functus* except in so far as we had remitted to him, and could only do what by that remit we had authorised, namely, to give decree for the expenses when taxed, and do anything which was lawful and necessary to give practical effect to our judgment.

It is said, however, that if the Lord Ordinary could not competently receive the reclaimers' claims, we are able to do so, and should do so. I think we neither can nor should. It appears to me that the cause has been finally disposed of by us, and that we cannot go back upon our own judgment. We have found Watson & Company entitled to a ranking on the fund to a certain extent, and have ranked and preferred Mr Wilson to the whole balance. There is, therefore, no fund on which the present reclaimer can be ranked; the whole fund *in medio* is disposed of. The reclaimers urged that the competition was not finally disposed of, because although we had ranked and preferred Mr Wilson, we had given no decerniture in his favour. Whether there was a decerniture or not, there was at least a finding, and our findings when pronounced can no more be recalled by us than our decrees. But it was not necessary to decern in favour of Mr Wilson. The fund was in a sense in his own hands; it was in the hands of his trustee, who only held for him after all other claims sustained in the process had been met. Had a decree been necessary to enable Mr Wilson to obtain payment from his trustee, the Lord Ordinary would have granted such a decree *de plano* under our remit. The finding in Mr Wilson's favour was final and conclusive as to his right "to the balance of the whole fund." It is, therefore, I say that we cannot now receive or deal with the reclaimers' claims. Nor do I think we should even if we had the power. From the decisions cited to us there appears to have been an indulgence extended to defenders in a process of multiplepoinding, which has gone perhaps too far—an indulgence quite unknown in the case of any other kind of litigant. When the summons of multiplepoinding has been served each defender called is certiorated that there is a competition for a certain fund to which he has or pretends some right. He is called to come forward and discuss with others their respective rights and preferences on the fund. If they neglect to do so they have only themselves to blame if their rights are passed over or disregarded. The Court is not charged with the preservation or enforcement of rights which the holders of them do not come forward to assert and vindicate. While a competition is in progress claimants who had not previously appeared might, I think, be still allowed to lodge claims on cause shown, and on such conditions as to expenses as the Court might impose. But after the competition has been closed in the Outer House by an exhaustive judgment of the Lord Ordinary, I (for my own part) would allow no new claimant to appear except in the case of a claimant who had not been called as a defender.

The case of *Dymond* was cited to us as an authority in favour of the view that a new claim may be admitted after a final ranking has been pronounced. That case was a very special one. The claim there admitted at a late stage might perhaps have been sooner made as a claim on the fund *in medio*. But it was in fact a claim made by the holder of the bottomry bond upon the sum to which the owner of cargo had been preferred, in respect that cargo was liable for average. It was really a riding claim on the successful claim of the owner of cargo. Regarded in that light, the decision in *Dymond's* case may not be open to much adverse criticism, although I should have hesitated to admit even a riding claim at the stage which the process had then reached. But if regarded as an authority for the proposition that the Court may, after final ranking, admit an entirely new claim upon the fund *in medio*, I think it is inconsistent with our practice, and I should not be disposed to follow it.

LORD MONCREIFF—This case raises purely the question whether parties who have been duly cited as defenders in a process of multiplepoinding, but have chosen not to enter appearance but to await the result of a competition between those parties who have appeared, are entitled to come forward after final judgment has been pronounced and ask to be allowed to lodge claims for the purpose of taking benefit by the judgment, thus diminishing the shares of the fund *in medio* to which those parties who have appeared have been ranked and preferred.

There is no doubt that in the process of multiplepoinding the ordinary rules of procedure are to a certain extent relaxed. This results from the nature of the process. The holder of the fund finds that conflicting demands are made upon him, and his object

naturally is to throw the fund into Court and obtain exoneration as speedily as possible. He is often unable to ascertain with certainty all the parties who may be interested in the fund; and although he may ascertain their names, he may fail by advertisement or otherwise to advise them of the dependence of the process. Consequently considerable indulgence is shown to parties interested who have not been cited or received notice of the dependence of the process, and who are able to satisfy the Court that they did not know of its dependence. In the case of such persons there are decisions to the effect that even after final judgment they will be allowed to come forward and claim provided the funds are still *in manibus curiæ*. The case of *Morgan* v. *Morris*, 18 D. 797 and 818, and 3 Macq. 347, affords a very good illustration of the difference between the case of parties who have not been cited and that of those who have been cited but have not chosen to appear. After final judgment in a competition certain parties who had not been cited applied to the Court for leave to lodge claims. They were allowed to do so, but only on the Court being satisfied on inquiry that they had only recently heard of the dependence of the process, and on condition of a large payment of expenses (18 D. 818).

But in the same case, and at the same time, other parties who had been called to the multiplepoinding but had not appeared, desired, after final judgment, to claim on a different footing from that on which the competition had previously proceeded. This proposal the Court unanimously rejected, leaving the parties to adopt any other remedies which they might have.

Now, in the present case the reclaimers were duly called as defenders, and did not choose to appear; and they allowed the case to proceed so far that this Division pronounced a final judgment, the effect of which was to divide the whole fund between those claimants who did appear. In an ordinary action the proposal now made would undoubtedly be held to come too late; and among the various authorities which were cited to us I find none which in my opinion constrain us to apply a different rule to multiplepoindings. The only case which creates any difficulty is *Dymond* v. *Scott*, 5 R. 196. In that case, after a final decree of ranking and preference had been pronounced by the Inner House, a party who had been called as defender, and had appeared and been ranked in one capacity, was allowed after final judgment to lodge a new claim. That decision can perhaps be explained on the supposition that the new claim which was allowed to be lodged was regarded as a rider upon the claim for the owner of the cargo. I cannot otherwise reconcile it with previous decisions. While the report of the argument is clear enough though short, no opinions of the Judges are reported; which leads me to think that they cannot have intended to decide the larger question which was argued to us.

I am therefore of opinion that the Lord Ordinary has rightly refused the motion for the claimants.

The Court adhered.

Counsel for the Pursuers and Real Raisers—Napier. Agents—Webster, Will & Company, S.S.C.

Counsel for Claimants David G. Landale and Others—Solicitor-General (Dickson, Q.C.)—Younger. Agents—J. & J. Ross, W.S.

Counsel for Claimant the Bank of Scotland—W. Campbell, Q.C.—Pitman. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Claimant J. S. Wilson—Dundas, Q.C.—Chisholm. Agent—J. Gordon Mason, S.S.C.

Tuesday, June 19.

SECOND DIVISION.

[Sheriff-Substitute at Aberdeen.

WEIR *v.* PETRIE.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7—"*Undertaker*—"*Factory*"—*Factory and Workshops Act* 1878 (41 *Vict. c.* 16), *sec.* 93, *sub-sec.* (3)—*Mechanical Power Used in Aid of Manufacturing Process—Grindstone Driven by Gas-Engine.*

A workman, who was employed in a stone-dressing yard claimed compensation from his employer for injuries received by him in the course of his employment. The premises occupied by the employer consisted of a yard in which the stones were dressed by manual labour, and included an engine-house, where the workmen's tools were sharpened on a grindstone driven by a gas-engine. No other mechanical power was used in the premises. The claimant while dressing stones was struck in the eye by a piece of metal from a chisel which was being ground.

Held (1) that the premises were a factory within the meaning of the Factory and Workshops Act 1878, section 93 (3), and the Workmen's Compensation Act 1897, section 7 (2); and (2) that the employment was one to which that Act applied.

This was an appeal under the Workmen's Compensation Act 1897 in the matter of an arbitration before the Sheriff-Substitute (BURNET) at Aberdeen between James Petrie, claimant and respondent, and David Weir, builder, Aberdeen, appellant.

The facts stated as proved were as follows:—"The defender occupies premises at 23 Claremont Street, Aberdeen, in which he carries on the business of dressing stones for building purposes; the stones are dressed by manual labour, and the defender employs in that work a number of workmen, of whom on 4th July the pur-