LORD KINLOCH—I am of the same opinion. I think it clear that both the defender and Scott employed the agents in these actions; and it is not difficult to understand why. The defender evidently had an interest in the action of multiplepoinding; and, moreover, in that action, and by being a party to it, he actually got £125. I do not see the slightest evidence of mismangement on the part of the agents. And I think we cannot do otherwise than adhere to the Lord Ordinary's interlocutor.

Lord Ordinary's interlocutor adhered to.

Agent for Reclaimer and Defender—James Barclay, S.S.C.

Agent for Respondent and Pursuer—D. J. Macbrair, S.S.C.

Tuesday, November 22.

CHEYNE *v.* GRAY.

Procedure — Absence of Counsel — Professional instruction—Expenses. Reclaiming Note refused in respect of no appearance for reclaimer, whose counsel was alone in the case, it being no excuse that he was engaged in a proof before a Lord Ordinary, and was alone there too. The Court refused to hear a counsel instructed on the spot, remarking that that was not professional instruction. No expenses allowed, in respect that there was no appearance for the respondent either.

When this case was called no appearance was made for the reclaimer, and it was stated at the bar that, as the case was a small one, only a single counsel was instructed, and he was engaged in a proof before a Lord Ordinary, in which he was also employed alone. The Court, while observing that, in a case such as this, one counsel appeared to be sufficient, held that the excuse could not be accepted, and desired that the reclaimer's counsel be informed of this. In the meantime, the gentleman who had acted as counsel for the respondent (the pursuer) in the Outer House appeared at the bar, and stated, in reply to the Lord President, that he had not been instructed for the Inner House, though he had no doubt that he would be. After waiting for some time,—the reclaimer's counsel failing to appear,—the Court, in respect of no appearance for the reclaimer, refused the reclaiming note, but, in respect of no appearance for the respondent, without expenses.

Afterwards, a counsel appeared for the reclaimer, and in reply to the Court, stated that he had been instructed since the calling of the case, to support the reclaiming-note. The Lord President remarked that such instruction could not be held as professional instruction; and that the Court could not hear him. It was farther remarked, that as an interlocutor had already been pronounced, the Court could not listen to counsel's argument.

Reclaiming-note refused, but without expenses.

Agent for Reclaimer—James Buchanan, S.S.C.

Agent for Respondent—Thomas Sprot, W.S.

Wednesday, November 23.

FORBES *v.* INNES.

Process—Declarator — Reduction — Relevancy—Personal Exception — Glebe — Heritors. Circumstances in which it was held that the declaratory conclusions of an action could not be maintained so long as a certain decreet-arbitral remained unreduced.

Held that—where, after a regular motion of the presbytery for perambulation of the glebe, of which notice had been given to the heritors, the minister and one of the heritors of a parish had entered into a submission for the determination of the boundaries of the glebe, which submission was carried out through a long course of proceeding, and a final decreet-arbitral pronounced—it was not a relevant ground of reduction of the said submission and decreet arbitral, at the instance of the heritor, to say that the other heritors had not been made parties to the submission; and that he himself had become a party to it on the understanding that they should also do the same. *Held* that he was barred *personali exceptione*, no such understanding appearing on the face of the submissions, and no objection having been taken during the proceedings, and none of the other heritors having any interest to disturb the existing state of matters.

This was an action of declarator and reduction at the instance of Forbes of Haddo, against the other heritors of the parish of Inverkeithny, the Presbytery of Turriff, in which the said parish lay, the Rev. John Souter, the minister of the said parish, and George Cruickshank, farmer at Comisty, and John Ligertwood, advocate, Aberdeen, arbiter and clerk respectively, under a deed of submission which was therein sought to be reduced. The pursuer concluded (1) that it should be found and declared that the minister's glebe of the parish of Inverkeithny consisted "of the lands specified in the minutes of meeting of the Presbytery of Turriff, within which the said parish of Inverkeithny is situated, dated 15th August 1750, and which lands are therein described as follows:"—There was then inserted the description of the said glebe lands from the minutes of said meeting, which had been called for the express purpose of perambulating the same. There then followed a conclusion as to the pursuer's own property of Haddo adjoining the glebe, and one requiring the minister and presbytery to flit and remove from the same. "(2) That, if necessary, in order to give effect to the conclusions above written, decree of reduction should be pronounced, of, first, a pretended deed of submission, dated 1861, bearing to have been entered into between the defenders, the said Presbytery of Turriff and the said minister of Inverkeithny on the one part, and the pursuer on the other, whereby it was alleged that the said parties thereto submitted and referred to the defender, the said George Cruikshank, as sole arbiter, to ascertain, settle, and determine the boundaries of the said glebe of Inverkeithny. Second, a pretended decreet-arbitral, dated 22d February 1867, alleged to have been pronounced under the said submission.

In his condescendence the pursuer averred that, by the minutes of meeting of the Presbytery of Turriff in 1770, the limits of the glebe had been determined, and the boundaries accurately defined; that in consequence of the late minister, Mr Milne, having for many years been a tenant of the pursuer's authors in the farm of Dundore, on the estate of Haddo adjoining the glebe, the boundary of the glebe had been lost, and the pursuer's lands encroached upon; that for some years previous to 1860 a dispute had existed between the pursuer and the minister of the parish as to the

boundaries of the glebe; and that in 1860 a movement had been made in the presbytery by the defender, the present minister, for the perambulation of the glebe; that thereupon it was proposed that a submission should be gone into, with a view of settling the extent and position of the glebe, &c.; that the pursuer agreed to enter into such a reference to George Cruickshank of Comisty, one of the defenders in the present action, but his consent was given on the express condition that all parties interested were to concur, and that the submission was to be obligatory on all such parties, and should result in a final and conclusive settlement of the disputes, binding on the presbytery, the minister, all the heritors of the parish, and indeed all parties concerned. That he would not have consented to enter into any submission which was to be binding on only some of said parties. The deed of submission now brought under reduction was, as stated by him, signed by the pursuer on 4th May 1861. The parties to it, besides the pursuer, are the Presbytery of Turriff and the Rev. Mr Souter, as the minister of Inverkeithny. The heritors of the parish of Inverkeithny are no parties to it, and no consent, express or implied, was ever given to it by them. They were never communicated with on the subject, and had no knowledge of the said deed. The pursuer signed said submission in the belief that the other heritors of the parish and all parties interested would also be parties to it, and that the transaction would be made binding on them; but, as already stated, the heritors have not become parties to said submission, and the pretended decreet-arbitral following thereon is in no way binding on them, nor was the patron of the parish a party to it. He further stated that, "in case it may be held that the existence of the aforesaid submission and decreet-arbitral is any bar in the way of the pursuer obtaining decree of declarator from the Court, regarding the position and extent of the glebe, and the boundary between it and his estate of Haddo, he has introduced into the summons conclusions for reducing and setting aside the said pretended submission and decreet-arbitral. And he avers that said submission is null and void, and reducible at his instance, on account of his consent thereto having been given on the condition and agreement, that it was to effect a final settlement of the said question of the boundary, and be binding on all parties concerned; whereas the other heritors of the said parish of Inverkeithny, not having become parties to the said submission, are in no way bound thereby, or by the proceedings following thereon, and particularly are not bound by the pretended decreet-arbitral, dated 22d February 1867. The said submission and decreet-arbitral, not being binding on the heritors, are null and void, and are binding on no one."

The pursuer's pleas in law were—"(1) The extent and position of the glebe, and the boundary between it and the pursuer's estate of Haddo being as described in the conclusions of the summons, the pursuer is entitled to decree accordingly; (2) the lands adjacent to said glebe, but not included within the boundaries thereof, being part of the estate of Haddo, the pursuer, as owner thereof, is entitled to decree of removing, &c., as concluded for with reference to said lands; (3) the pretended deed of submission having been signed by the pursuer on the condition and agreement mentioned on record, and the heritors of the parish of Inverkeithny not being parties thereto, but, on the contrary, having repudiated the same, and being in no manner bound thereby, the same is not obligatory on the pursuer, and is reducible at his instance, and should be reduced accordingly; (4) the submission and decreet-arbitral are reducible in respect that the heritors, as proprietors of the school and grounds feued from the pursuer, were not parties to the proceedings, and, *separatim*, they are reducible in respect the other surrounding proprietors were no parties thereto."

The defender, the Rev. Mr Souter, minister of the parish of Inverkeithny, pleaded—"(3) The declaratory conclusions of the action cannot be maintained, unless and until the said submission and decreet-arbitral shall be reduced; (4) the pursuer has not set forth any statement relevant or sufficient in law to support the reductive conclusions of the summons and, *separatim*, assuming that a proof of the alleged condition and understanding set forth in article 7 of the condescendence could competently be allowed, the same could not be proved otherwise than by writ, or at all events by writ or oath.

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 28th June* 1870.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, finds that the declaratory conclusion of the summons cannot be maintained, so long as the decreet-arbitral libelled remains unreduced; and also, finds that the pursuer has not set forth any statement relevant or sufficient to support the reductive conclusions of the summons: Therefore sustains the third plea in law for the defender Mr Souter, and first part or branch of his fourth plea in law, and in respect thereof repels the reasons of reduction, dismisses the action, and decerns: Finds the defender Mr Souter entitled to expenses; allows him to lodge an account thereof, and remits it, when lodged, to the auditor to tax and repart.

"*Note.*—According to the pursuer's own showing, no heritor or other party has raised any question, or has made any complaint in regard to the march or boundaries of the glebe in dispute. The pursuer, however, says that the glebe encroaches to some extent on his property, and his object in the present action is to have this remedied. But he at the same time makes it a part of his own statement, that the very matter now brought into controversy by him was lately the subject of arbitration between him and the minister of the parish, the present defender Mr Souter, and that the arbiter decided it against him, the pursuer, by decree-arbitral, dated 22d February 1867. It appears, therefore, to the Lord Ordinary to be clear that, so long as this decreet-arbitral stands unreduced, the pursuer cannot be allowed to reopen the dispute about the glebe. The pursuer has accordingly in the present action concluded for reduction of the decreet-arbitral, but on grounds and for reasons which the Lord Ordinary considers to be irrelevant and insufficient. He says that he became a party to the submission referred to, on the understanding that the other heritors of the parish should also become parties to it. But as the deed of submission contains no indication of any such understanding, it would be altogether irregular and incompetent to give effect to it now. The submission was entered into by the pursuer and the defender Mr Souter, and the controversy, involving the very matter now attempted to be reopened by the pursuer, was maintained between them, under that submission for a considerable time, without any refer-

ence to the other heritors being made parties to it. It would therefore be contrary to the most obvious principles of law and equity to allow the pursuer, now that the arbiter has determined against him, to recommence the discussion, just as if no such arbitration as that referred to had ever existed. Nor is it of any importance for the pursuer to say that the other heritors and proprietors in the parish were not parties to the submission, and that the limits or boundaries of the glebe cannot for that reason be held as settled, for there is no heritor or proprietor seeking to disturb the existing state of matters, or indeed has, according to the pursuer's own showing, any interest to do so."

The pursuer reclaimed.

SOLICITOR-GENERAL and ASHER for him.

SHAND and BALFOUR for the defender.

ASHER referred to the case of *Lockerby* v. *Stirling*, 13 S. 978, and argued that, if an action was incompetent by the minister against any individual heritor, on a subject in which all were interested, neither could a submission be valid and binding between the minister and a single heritor on a similar subject.

Without calling for further argument the Court unanimously adhered.

Agent for Pursuer—Alexander Morison, S.S.C.

Agents for Defender—Gibson-Craig, Dalziel & Brodies, W.S.

Wednesday, November 23.

GALL *v.* GALL.

Proof—Marriage—De presenti *consent—Antecedent and subsequent conduct of parties.* Circumstances in which, the defender and pursuer having cohabited for some years without any presumable intention of becoming married persons, and the defender having, on a particular occasion, signed a document acknowledging the pursuer to be his wife, but which document was proved not to have been written or signed with any serious intention whatever on his part, and was not followed by any change in the parties' manner of life,—*held* that such document could not constitute a valid marriage between them. *Held*, farther, that an indorsation by the defender of his name on the back of this document could not effect a confirmation or homologation of the original, or itself establish marriage.

Observed, that such a document and such an indorsation proved nothing in themselves, but depended entirely upon the circumstances in which they were written, signed, and delivered.

Evidence—Competency—Credibility of Witness. Evidence Act 15 *and* 16 *Vict. c.* 27, § 3. *Held*, that where a party is bound to adduce a witness as being an instrumentary witness, or otherwise essential to his case, he is entitled to contradict the testimony of that witness, and break down his credibility, by proving that he gave a different account of any matter pertinent to the issue at some other occasion, from that given in evidence, just as much as if he were a witness for the opposite side and being examined in cross. But *held*, farther, that the precedent conditions laid down by the statute must be complied with in order to the competency of such a course, viz., a foundation for such contradictory evidence must be laid by specific questions put to the first witness.

This was a declarator of marriage brought by the pursuer Elizabeth Gall, against the defender William Gall, farmer at Gilkerscleuch, now residing at Crawfordjohn, both in the county of Lanark. The pursuer's averments were that she had entered the defender's service as his housekeeper or general servant, that he had shortly thereafter begun to pay her marked attentions, and that, relying upon repeated promises of marriage, she had yielded to his solicitations; that she repeatedly urged the defender to have a regular marriage celebrated between them, which he declined to do on the ground of publicity; that, however, in the year 1864, upon an occasion when the defender's cousin, George Milligan, was upon a visit to him, he caused the said George Milligan to write out the following document, which was thereafter signed by the defender:—"Gilkerscleuch, 26th, 1864. Dear Sir,—I bind and oblige myself to keep and support that woman through life. I consider her my lawful wife. (Signed) WILLIAM GALL. Witnesses' hands (Signed) G. MILLIGAN, ELIZABETH GALL." Endorsed on back, "William Gall." The pursuer averred that this document was a deliberate interchange of *de presenti* consent, or otherwise that the defender did thereby deliberately renew his promise. That the said document was delivered to her, and upon the faith of it she continued to live at bed and board with the defender as his wife in all respects, in so far as was consistent with the secrecy desired by the defender. That in the year 1868 she had been obliged to leave the defender's house in consequence of his misconduct, but was induced again to return, when the defender a second time acknowledged her as his wife, and in token thereof endorsed the foresaid document as abovementioned in presence of one of their neighbours. Sometime after this, however, the defender left her, and has since refused to acknowledge her as his wife or to support her. She pleaded that marriage had been constituted by *de presenti* consent, or else by promise *subsequente copula*.

The defender denied all the statements of the pursuer; and, with regard to the document produced, and founded on as constituting a marriage, he explained, that it had been written by the said George Milligan in the course of a drunken frolic, and that he, the defender, was at the time in a state of utter imbecility and unconscious from the effects of drink; and he pleaded that, never having been married to the pursuer, and never having promised to marry her, he ought to be assoilzied from the conclusions of the action.

In the course of the proof led before the Lord Ordinary, a question on the competency of evidence arose. George Milligan, one of the chief witnesses for the pursuer, but also a necessary witness, whom she could not but call, as, besides being the sole witness to much that had taken place between the parties, he was the writer and sole witness to the signature of the document already narrated, having been asked generally whether he had ever given a different account of the writing from that which he gave in evidence, and having replied in the negative, was then asked whether he had ever spoken to a Mr Majoribanks, another of the pursuer's witnesses, at any time about the writing. His reply was, "Not to my knowledge, but it might be." He was then asked, "Did you ever tell him that it had been done quite seriously?" and answered, "I do not mind." When Majori-