are not such as could, under any circumstances, be claimed from the defender under section 32. It appears to me that the commissioners have laid their claim in this action entirely on the Act of Parliament, and on the footing of this having been a statutory submission, and that they cannot recover what they now seek, on the footing of its having been a common law submission. It may seem perhaps somewhat surprising that they have so laid their case, because the parties seem to have gone entirely out of the Act of Parliament. There is a deed of submission executed, a thing unheard of under this statute, and the parties seem to have gone on litigating before the arbiters for about two years, whereas under the statute the award should be given in three months. But the pursuers could not have claimed these expenses as if the submission had been a common law one, because the arbiters have declared in their award that the expenses of the arbitration and incident thereto shall be borne by the parties, in conformity with the provisions of the Lands Clauses Act. What, therefore, we have to deal with is a claim under the Act of Parliament, as arising under a proper statutory submission; and the simple question is whether the account incurred to Mr Traquair is, to the extent of one-half, within the meaning of the Act, the defender's own expenses incident to the arbitration. Now it appears to me that the statute, in dealing with expenses, considers that all the expenses of an arbitration are divisible into three classes—(1) those incurred by the promoters; (2) those incurred by the claimant; and (3) those incurred by the arbiters or oversman, as the case may be. It says nothing about a clerk to a reference, and does not seem to contemplate that the arbitration should be carried on like a common law submission. Nor is this surprising, for the object of the submission is not to settle a *lis*, nor to act for the parties in any way as coming in place of the ordinary tribunals. Its object is simply to fix or assess a sum of money. The duty of the arbiters is very much the same as that of what used to be called *arbitrators* as distinguished from *arbiters*. Such persons were appointed, for instance, to liquidate the sum due under a contract. They were persons of skill, no doubt, and might require to take evidence, but the proceeding before them was a very short matter. I think this is just what this statute contemplated. I don't think it contemplated the employment of the machinery of a common law submission. I don't doubt that if arbiters found it necessary to take the assistance of a lawyer, or an accountant, or an engineer, or a clerk, they would be quite entitled to do so, but the expense of their doing so would just be part of their own expenses, which the statute says are in all cases to be borne by the promoters. The account in this instance is that of a clerk to the arbiters, and all that can be said in defence of his employment is that the arbiters required to employ some one to write for them. If they did, the account is just part of the expenses of the arbiters. The question we have to deal with is not whether this was a good claim against anybody, but whether, if it is, under what class does it fall; and I have no hesitation whatever in saying that it falls under the third class I have mentioned, and not under either of the other two.

The other Judges concurred, and the interlocutor of the Lord Ordinary was accordingly recalled, the defences sustained, and the defender assoilzied with expenses.

Agent for Pursuers—John Thomson, S.S.C.
Agent for Defender—Thomas Padon, S.S.C.

Saturday, Dec. 1.

FIRST DIVISION.

MORSON & CO. *v.* BURNS.

Sale — Disconformity to Order. A purchaser having received delivery of goods and observed that they were disconform to order, held not entitled, when afterwards sued for the price, to plead the disconformity, in respect he had not returned them.

The pursuers, who were waggon builders in England, sued the defender, a coal agent in Edinburgh, for £519, 10s. The circumstances were these:—In the month of October 1863, the defender ordered from the pursuers five waggons, "Ashbury's pattern, equal in every respect," at the price of £53 each on delivery at Wishaw; and in the month of December 1863, he ordered from the pursuers other five waggons of the same description and upon the same terms. By the terms on which the said orders were given, sixpence per day per waggon was to be charged if the said first five waggons were not delivered by the 1st of November following, and if the said second five waggons were not delivered by the 1st of January following. The said ten waggons were delivered on the following dates—*videlicet*, two on 1st, and three on 14th December 1863, and three on 14th and two on 31st March 1864. The waggons were ordered subject to a provision contained in a letter from Mr John Pickering, acting for the pursuers, to the defender, dated 12th October 1863, that "in case of any dispute as to material or workmanship, the same shall be submitted to Mr Thompson of Wishaw, who shall decide the case." While the waggons were in the course of delivery the defender wrote to the pursuers, or to Mr Pickering on their behalf, finding fault with the quality of the iron and the execution of the waggons in other respects, but he did not propose to return them or to have them inspected before being used. The defender commenced to use the said waggons upon their being respectively delivered to him, and has continued to do so. On 5th April 1864, after receiving the last of the waggons and the pursuers' account, amounting to £530, the defender forwarded to the pursuers a cheque for £500, stating —"According to agreement, I shall get the referee-man to examine the waggons, and shall then write you in detail." In the letter enclosing the said cheque the defender again found fault with the iron and the execution of the waggons in other respects. On 8th April 1864, the defender stopped the cheque, and wrote to the pursuers informing them that he had done so, and that he had got the referee to examine the waggons, who said they were not at all according to bargain, nor near equal value to Ashbury's waggons. Thereafter correspondence and communings took place between the parties and their agents, with a view to a settlement, during the course of which the defender obtained, and through his agent communicated to the pursuers, a letter from the referee containing his report upon the waggons, which bore that £3, 15s. should be deducted from the price of each; but no settlement having been come to by the parties, this action was brought for payment of the contract price of the waggons, under deduction of £10, 10s., as the agreed-on abatement of sixpence per day per waggon for delay in delivery.

Mr Pickering's letter to the defender, before referred to, was in these terms:—

"*Wilton-le-Wear, Darlington, October* 12, 1863. —Mr M. Burns. Dear Sir,—I shall be glad to make you five or more waggons (Ashbury's pattern, *equal in every* respect), and guaranteeing the springs for five years, and the wheels for two years, and the general work for twelve months. In case of any dispute as to *material* or *workmanship*, the same shall be submitted to Mr Thompson of Wishaw, who shall *decide* the *case*. The waggons to be fifty-three pounds each on delivery at Wishaw.—Yours very truly,

(Signed) "J. PICKERING.

"Please address your acceptance to me at Wilton-le-Wear, Darlington.

"*P.S.*—That *sixpence per day* per *waggon* be charged if the waggons are not delivered by *the 1st of November.* (Initialed) "J. P."

The defender pleaded in defence—1. The present action is excluded by the stipulation as to the submission in the contract between the parties, and ought to be dismissed. 2. The waggons furnished to the defender not having been made in terms of the contract, the defender is not liable in the price therein stipulated. 3. The defender having objected to the waggons from time to time as they were delivered, was not bound to pay the price until the whole had been delivered, and it had been ascertained whether they were in terms of the contract, and what price was to be paid for the whole. 4. The defender having, after due intimation to the pursuers, and with their knowledge, asked Mr Thompson, the referee, to examine the waggons, and no objection being stated to his doing so, the pursuers are now barred from objecting to the defender having so asked the referee, or to the referee having made the examination. 5. The pursuers having homologated the course taken by the defender in getting the referee to examine the waggons, by stating detailed objections to the referee's views, they are barred from insisting in the present action, and are bound to go before the referee and obtain his final award. 6. Generally, the statements of the pursuer, in so far as they do not coincide with those for the defender, being unfounded in fact, and their pleas untenable in law, the defender is entitled to absolvitor, with expenses.

The Lord Ordinary (Barcaple) found that the foresaid reference to Mr Thompson was only a reference of any dispute as to materials or workmanship, and did not comprehend any question as to the construction or effect of the contract between the parties; that the defender having taken delivery of the waggons, and commenced and continued to use the same, he was not entitled to a deduction from the contract-price thereof, in respect of any award by the referee, already obtained, or to be hereafter obtained, as to defects of material or workmanship; that the abatement to which the defender was entitled for delay in delivering the said waggons, amounted to £14, 15s. 6d., and that in the circumstances the pursuers were only entitled to interest from the date when the said cheque was forwarded to them; and subject to this finding, he repelled the defences, adding the following

"*Note.*—The leading defence, and that which was most pressed at the debate, is, that the action is excluded by the reference to Mr Thompson, as a general reference of all questions arising under the contract. The argument of the defender was rested upon the words 'who shall decide the case,' as importing a general reference. The Lord Ordinary has no hesitation in holding that these words must be read as limited by the immediately preceding context, which only refers to Mr Thompson any dispute as to material or workmanship. The principle given effect to in *Calder* v. *Mackay*, 22 D. 741, seems to apply directly to this case.

"There was a reference to Mr Thompson of an important kind, of which the defender was entitled to avail himself. But it appears to the Lord Ordinary that he mistook his remedy under it. The question is, whether, after going on for a considerable time to use the waggons, without any special arrangement with the pursuers to that effect, he was entitled to call in Mr Thompson to pronounce upon defects of material or workmanship, with the view of his obtaining a deduction from the price? That is a course not sanctioned by the general law applicable to such contracts; and the Lord Ordinary does not think that it was within the terms of the original agreement between the parties in this case; or that anything has since occurred to entitle the defender to betake himself to it. The reference to Mr Thompson does not appear in any way to extend the legal rights of the defender, as buyer, in the event of the waggons proving not to be conform to contract. It merely affords a summary mode of determining the matter of fact. If the defender was dissatisfied with the waggons when delivered, he ought immediately to have intimated that to the pursuers, and obtained the judgment of Mr Thompson with the view of their being returned as disconform to order.

"The defender founds upon the correspondence and communings of the pursuers after the dispute arose as constituting acquiescence in the view which he maintains. But these were proceedings for effecting a settlement of the nature of a compromise which cannot be founded upon as affecting the legal rights of the parties. In the view which the Lord Ordinary takes of the case, the defender had already lost his remedy when that correspondence began.

"The Lord Ordinary thinks that the pursuers never having asked payment until they rendered their account for the whole waggons, they are not entitled to interest prior to 5th April 1864, when the defender timeously forwarded the cheque, which he subsequently stopped."

The defender reclaimed.

YOUNG and MAIR were heard for him, and CLARK and LANCASTER for the pursuers.

The Court adhered.

The LORD PRESIDENT—This case involves some points of very considerable nicety of construction. The agreement betwixt the parties is somewhat peculiar. It has reference to the making of certain waggons. The waggons were made and sent on from time to time as they were ready. It appears that the defender from time to time observed defects in the material and workmanship, and that he wrote letters to the pursuers letting them know of these defects; and soon after the receipt of the last two waggons he seems to have got Mr Thompson, the referee, to examine one of the waggons, and Mr Thompson reported that it was quite different from what had been contracted for, that it was deficient in weight, and that the quality of the iron was bad. About the time of the receipt of the last two waggons, and before this report had been obtained, the defender had sent off a cheque for £500. I think it is pretty clear that the defender throughout the matter acted with perfect honesty and in good faith, but when the referee ascertained the deficiency he stopped payment of his draft, and then a question arose betwixt the

parties. It appears that the referee was of opinion, on a subsequent examination of all the waggons, that they were of less value than had been contracted for to the extent of £3, 15s. each, and the defender claimed this deduction, and was ready to settle on these terms. The pursuers refused to do so, and raised this action, to which several defences are stated. It is said the waggons have not been constructed according to agreement, and that the referee being of that opinion, the defender is not liable in the price. It is also said that the action should be dismissed, because it is a subject under the contract for reference. The first plea is met by the pursuers, who say that reference is out of the case—that the reference did not extend to anything but the condition of the materials and workmanship when delivered, and that at all events the defender's remedy was to return the waggons, which he did not do. I don't entirely adopt the construction of either party. I think the subject of the contract ought to be looked to. Although the clause of reference occurs in a sentence by itself, it is impossible to throw out of view the general character of the transaction which is embodied in the preceding paragraph, where the pursuers give their guarantee for a certain time. If, in the course of the twelve months, some or all of these waggons had broken down in consequence of deficiencies, and it had been discovered that the real cause was the original defective construction, I am not prepared to hold that under the contract the referee was not the proper person to determine that matter. I think, if the sellers had said, "We insist on having the opinion of the referee," the buyer could not have objected. But I don't think the case is in that position. It appears to me that the defender here has proceeded from the beginning on a mistaken notion of what were his duties under the contract, and I cannot discover that the defects observed by the referee afterwards were latent, and such as might not have been observed when the waggons were first delivered. The defender seems to have thought that he could go on using the waggons, and at any time take the opinion of the referee. He says himself on record —"The defender found, as the waggons were delivered, that they were defective in several respects, and he intimated these defects in writing to Mr Pickering from time to time as the waggons arrived. It was, however, not thought necessary to have them examined by Mr Thomson, the party named by Mr Pickering as the referee, until the whole of the waggons had been delivered, when it could be ascertained whether they were in every respect equal to Ashbury's waggons, as stipulated in the contract." That is his own statement. Now I think he was quite wrong in not returning the waggons if their disconformity to order could have been ascertained on delivery. But instead of that he went on using them, and has so mistaken his legal rights. I think, therefore, that the result the Lord Ordinary has arrived at is right. I also agree with him that the action is not excluded by the reference, and that the plea of homologation on the part of the pursuers has not been made out.

The other Judges concurred.

Agents for Pursuers—H. & A. Inglis, W.S.
Agent for Defender—James Finlay, S.S.C.

Wednesday, Dec. 5.

SECOND DIVISION.

GIBSONS *v.* MACQUEEN.

Process—Summons—Joint Pursuers—Competency.

A summons at the instance of four pursuers, whose interests were different, concluding that a slump sum of damages be paid to them all jointly, dismissed as incompetent.

This was an action of damages at the instance of four pursuers, who alleged that two of them had advanced £1200, and the other two £300, to James Scott, ironmonger in Edinburgh, for which sums separate bonds and dispositions in security were granted over certain subjects in Howe Street belonging to Scott. The summons concluded for a slump sum of £840. The defender in the action, Mr Macqueen, was agent for the debtor, and the nature of the allegations, which are the grounds of action, appear from the following issues proposed by the pursuers :—

"It being admitted that the pursuers, Jane Gibson and Agnes Gibson, agreed to advance to James Scott, then ironmonger, Howe Street, Edinburgh, the sum of £1200, on a bond and disposition in security over certain subjects in Howe Street, belonging to the said James Scott, to be subscribed by the said James Scott as principal obligant, and also to be subscribed by Alexander Scott, residing in Lauder, Berwickshire, and Alexander Reid, residing at Edmonston, in the county of Edinburgh, as cautioners for the regular payment of the interest on the foresaid sum : It being also admitted that the said Elizabeth Greenshields Gibson and Esther Gibson agreed to advance to the said James Scott the sum of £300, on a bond and disposition in security over certain subjects in Howe Street belonging to the said James Scott, to be subscribed by the said James Scott as principal obligant, and also to be subscribed by the said Alexander Scott and the said Alexander Reid as cautioners for the regular payment of the interest on the foresaid sum :—

"1. Whether, on or about 9th May 1854, the defender, John Moir Macqueen, acting as agent for the said James Scott, on payment to him of the foresaid sum of £1200, by John French, W.S., as agent for the said Jane Gibson and Agnes Gibson, delivered to the said John French, as agent aforesaid, the bond and disposition in security, No. 10 of Process, as a duly executed deed, in the knowledge that the subscriptions 'Alexander Scott,' 'James Browning,' and 'James Lockhart,' appended to said bond, or some one or more of said subscriptions, were forged, to the loss, injury, and damage of the said Jane Gibson and Agnes Gibson?

"2. Whether, on or about 9th May 1854, the defender John Moir Macqueen, acting as agent for the said James Scott, on payment to him of the foresaid sum of £300 by John French, W.S., as agent for the said Elizabeth Greenshields Gibson and Esther Gibson, delivered to the said John French, as agent foresaid, the bond and disposition in security, No. 11 of Process, as a duly executed deed, in the knowledge that the subscriptions 'Alexander Scott,' 'James Browning,' and 'James Lockhart,' appended to said bond, or some one or more of said subscriptions, were forged, to the loss, injury, and damage of the pursuers, the said Elizabeth Greenshields Gibson and Esther Gibson?

"3. Whether, on or about the 9th May 1854, and at the delivery of the said bonds, the said John Moir Macqueen falsely and fraudulently represented to the said John French, as agent for the pursuers, for the purpose of enabling the said John French to complete the testing clauses of the said bonds, that the said bonds were signed by the said Alexander Reid before these wit-