vious occasions the defender had made attempts of the same kind, and had been obliged to withdraw his preparation from the market as an infringement of patent. Therefore, an analysis of that Original Melossoon Dip was fair, whether used at the trial or not. I am therefore disposed to allow that analysis, charged by Dr Odling and Dr Millar, of London; but as to the other analyses, the expense of which has been taxed off by the auditor, there is no ground on which they can be allowed.

As to the evidence of the chemists about the specific gravity of oil of tar at different stages of running off, that matter is perfectly well known to the scientific and commercial world, and there is no reason to differ from the auditor.

Next, as to the expenses of witnesses waiting at the trial. The scientific witnesses resident in Edinburgh cannot be allowed to charge for attendance on days when the trial is not going on. With regard to a scientific witness from Glasgow, it is pretty plain that it is time enough to summon that witness when the trial comes on, unless he is to be the first, or one of the first, witnesses. The pursuer here must have known that the chemical part of his case would not be gone on with u til a late stage.

The only other matter is the charge for the witnesses Paul and M'Dougall. As to the former, it seems to follow, from allowing the analysis of the sample of the Original Melossoon Dip, that this charge must be allowed, for Paul was necessary to prove the sample; and for a similar reason, the charge for M'Dougall must be sustained, there being no admission until the trial had begun so as to dispense with his attendance.

The result will be to allow the expense of a third counsel, the charge for the analysis of the Original Melossoon Dip by Drs Odling and Millar, and the charges for Paul and M'Dougall.

The other judges concurred.

Agents for Pursuer—Macnaughton & Finlay, W.S.

Agent for Defender—Andrew Webster, S.S.C.

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*Thursday, December* 19.

## SECOND DIVISION.

### SERVICE AND OTHERS *v.* YOUNGMAN.

*Promissory-Note—Protest.—Charge—Clerical Error.* A protest of promissory-note was registered, through a clerical error, in the name of a wrong party as holder; in order to correct this mistake a new protest was extended and recorded next day in the name of the holder, and upon this second protest a charge was given. *Held* that this was incompetent while the former and inconsistent protest stood.

This was a suspension of a charge which had been given by George Youngman, the respondent, to Mrs Christina Lang or Service and others, the complainers. This charge was given by virtue of an extract registered protest from the Sheriff-court books of Renfrewshire, and a warrant of the Sheriff thereon, dated 11th December 1866, at the instance of the respondent, indorsee and holder of a promissory-note granted by the complainers. The payee in the promissory-note was Charles Reed, and it was blank indorsed. In respect of this blank indorsement, it was alleged that, prior to 10th December 1866, the note passed into the hands of the respondent, and on that day a protest was extended, recorded, and extracted against the complainers as at the instance of Wadeson and Malleson, solicitors in London, who, the respondent alleged, were his agents, and whose name, it was alleged, was used instead of his by a clerical error. On the following day a second protest was extended and recorded at the instance of the respondent with a view of rectifying this error; and on an extract of this second protest the present charge, now sought to be suspended, was given.

The complainers pleaded,—There having been a subsisting and recorded protest on the said note, at the instance of other parties, against the complainers, at the dates of recording of the protest, and of the charge in question, the procedure last mentioned was and is incompetent, irregular, and invalid.

The Lord Ordinary (Ormidale) sustained the reasons of suspension. In his note, his Lordship said that the facts, that the promissory-note in question was only once protested, and that an instrument of protest was first extended and recorded at the instance of Wadeson and Malleson, were sufficiently admitted on record. It was not said that there was any new or subsequent indorsation to the charger, or that the note was of new protested at his instance; nor did the charger allege that he had acquired any right to the note from Wadeson and Malleson. He did not proceed, or put himself in a position to proceed, in terms of either 12 Geo. III., c. 72, or of 1 and 2 Vict., c. 114, sec. 12. All that the charger said was, that the instrument of protest was by "a clerical mistake, it is believed, extended, recorded, and extracted at the instance of his London solicitors, Messrs Wadeson and Malleson," and that, without any new presentment and demand of payment, or noting, or protest, another instrument was, after the lapse of a day, extended and recorded at his own instance. It might possibly be true that it was by mistake (although as to this the charger did not, from the expressions he used, seem quite certain) the protest was, in the first instance, extended and recorded in the name of Wadeson and Malleson, but there was no evidence of this; there was nothing but the unsupported statement of the charger, which was opposed by and directly in contradiction of the formal, notarial, and in every respect *ex facie* regular and unobjectionable, statement in the recorded instrument of protest at the instance of Wadeson and Malleson. The Lord Ordinary was therefore unable to see how he could sustain the instrument of protest and decree at the instance of the charger as the foundation and warrant of summary diligence, but, on the contrary, he thought that they were irregular and incompetent for such a purpose. The Lord Ordinary, in coming to this conclusion, was not to be understood as giving any opinion to the effect that a bill or promissory-note might not be competently transferred by indorsation after it had fallen due, and of new protested and diligence followed out at the instance of the indorsee, although it had been previously protested, and the instrument of protest recorded at the instance of another party, nor had he found it necessary to decide anything against the validity of an instrument of protest extended without any new proceeding at the instance of a party different from that at whose instance the bill or promissory-note had been noted, although the regularity and competency of this appeared to have been questioned in the case of *Swanson* v. *Archibald*, 1838, 16 Sh., 308.

The respondent reclaimed.

Watson and Finlayson for him.

Solicitor-General and R. V. Campbell for complainers.

At advising—

Lord Justice-Clerk—It is not necessary to ascertain what is the proper way of correcting the clerical error which is said to have been committed. Some mode there must undoubtedly have been, but it is enough for the present question that there has been no attempt to correct the error except the recording of a new protest. That was clearly incompetent while the former and inconsistent protest stood.

Lord Cowan—If the charge had been turned into a libel, which was competent prior to the closing of the record, the whole facts of the case and the substantial rights of the parties in the promissory-note might have been investigated and enforced; but it is too late now that the record has been closed.

Lord Benholme and Neaves concurred.

Agent for Complainers—W. B. Glen, S.S.C.

Agent for Respondent—A. Kirk Mackie, S.S.C.

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*Friday, December* 20.

## FIRST DIVISION.

### JACKSON *v.* GALLOWAY.

*Arbitration—Judicial Reference—Award—Clerk to Reference—Issued Award.* Claim by clerk to a judicial reference for his fees *sustained*, the defender denying that the award sued on had been issued. Opinions (1) that the remuneration of the clerk was earned whether or not the award was issued before death of referee; (2) that though an award may remain in the hands of the clerk, it may yet be a delivered award, and parties cannot deprive the clerk of a right to his fees by delaying to take up the award.

This was an advocation from the Sheriff-court of Fifeshire. David Galloway, accountant in Edinburgh, raised an action in that Court against Thomas Jackson, writer in Kirkcaldy, and Charles Welch, writer in Cupar, for payment of £37, 7s. 8d., being the amount found due to him as clerk to a judicial reference between the defenders to the late Accountant of Court. Jackson defended. After a proof, the Sheriff-substitute sustained the claim of the pursuer, and, on appeal, the Sheriff adhered. Jackson advocated, and pleaded *inter alia* (1) that the award upon which the action was founded was not issued at the date of the summons, and the action was therefore incompetent; (2) the award could not now be issued owing to the death of the referee; (3) the appointment of the pursuer as clerk was *ultra vires* of the referee, the matters embraced in the award not being within the scope of the reference, and there being at the time no existing judicial reference.

The Lord Ordinary (Kinloch) held it proved that the charges sued for were incurred to the pursuer as clerk to the judicial reference, and that the same were allowed and awarded by the report of the referee, and repelled the reasons of advocation.

Jackson reclaimed.

Monro and Shand for reclaimer.

Gifford and Mair for respondent.

Lord President—As to the first objection taken by the reclaimer—that the referee had no right to go beyond the 20th November 1862 with the accounts of Welch with the estate of Pearson and Jackson—that may be a matter of some difficulty, and I should desire to hear more argument on that objection if it were necessary to decide it here. My impression is that he was entitled to do so. But whether or not, the reference went on. No doubt it went on under Jackson's protest not to be bound by it, but that will not liberate him from liability to remunerate the services rendered by the pursuer of this action. It is quite sufficient to subject this reclaimer, that these services were performed under the order of the referee, whether the referee went beyond the time included in the reference or not.

The other matter is, whether the report of 15th July 1865 was ever delivered so as to become an operative report, There is some difficulty there. I have an impression adverse to the reclaimer if we had to decide that absolutely. But it is not necessary to do that here, for I do not read the summons in the inferior court as implying that the pursuer cannot recover under it unless he set up the award as complete and binding. I think the remuneration of the clerk was earned whether or not the report was delivered by the arbiter before his death.

Lord Curriehill—If this case depended merely on the justice of the demand, there is no doubt that the pursuer would be entitled to decree. But I have some doubt if he is in a position to make that claim good in the present action. I think one of the questions raised is of very great importance to the law, and that is, whether an award which has never been delivered, but which is in the hands of the clerk to the reference, *qua* clerk, as this award was, according to the statement of the clerk himself, can be held to be an award at all? That is a very difficult and important question. And though it would be painful to give effect to rules of law coming in the way of substantial justice, I should hold myself bound to be the more careful that the law did not suffer by the judgment pronounced. If this question depended on the matter of fact, whether this was a delivered award, I should have great difficulty in holding that it was so, But another question is raised, whether delivery of the award is necessary to enable us to give decree under the present summons. That is a question which is of no general importance. I am not clear on the matter.

Lord Deas concurred with the Lord President.

Lord Ardmillan—I am of the same opinion. The only observation I have to make is on a point of law, *i.e.*, the effect of this award being in the hands of the clerk. I adopt the opinion of the late Lord President in the case of *Macquaker*, 19th March 1859, 21 D. 794, in which his Lordship says:—"The true inquiry is, whether the arbiters had fulfilled the whole matter submitted to them within the prescribed time? Whether they had exhausted the submission? Whether they had exonerated themselves by giving judgment in the case? Now, in this case, it appears to me that they have done so. In every case in which that matter is to be considered, the particular circumstances must be attended to. It may be that a decree is in the possession of the clerk to the submission in circumstances which will not make it the irrevocable decree of the arbiters, or a final dis-