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.

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-

posal of the case; as, for example, where the arbiters have themselves clearly indicated that they have made a different decree. On the other hand, it may be that the decree is in possession of the clerk in such circumstances as to make clear that it is a final decree. His official custody of it remains so long as the parties have not taken it up. It is not necessary for him to put it on record in order to make it an issued arbitration."

Now this gentleman bringing his action, is met by the defence that this award, which was signed, and has now been actually delivered, was not delivered at the time the action was raised, and was not delivered prior to the death of the referee. That may be true in fact, but who is to prove the truth of it? The award is issued. It is in the hands of the parties, and is acted on. The party who alleges that it did not exist at a specified date is bound to prove his allegations. The pursuer says that "Mr Maitland delivered his report, with the process, to me, as clerk to the reference, to be held by me *till payment of the fees.*" I have no doubt that if nothing remained to be done to the award in the hands of the clerk, it is a delivered award. It cannot be that the withholding of payment of the fees keeps the award in suspense. It might be that the subject was of such trifling importance, that no one had an interest in following out the reference, and the clerk would have to remain without his fees. I have no doubt that Jackson left the matter on the evidence at a point which does not sustain his objections.

Agents for Reclaimer—Duncan & Dewar, W.S.
Agents for Respondent—D. N. & J. Latta, S.S.C.

Friday, December 20.

JENKINS AND OTHERS *v.* MURRAY.

(4 Macph. 1046., *ante.* iii. 368.)

Expenses — Auditor — Three Counsel — Jury Trial. Circumstances in which the Court gave the defender, who obtained a verdict in a second trial in absence of the pursuer, the expenses of the first trial, in which he had been unsuccessful. Expense of third counsel disallowed.

This was a question between W. Jenkins, jun., Stirling, and others, and Lieut.-Colonel Murray, of Polmaise, as to the right of the public to use a road, called the Bearside Road, through the lands of the defender, in the vicinity of Stirling.

The jury returned a verdict for the pursuer. On 12th July 1866 the Court set aside the verdict, and granted a new trial, reserving all questions of expenses. The second trial was appointed for the Spring Sittings. The defender moved for a special jury. The Court granted the motion. The case came on for trial on Thursday, 11th April 1867. No appearance was made for the pursuers. The special jury was empannelled, and a verdict was returned for the defender. Thereafter, on the motion of the defender, the Court, on 24th May 1867, pronounced this interlocutor:—

"Apply the verdict found by the jury on the issue in this cause, and in respect thereof assoilzie the defender from the conclusions of the libel, and decern: Finds the defender entitled to expenses; allows an account, &c."

The auditor taxed the account at £563, 1s. 4d., "reserving for consideration of the Court (1) whether the general finding of expenses contained in the interlocutor dated 24th May 1867, includes the expenses of the first trial, in which the defender was unsuccessful, these expenses amounting to £252, 8s. 3d.; (2) whether the expense of a third counsel ought to be allowed."

JOHNSTON, for defender, contended that the expenses of the first trial, and also of a third counsel, ought to be allowed.

No appearance was made for pursuers.

LORD PRESIDENT—There is great specialty in the present case, for practically there was only one trial, although two verdicts, and, as I understand the case, the evidence led at the first trial was such, with reference to the law applicable to that evidence, that the verdict ought to have been for the defender. Now the defender, by the subsequent proceedings, has got his verdict, because the pursuers felt that they could not get a verdict, and therefore did not repeat their evidence. It seems to be very much a case where there is one trial on a matter of fact, and a verdict for the defender. My impression is that the defender ought to have the expenses of the first trial. It is a very special case. I think the expense of the third counsel cannot be allowed.

LORDS CURRIEHILL and DEAS concurred.

LORD ARDMILLAN—I am satisfied that the verdict was held by the Court to be a verdict contrary to evidence. There has been no second trial, and if the defender did not get the expenses of the first trial, the result would be that he would not get the expense of leading that body of evidence on which he got a favourable judgment. On the question of the expense of a third counsel, I concur.

Agents for Defender—Russell & Nicolson, C.S.

Friday, December 20.

SECOND DIVISION.

THOMS *v.* THOMS.

Promissory-Note—Cautioner—Letter of Acknowledgment—Entries in Books—Res Mercatoria—*Executor—Relief.* A joint acceptor in a promissory-note maintained, in an action of relief brought by him against the executor of the other acceptor, that a letter of acknowledgment, neither tested nor holograph, but signed by the acceptor, showed that he was only cautioner in the note, and therefore that he was entitled to be relieved by the executor. He also founded on certain entries in the acceptor's books. *Held* that the letter, as much as the note, was *res mercatoria*, and did not require to be either tested or holograph in evidence of the fact that the pursuer was only cautioner.

LORD COWAN (dub.)—Whether the letter of acknowledgment, without the entries in the books, was sufficient?

Observed—That the statutes providing for the authentication of writs do not apply to documents which are merely framed for the purpose of evidencing facts.

This was an action of relief brought by Mr John Thoms of Seaview, St Andrews, against the executrix of his deceased brother, Alexander Thoms of Rumgally, and the questions were—(1) Whether the pursuer was entitled to be relieved of the con-