Birrell, commission merchant, Glasgow, and William M'Culloch, fishcurer and merchant, Glasgow.

The circumstances were thus stated in the note to the Lord Ordinary's interlocutor :—

"On 15th May 1862, the pursuer, George Birrell, hired his vessel, the Jessie Brown, to the defenders, Messrs M'Culloch & Fyfe, for the period of one month, from 19th May, at the freight of £150. The charter-party bears 'That the said steamer shall be delivered up by the charterers at the termination of this charter-party at Glasgow, Ardrossan, Bowling, or Ballycastle, in charterers' option ; and should she not be delivered to owner at expiry of one month, from being on her voyage, then £5 per day to be paid by the charterers for the extra time, and afterwards at the rate of £8 per day till she is delivered, unless the parties to this charter agree to a new charter party.' The meaning of this stipulation seems to the Lord Ordinary not obscure. The vessel was deliverable at the close of a month from 19th May. But she might possibly be then on a voyage ; and it was agreed that, till she completed her voyage, £5 per day was to be paid for the extra time. Any after detention was to be at the rate of £8 per day. On 17th June, the defender, M'Culloch, telegraphed from Liverpool a request for a week's further use of the vessel at the same rate per day, and this was acceded to. The vessel was, however, not delivered back to the owner till some time after the expiry of this week. It is said that she had met with an accident, which made some repairs necessary. The parties differed as to the entire sum to be paid to the owner. By the terms of the charter-party it was provided, 'That should any difference arise between the parties to this contract as to its terms, either in principle or detail, they hereby agree to refer the same for arbitration to Mr John Jamieson, fishcurer in Glasgow, whose decision will be final in all matters of dispute.' Mr Jamieson was accordingly applied to, and he pronounced the decree-arbitral for a balance as due to the owner, on which Mr Birrell now sues, and which Mr M'Culloch has brought under reduction. The ground of reduction is, in substance, that by the agreement made by telegram for an additional week's use, a new contract was made, not containing the conditions of the original charter-party, and, *inter alia*, not containing the the agreement to refer ; and that the arbiter had no power to enter on the matter decided by him."

The Lord Ordinary (Kinloch) repelled the reasons of reduction, and in the other action decerned against the defender as concluded for. In his note he observed :—"It appears to the Lord Ordinary that this ground of reduction is wholly untenable. Nothing was done by the telegram except to give the charterers the benefit of a fixed extra time for re-delivery—viz., a week additional, at the primary rate of £5 per day. To this extent the charterers were freed from any question as to the rate per day to be paid. In other words, the fixed period of the contract was prolonged for a week further. But this did not imply that the contract was qualified to any other effect, far less that it was entirely set aside. At the utmost, there was a qualification of the contract—there was no innovation. It had a supplementary clause added to it, nothing more. The Lord Ordinary considers the contract to have remained generally in undoubted validity ; and amongst its subsisting stipulations to be that providing for a reference to Mr Jamieson. It was said that by the reference clause, Mr Jamieson had only power to declare the terms of the contract, and could not issue a decree for a specific sum. The Lord Ordinary thinks this plea extravagant. A reference of pecuniary disputes implies a proper decree-arbitral for the sum found due. The pursuer, Mr Birrell, maintained that all challenge of the decree-arbitral was barred by the conduct of the defender in going on before the arbiter without objection. There were conflicting averments on this head. The Lord Ordinary has found no occasion to inquire into the matter of fact, being fully satisfied that, supposing the challenge to be open, it is destitute of good foundation on its merits."

M'Culloch reclaimed.

THOMS (GIFFORD with him) was heard for the reclaimer.

SPITTAL (CLARK with him) supported the Lord Ordinary's interlocutor.

The Court unanimously adhered.

Agent for Birrell—William Mitchell, S.S.C.
Agent for M'Culloch—William Officer, S.S.C.

SECOND DIVISION.

GLASGOW CORPORATION WATER WORKS COMMISSIONERS *v.* HENRY.

Arbitration—Lands Clauses Act—Expenses. Held (alt. Lord Ormidale) that in an arbitration under the Lands Clauses Act. the account of a clerk to the arbitration is a part of the expenses of the arbiters, which under Sect. 32 the promoters are in all cases bound to defray.

Mr Jardine Henry, trustee on the sequestrated estate of the late John Graham, Esq., of Ballagan, in 1862 claimed from the Glasgow Corporation Water Works Commissioners the sum of £1071, 14s. 6d. as compensation in respect of the construction of their works through lands the minerals of which, as he alleged, belonged to him. The claim was referred to arbiters, one of whom was named by each party.

The findings in the decree-arbitral were as follows :—"First, we, the said arbiters, hereby find no damages or compensation due to the said Jardine Henry, as trustee foresaid, under or in respect of the said deed of nomination by him, and nomination of arbiter by the said commissioners, or subject-matter thereof ; and, second, we, the said arbiters, hereby declare that the expenses of the arbitration, and incident thereto, shall be borne by the parties, in conformity with the provisions of the Lands Clauses Consolidation (Scotland) Act, 1845."

By section 32 of the Lands Clauses Consolidation (Scotland) Act it is provided :—"All the expenses of any such arbitration, and incident thereto, to be settled by the arbiters or oversman, as the case may be, shall be borne by the promoters of the undertaking, unless the arbiters or oversman shall award the same sum as, or a less sum than, shall have been offered by the promoters of the undertaking, in which case each party shall bear his own expenses incident to the arbitration ; and in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decree-arbitral or award in the books of Council and Session shall be borne by the promoters of the undertaking."

The Water Commissioners having been called on to pay the account of Mr William Traquair, W.S., the clerk to the reference, amounting to £92, 10s., they did so under reservation of their right to re-

cover one-half from Mr Henry, and then raised this action against him for relief to that extent.

They averred in Cond. 10.—"The account incurred to Mr Traquair, as clerk to the reference, before referred to, is, to the extent of one-half thereof, part of the defender's own expenses incident to the arbitration, and is payable by him, the arbiters having awarded him nothing. The pursuer not only repeatedly called upon the defender to pay his share of the said account before settling with Mr Traquair, but he has also since then required the defender to relieve him of the one-half of the said account. The defender refuses or delays to do so, and this action has therefore become necessary."

The defender averred in Stat. 7.—"The account sued for consists entirely of the expenses of the arbiters and oversman. It embraces, *inter alia*, fees paid by them to counsel whom they consulted in the course of the reference on a question of law which arose between the parties, for their guidance; and of railway and coach fares, and hotel bill, and other personal expenses incurred by the arbiters in visiting the works; of stamps for the decree-arbitral; of postages, and the expenses paid, or for which they were liable to their clerk, for drawing the decree-arbitral; and attendances upon them during their deliberations. None of the items contained in said account were incurred by or on the employment of the defender, but are entirely expenses incurred by the arbiters themselves. The shorthand writer was not employed by the defender, nor with his consent or concurrence. The defender was not consulted as to his employment, nor did he procure from him a copy of the notes of evidence taken by him at the proof."

The parties having renounced probation, the Lord Ordinary (Ormidale) found that the defender was liable in relief and payment to the pursuer of one-half of the foresaid account paid to Mr Traquair, in so far as the same consists of proper charges incurred to him as clerk to the foresaid reference; and before further answer, remitted to the auditor of the Court of Session, as a man of business, to examine Mr Traquair's account, hear the parties thereon, tax the same, and report to the Lord Ordinary. He added the following

"*Note.*—There neither was nor could be any dispute as to the obligation of the parties in this case to bear their own expenses incident to the arbitration. But the defender denied that the charges of Mr Traquair, the clerk to the reference, were of the nature of expenses 'incident to the arbitration,' and maintained that they were rather of the nature of 'expenses of the arbiters,' which the Waterworks Commissioners, as promoters of the undertaking, were, in terms of section 32 of the Lands Clauses Consolidation Act, bound to defray themselves. There might be some difficulty in determining precisely what charges, if any, besides their fees, fall under the expression 'expenses of the arbiters,' but there can be no doubt that both parties were and are liable to the clerk to the reference in payment of his just charges, each having his relief against the other to the extent of one-half thereof. See Mr Bell's Treatise on the Law of Arbitration, and authorities cited by him, and particularly the case of Macfarlane, 29th June 1842, 4 D. 1459. If this be so, it appears to the Lord Ordinary that, in terms of the statutory provision, not disputed to be applicable to the present case, that 'each party shall bear his own expenses incident to the arbitration,' the liability of the defender as concluded for is clear.

"The only point attempted to be made on the part of the defender to the contrary, was founded on the assumption that the arbiters being themselves the parties liable to the clerk for his charges, such charges must be held to be part of the 'expenses of the arbiters;' but no authority whatever was cited in support of the defender's assumption, which the Lord Ordinary holds to be unfounded. He does not suppose it was ever maintained by a clerk to a reference that the arbiters were personally responsible to him for his account. In appointing the clerk to a submission or reference, the arbiters act as mandatories or *quasi*-mandatories of the parties, and in virtue of the powers, express or implied, derived from them. This, as well as that the parties are liable for his just charges, must be assumed to be always known to the clerk, and therefore on their, and not the responsibility of the arbiters, it may be fairly held that the clerk has accepted of the appointment and performed its duties. The Lord Ordinary understood the counsel for both parties to say that they had no objection to such a remit as that now made to the auditor.

"It may be proper to add that the defender's counsel suggested rather than seriously maintained, that even supposing the principle on which the Lord Ordinary's interlocutor proceeds to be sound in itself, and applicable to the case of the same or a less sum of damages having been found due than what had been offered by the promoters of the undertaking, it could have no application to the present case, where no damages at all were found to be due, and no previous offer had been made. The Lord Ordinary could not give effect to a plea so inequitable as this, and of which there is no indication in the record. It seems, besides, to have been substantially overruled in the case of the Queen *v.* Biram, 17 Ad. and Ellis, p. 969, cited on the part of the pursuer."

The defender reclaimed.

CLARK and JOHNSTONE, for him, argued:—1. No tender was made in this case, and the arbiters awarded nothing. It is therefore not within the exception contained in section 32, and all the expenses of the arbitration fall to be paid by the promoters. In the case referred to by the Lord Ordinary this point was not urged upon the Court. 2. The clerk's account is a portion of the arbiters' expenses, which, in any case, fall to be paid by the promoters.

YOUNG and BURNET, for the pursuers, replied—1. There is no plea on record in regard to the first ground of non-liability; but to give effect to it would be violating the spirit of the statute. Reg. *v.* Biram is conclusive as to this and this is an *a fortiori* case. 2. The clerk's account is the expense of the parties, because in employing a clerk arbiters act as their *quasi*-mandatories.

At advising,

The LORD JUSTICE-CLERK (after stating the facts)—It is said that under these circumstances the commissioners are entitled to claim from the defender certain expenses under the provision of section 32 of the Lands Clauses Act. It was contended in argument by the defender—first, that this case did not fall under the provisions of that section, because nothing had been awarded by the arbiters, and the section is applicable only to a case where the arbiters have awarded something. Now that is a question of considerable importance, but I think it is not competently before us. There is no plea on the subject, and no proposal has been made to add one, and therefore we can pay no attention to it. I give no opinion in regard to it. But it is said further that the expenses claimed

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:—