who seemed to act throughout as master of the "Xantho," gave him an order on the defenders for £50, in payment of the towage in question, which order the defenders have always been willing to honour. The defenders further maintained that, even though the service be held to have been of the nature of salvage service, the pursuers were bound by the above mentioned agreement, and that the sum of £50 was ample remuneration for the service actually rendered, apart from contract.

The pursuers, while admitting that an order for £50 was sent to Mr Buchanan in recognition of the services, alleged that it was grossly inadequate remuneration, and denied that the person above referred to was the master of the "Xantho," or had any authority to enter into any contract, or receive any payment that would be binding on the pursuers.

An issue was lodged by the pursuers, and after some discussion before the Lord Ordinary, the following was agreed to by the parties:—

"It being admitted that the defenders were, on 2d January 1866, and still are, the registered owners of the barque 'Lorena' of Ardrossan, and that Norman Buchanan, distiller in Islay, was, on said 2d January 1866, the registered owner of the steam-vessel 'Xantho;'

"And it being further admitted that the estates of the said Norman Buchanan were sequestrated under the 'Bankruptcy (Scotland) Act' on 21st August 1866, and that Mr George Wink, accountant in Glasgow, was appointed trustee on the said sequestrated estates, conform to act and warrant in his favour dated 5th September 1866; as also, that the pursuer, John M'Gaan, is now in right of the said Norman Buchanan and George Wink;

"Whether, on the said 2d January 1866, the 'Xantho' and her master and crew saved the 'Lorena' and her cargo from the perils of the sea? And Whether the defenders are indebted and resting-owing to the pursuers, or any of them, in the sum of £2000, or any part thereof, in name of salvage?"

The parties differed as to the counter issue proposed by the defenders, which was latterly stated in the following terms:—

"Whether the services rendered on 2d January 1866 by the 'Xantho' and her master and crew, were so rendered under contract entered into between the master of the 'Lorena' and the master, or those in charge, of the 'Xantho?' And whether the said contract, when so entered into, was just and reasonable?"

The Lord Ordinary reported the case to the Court, accompanying his interlocutor with the following note:—

"The pursuers' issue, with the admissions prefixed to it, No 27 of process, was not objected to by the defenders.

"But the pursuers objected to the defenders' counter issue, No. 26 of process, in respect that it did not embrace the question, whether the alleged contract, on which it is founded, was made with the authority of the owner and crew ef the 'Xantho.' In regard to this objection, the Lord Ordinary has to remark that it is not very obvious what substantial interest the pursuers have to insist in it, supposing it to be made out (and the defenders undertake to make it out); that the alleged contract which they found on was in itself just and reasonable. It may be also remarked, that to hold that the special authority of the owner is necessary for the validity of such a contract as that referred to would be almost equivalent to holding that no such contract can be entered into at all, as the owner is seldom or ever likely to be present to interpone his authority in the suddenly emerging circumstances which usually gave rise to questions of salvage."

Balfour (D.-F. Moncreiff with him) maintained that the defenders were bound to put in issue and prove special authority granted by the owner and by the crew to the master of the 'Xantho' to enter into the alleged contract.

J. C. Lorimer (Gifford with him) maintained that the master had full power to bind the owner in salvage contracts entered into at sea in his absence; and that, in regard to the crew, it was a question of circumstances; and in the present case, in which the pursuers alleged salvage service, rendered by towing, and did not allege special personal exertions, and where the defenders undertook to prove that the contract was just and reasonable, the latter were not bound to prove any special authority,

The following were the authorities referred to by the parties:—M'Lachlan on Shipping, page 531. The *Britain* (1839), 1 Wm. Robinson's Admy. Rep., 40. The *Africa* (1854), 1 Spinks' Admy. Rep., 299., The *Sarah Jane* (1843) 2 W. Rob., 110. The *True Blue* (1843), 2 W. Rob., 176. The *Elise*, Swabey's Admy. Rep., 436.

The Court altered the counter issue to the following:—

"Whether the services rendered on 2d January 1866 by the 'Xantho' and her master and crew, were so rendered under contract entered into between the master of the 'Lorena' and the master, or person for the time in command, of the 'Xantho,' acting on behalf of the owners and the crew of the said vessel? And whether the said contract, when so entered into, was just and reasonable?"

Agents for Pursuers—Murray, Beath, & Murray, W.S.

Agents for Defenders—Duncan & Dewar, W.S.

Tuesday, July 2.

HOEY *v.* M'EWAN & AULD.

(*Ante*, p. 71.)

Obligation—Contract of Service—Partnership—Expenses.

In obedience to the order of the Court a minute was lodged for the pursuer, stating what he had earned during the period specified, but showing that the expenses of an office, &c., had more than swallowed up those earnings.

A minute was lodged for the defenders, agreeing to pay to the pursuer the full proportion of his salary for the period from 11th June to 1st October 1866, with interest from 1st October.

Decree of consent for that sum.

Both parties moved for expenses.

The Court gave expenses, subject to modification, to the defenders.

Lord Deas thought that neither party should get expenses.

Tuesday, July 2.

HILTON *v.* WALKER.

(*Ante* Vol. iii., p. 283.)

Arbitration—Judicial Referee—Award—Expenses—Auditor. Held that a judicial referee, in making an award of expenses, is not bound to take the advice of the auditor or any one else as to the amount. Opinion (*per* Lord President), that if the referee committed a great injustice in the exercise of power in this respect, redress would be had under the head of corruption.

This was an action by a landlord against a tenant for miscropping. The summons concluded for £135 damages. The defence was—(1) Denial of miscropping; (2) Counter claim for non-implement of conditions of lease. The parties having agreed to a reference, Robert Smith, farmer, was appointed judicial referee, with power to award expenses. The referee took proof, and issued notes of what he proposed to find, which was, that there had been miscropping to a certain extent, that otherwise the landlord's claim should be disallowed, and that each party should pay his own expenses. The parties acquiesced. The arbiter then adhered to the proposed findings on the merits, assessing the damages at £20, but finding the landlord liable in £50 of modified expenses, on the ground that the action ought to have been brought in the Sheriff-court, and not in the Court of Session. Objections were lodged for the landlord, which objections the Lord Ordinary repelled. The landlord averring that the sum of expenses awarded by the referee was more than the full taxed amount, the Court remitted to the referee to reconsider his award on the subject of expenses, with power to alter his finding. Parties were heard before the referee, the landlord asking that the account of expenses should be taxed. The referee adhered to his former award. The landlord asked the Court to re-remit to the referee.

YOUNG and GIFFORD, for him, urgued:—

The referee may undoubtedly award expenses, and may modify them, but he cannot award expenses which never were incurred. In modifying the expenses, the question, what expenses have been duly incurred, cannot be determined by him without evidence. As to the merits of the case, he might judge, as a man of skill, without witnesses, but in the matter of expenses, as to which he is not skilled, he must take evidence. A farmer is not a "man of skill" as regards expenses in the Court of Session. If the referee is told that the sum of expenses claimed is too great, and that that will be found to be the case on a remit to the auditor, he is bound to take the proper means of informing himself. He may not, perhaps, be compelled to take the evidence of the auditor as conclusive on the question of expenses, and may, perhaps, allow or disallow differently. But when he determines on expenses without taking the evidence of the auditor, that is just as if he determines a question on the merits, as to which he had no skill, without evidence. The pursuer is willing to deal with the question on the footing that he is found liable for the full expenses. Well, the proper mode of ascertaining the full amount is by a remit to the auditor. In regard to expenses in this Court, the proper rule, in the absence of authority, is that in a judicial reference, because still remaining here, the auditor is the proper party to determine the question of expenses, subject to review in this Court. After report, the referee may award or modify. There may, perhaps, be room to distinguish as to expenses before the referee, but even there, he must take some legitimate mode of informing himself in a matter in which he has no skill.

PATTISON and M'KIE for Respondent.

LORD CURRIEHILL.—This is a question as to the effect of a finding by a judicial referee. The case was before us formerly, when we remitted back to him, to reconsider his award. The amount of the sum in dispute is not great, but, in my view of the case, it involves a principle of very considerable importance.

The parties, instead of going on with the case, entered into a judicial reference, with express power to the referee to dispose of the matter of expenses. That probably would have been included, but it was distinctly expressed. The case went before the referee, and he disposed of the matter in dispute; and, as to the matter of expenses, he found the pursuer liable to the defender in £50 of modified expenses. An objection was taken to that part of the award on this ground, that it had been pronounced without the referee having heard parties, and not only so, but that it was contrary to the opinion which he had indicated in a previous note, and which led the parties to believe that he was to dispose of the question of expenses differently. When the matter came before the Court, we thought the referee had acted irregularly in pronouncing such an award without having heard parties, and we remitted back to him, on 5th March, to reconsider the question of expenses, especially as to the amount; to hear parties, with power to alter his report in regard to expenses; and to report of new. The matter went back to the referee, and on 17th April he ordained parties to be farther heard. And then, on 5th June, he pronounced another interlocutor, in which he states that he had reconsidered the question of expenses, and had heard parties thereon—and it was admitted that parties were heard—and, having carefully considered the whole process, adhered to his former report. The question again comes before us on an objection by the pursuer, against whom the award has been pronounced, not only that the expenses awarded were too great, but that the referee had not taken the usual course of having them audited; and, on that ground, he asked the Court to interfere. The question before us is, Is that a competent motion? And the opinion which I have formed is, that the motion is not competent. The ground of that opinion is, that although this reference is a judicial reference, yet, in this respect, it is the same as if it had been a voluntary extra-judicial submission. There are, no doubt, differences in some respects between a judicial reference and an extra-judicial arbitration. These differences were well pointed out in the case of *Mackenzie*, 19th December 1840 (3 D., 318), by all the judges, and especially by Lord Moncrieff. I think that the law on this matter comes to this, that when there is an irregularity committed by the judicial referee, that irregularity may be rectified at any time before his award is judicially affirmed in this court. It is competent for the Court to remit to him to re-consider his opinion; and that course was followed here. We thought the referee had committed that irregularity of pronouncing an award without hearing parties, and accordingly we remitted to him to re-consider the question. But, with that exception, I hold that the powers of a judicial referee,