especially in the face of the pursuers' protest. The breach of contract therefore follows as a necessity, because he left during the currency of the period. It was not necessary for the pursuers to prove that the defender was carrying on the same kind of business as they. It is enough that the time which was to be exclusively occupied in their service was occupied by the defender for his own personal benefit. Then comes the question of damages, which is always an embarrassing one. There are three considerations on which I think the claim to damages can be supported. 1. The loss of time which was abstracted from the pursuers' business and devoted to the defender's own affairs, the pursuer having paid him therefor both salary and travelling expenses. 2. The inconvenience caused to the pursuers in the conduct of their business by the sudden and unexpected breach of contract of the defender, which drove them to look out for a successor under embarrassing circumstances. 3. There must have been some falling off of business in the districts of the country travelled by the defender, some of which, at least, was attributable to his conduct. Putting these things together, and dealing with the question as a jury would do if it had been before them, I arrive at the same result in regard to the amount of damages due as the Sheriff Principal.

The other Judges concurred.

The pursuers were found entitled to full expenses in the inferior Court, and four-fifths of their expenses in this Court.

Agents for Pursuers—MacGregor & Barclay, S.S.C.

Agent for Defender—Alexander Wylie, W.S.

Tuesday, March 5.

FIRST DIVISION.

HILTON *v.* WALKERS.

Arbitration—Judicial Reference—Award. Held competent, before an award under a judicial reference was approved of, to remit to the referee to reconsider his report, in regard to a point which the Court thought required reconsideration, and remit accordingly made.

The pursuer of this action raised an action of damages against the defenders. The amount concluded for was £115. Before the record was closed the parties agreed to "refer the action to the determination of Robert Smith, farmer, Ladyland, near Dumfries, as judicial referee, with power to him to inspect the premises, and to take all manner of probation that may be necessary and to award expenses; and both parties consent that the referee shall have power to consult counsel on any points of law arising in the cause." The Court interponed authority to this reference. The referee reported that the pursuer was entitled to £20 of damages, and in regard to expenses, he reported—"Fourth, in respect of the above findings, and also being of opinion that the case should not have been taken to the Court of Session, but should have been tried in the local courts, finds the pursuer liable to the defenders in the sum of £50 of modified expenses; and, lastly, he finds both parties liable in the expenses of, and incidental to, the judicial reference." In a draft report which he had previously submitted to the parties there was the following clause on the same subject:—"Lastly, as to the expenses of the respective parties, the judicial referee, in the event of his adhering to the findings he has indicated, is disposed to find that each party shall pay their own expenses; and farther, that the expenses of, and incidental to, the judicial reference, shall be paid by the parties equally."

The pursuer objected to the referee's report in so far as it found him liable in £50 of expenses, because *inter alia* "said finding was incompetent, no inquiry into the matter of expenses having ever been required or permitted by the referee. No account of expenses of process and of the reference was produced, and no such sum as £50 has been incurred by the defenders. The pursuer is entitled to see the account of expenses, to have it audited, if necessary, and to be heard on the question of modification."

The Lord Ordinary (Kinloch) repelled the pursuer's objections, and decerned against the parties respectively in terms thereof. The pursuer reclaimed, and the case was argued in presence of the Lord Probationer on Saturday.

GIFFORD (YOUNG with him) was heard for the pursuer.

M'KIE (PATTISON with him) for the defenders.

At advising,

LORD PRESIDENT—This case was made the subject of a judicial reference to Mr Robert Smith, a farmer near Dumfries, and the minute of reference gives him power to inspect the premises, take all manner of probation which may be necessary, and to award expenses. The referee made his final report, and that report has been approved of and given effect to by the Lord Ordinary by the interlocutor which is complained of, in all respects, except that the account of the clerk to the reference has been sent for taxation to the Auditor of the Court. The pursuer reclaims against this interlocutor of the Lord Ordinary, and asks us to sustain certain objections which were stated to the referee's report, to remit the case to the referee with power to him to make such alterations on his report as he may think proper, in so far as it finds the reclaimer liable in the sum of £50 of modified expenses, and to report such alterations to the Court. Now, we had this case argued on Saturday, and we had also the advantage of the opinion of the Lord Probationer on the questions raised by the reclaiming note, and the result of my opinion is substantially in accordance with the opinion of the Lord Probationer. I think the Lord Ordinary's interlocutor is well founded in all respects except one, and that is in so far as he refuses to give any effect to the first of the objections stated by the pursuer. That objection is—[Reads.] Now, it is not necessary to determine whether the proceeding of the referee in this matter was, in the language of the objection, incompetent. It is quite sufficient that we should come to the conclusion—which I do without any difficulty—that the proceeding of the referee in this matter is not satisfactory or proper, and that an opportunity should be afforded him of reconsidering this matter by means of a remit—a course which is perfectly competent, and has been frequently followed in cases of judicial reference. The reasons why I think this course is the proper one in the present case, I shall state very shortly. The notes of the judicial referee, if we may so call them—that is to say, his first proposed report—dealt with the matter of expenses in this way: he said that, in the event of his adhering to the findings on the merits, which he indicated in that report, he "is disposed to find that each party shall pay their own expenses, and further, that the expenses of and incidental to the judicial reference shall be paid by the parties equally.'

Now, after this proposed report was issued, there was a representation against the findings by one of the parties, and an answer by the other, but from what we learned in the course of the argument, the subject of that representation and answer was very much the findings on the merits, and it was not very much addressed to the finding of expenses. And indeed parties, so far as I could gather from the statements made to us as to the contents of these papers, seemed to acquiesce a good deal in what the referee proposed to do by this draft report. But adhering to his findings as they stood in this draft report, and embodying them in the final report which has been given effect to by the Lord Ordinary, he deals with the expenses in this way:—"In respect of the above findings, and also being of opinion that the case should not have been taken to the Court of Session, but should have been tried in the local Courts, finds the pursuer liable to the defenders in the sum of £50 of modified expenses." Now, that is certainly a very hasty and peculiar way of dealing with the question of expenses. It is quite plain that he had not before him any sufficient or regular evidence as to what the amount of the defenders' expenses was. There seems to have been an account laid before him in rather an irregular kind of way, showing a larger sum than this £50, and I daresay Mr Smith, who I am quite sure intended to act most fairly and justly between the parties, had very little notion of the ordinary course of proceeding in dealing with accounts of expenses, and that the idea of taxation never occurred to his mind, and that when he said "the defenders' account is so and so, I think the pursuer should pay £50 of expenses," he thought he was exercising a fair enough discretion. But undoubtedly he was going too fast, because it is very strongly urged upon us by the pursuer, and upon apparently probable grounds, that the account, although the balance at the bottom of it appears to be more than £50, would on taxation really be found to be something much less. Now, if that be so, it certainly would be most unjust that the pursuer should be made to pay more than the expenses of the defenders, taxed as between party and party; and if Mr Smith had been aware of all this, I have not the least doubt that he would have given the parties an opportunity of being heard on this matter, and of taking the proper course to satisfy himself what was the true amount of expenses incurred by the defender, and how much of that, whether the whole or a part, he would think it reasonable that the pursuer should be called on to pay. Now, I think the proper course for us to pursue on the present occasion is just to give Mr Smith an opportunity of doing that yet, and therefore what I propose to your Lordships is to recal the interlocutor of the Lord Ordinary as regards this particular portion of it, to make a remit to the judicial referee to reconsider the question of expenses, and to give parties an opportunity of being heard, with power to him to alter that part of his report which regards the matter of expenses.

Lord CURRIEHILL—I concur with the opinion expressed by Lord Moncreiff in the case of Mackenzie, that when a judicial award is pronounced, and there is nothing stated as to the regularity of the procedure, it is as unchallengeable upon the merits as if it were an extrajudicial submission under the protection of the Act of Regulations. But I also concur with your Lordship and with the Lord Probationer in thinking that there was an irregularity in the proceedings here regarding the matter of expenses. In the first place, the ultimate award of the referee is entirely different from that which he had announced it would be if his opinion upon the preceding articles should be adhered to, and it was adhered to. In the next place, it appears that while Mr Hilton entirely acquiesced in that view, although the other party, in representing on the merits, said also something about expenses, there was something very like an *ex parte* proceeding. The referee received communications from the one party without the other being fully aware of what had taken place, regarding this very matter of expenses, and I think these irregularities have led to a result which in all probability the referee, if he had been aware of it, would have avoided. I therefore think that in a case where an award has not yet been approved of, and when the Court are asked to approve of it, it is still competent for the Court not to alter that award as being wrong, but to remit back to the referee himself to reconsider the matter. He may alter it if he shall come to be of opinion that it is wrong, and there are several decisions to that effect. There is the case of Baxter particularly, and some others collected by Mr Bell in his book on arbitration. I think this case is in precisely the predicament in which these cases were, and therefore I concur entirely in the suggestion which has been made by your Lordship.

Lord DEAS—I have no doubt at all that in the case of a judicial reference it is perfectly competent, as long as the award has not been approved of, to remit back to the referee to reconsider anything which we think requires reconsideration.

The proceedings in the reference here seem to me to have been exceedingly well conducted up to the point which has been noticed by your Lordship of modifying the expenses awarded at the slump sum of £50. I see no reason to think that the referee did anything either wrong or irregular in ultimately disposing of the question of expenses differently from what he had proposed to do in the original draft of his award, which, with great caution, he allowed the parties to see, and to object to if they chose. The main subject of discussion between the dates of the first and second reports appears to have been the matter of expenses. There was a representation given in, arguing that question by Messrs Walker, the tenants, on the one side, and a long answer for Mr Hilton, the proprietor, on the other, from which answer we have an excerpt at p. 5 of the appendix, in which Mr Hilton says that he "did not intend to make any observations on the referee's notes, being satisfied from his practical knowledge that his notes contained what he considered right in the whole circumstances, and the pursuer trusts he will issue his award in terms of the notes on as early a day as possible." So far as the merits were concerned, therefore, the proprietor was satisfied, and he does not seem to have objected to what the referee proposed to do about expenses. But the other party represented on the point of expenses, conceiving themselves entitled to them, and the proprietor opposed that claim, and then the referee, with all the argument before him, came to the conclusion that it was right to give expenses to a modified amount. In all this there was nothing but what was perfectly right and regular. The single error the referee has committed, if it be an error, was that he took for granted too readily that he knew what the full amount of expenses would be. He called for an account. He was quite entitled to do that, but he did not think it

necessary to have a discussion upon the account. I certainly think that the regular and satisfactory course would have been to get the account audited before he modified the amount, because otherwise it was quite possible that the amount which he awarded as a modification might be more than the whole expenses. I therefore perfectly concur with your Lordship in remitting back to him with the view that he may get the account audited, which he is quite entitled to do, or have its amount otherwise ascertained at sight of the parties, and then, if he shall think that the expenses should be borne by the party whom he proposed to hold liable for them, he will report his opinion of new, and state the amount which that party ought to pay.

Lord ARDMILLAN—I have nothing to add. I entirely concur in what your Lordship has said.

Expenses reserved.

Agent for Pursuers—W. S. Stuart, S.S.C.

Agent for Defenders—James Somerville, S.S.C.

Tuesday, March 5.

SECOND DIVISION.

George Patton, Esq., having on Friday last presented her Majesty's letter appointing him Lord Justice-Clerk and President of the Second Division of the Court, and having thereafter passed his probationary trials and taken the customary oaths, took his seat to-day on the bench as Lord Glenalmond.

SOFIO *v.* GILLESPIE AND CATHCART.

Jury Trial—Commission. Motion for a commission to examine the pursuer of an action which was to be tried by jury *refused*.

In this case issues were adjusted some time ago, which were set down for trial. The pursuer being resident in Messina,

CLARK and STRACHAN to-day moved for a commission to examine witnesses resident abroad, including the pursuer.

SCOTT, for the defenders, objected in so far as the motion asked the examination of the pursuer on commission.

The Court granted commission to examine witnesses other than the pursuer, but refused the motion *quoad* him. The pursuer was bound to attend the trial in this country and give his evidence at it.

Agent for Pursuer—James S. Mack, S.S.C.

Agent for Defenders—A. K. Morison, S.S.C.

Wednesday, March 6.

SMYTH *v.* WALKER.

Diligence — Adjudication — Letters of Horning — Superinduction—Erasure—Prescription. In a challenge of an adjudication on the grounds that certain words had been filled up after having been left blank in the letters of horning when they were signeted, and that there was an erasure in the execution—Held that the averments did not affect essential matters, and diligence sustained. *Question*—whether the documents were "grounds and warrants" which cannot be challenged after lapse of twenty years.

This was an action of reduction, improbation, and declarator, count and reckoning payment, against Mr Walker, who, on a bond for £300, had in 1837 adjudged the subject of his security in absence, from the pursuer's parents, and its object was to reduce that bond and all the diligence which had followed thereon. The pursuer had alleged forgery, and as he did not abandon that ground of action, the Lord Ordinary (Jerviswoode) ordered him to lodge issues. These issues, when lodged, only raised a question as to certain superinductions in the letters of horning, and an erasure in the execution thereof. The defender therefore craved absolvitor, at any rate as regards all the writs impugned, except the horning, and also as regards it, because, after the lapse of twenty years, the prescription of the warrants of an adjudication prevented any such challenge; and even if such challenge were competent, the superinductions and erasure were not of essential words, and were not such as to cast the diligence. The Lord Ordinary reported the points so raised.

MILLAR and WEBSTER for pursuer.

GIFFORD and THOMS for defender.

At advising,

LORD JUSTICE-CLERK — This case, depending since 1862, was instituted by the pursuer, David Smyth, as heir of his deceased father Alexander, and of his deceased mother, for the purpose, in the first place, of setting aside a bond over property belonging to his deceased father, together with an adjudication led in virtue of the bond against the subjects; also, to set aside a decree of the Magistrates of Dundee, in a process at the instance of the defender, the object of which was to obtain a count and reckoning with the deceased mother of the pursuer, as in possession under a prior bond, of part of the subjects, and, as was alleged, of the other portion of the subjects; and, lastly, a decree of declarator against Mrs Smyth in the Court of Session in absence, finding that Mrs Smyth's former security had been extinguished.

In reference to the reduction of the right of the defender, the bond and disposition in security, which was granted by the deceased Alexander Smyth in favour of Robert Chrystal for a sum of £300, and the various steps of the progress by which the right passed from Robert Chrystal into the person of the defender are called for. These constitute the first six writs called for. The eighth call is for the horning and poinding, the execution of charge and execution of denunciation; and the ninth is for the decree of adjudication.

There are no grounds assigned, at least there are none insisted on, for impeaching the validity of the original bond, and nothing directed against the validity of the instruments of transmission, by which the defender came to be in right of the bond. The pursuer's challenge is truly directed against the letters of horning and subsequent procedure.

The first objection taken is that the letters of horning, when signeted, were blank in the description of the residence of the party who was to be charged in virtue of the letters, and the pursuer offers to instruct that the blank was filled up after the signeting and before recording. A similar objection is taken to the word "sasine," and to the words "in favour of," which are a portion of a description of one of the links in the progress.

The first answer of the defender is, that the letters of horning, being "warrants" of the adjudication, which adjudication is *in se* complete, cannot be called for, or, if exhibited, cannot be looked at with a view to set aside proceedings