OUTER HOUSE.

(Before Lord Ormidale.)

GLASGOW CORPORATION WATERWORKS COMMISSIONERS *v.* JARDINE HENRY.

Lands Clauses Consolidation Act—Reference—Expenses—Clerk's Account. Held (per Lord Ormidale) that in a reference under the Lands Clauses Consolidation Act, in which the arbiters awarded no compensation, the claimant was, under section 32 of the statute, bound to pay one-half of the account of the clerk to the reference.

Counsel for Pursuers—Mr John Burnet. Agent—Mr John Thomson, S.S.C.

Counsel for Defender—Mr Robert Johnstone. Party, agent.

This is an action for relief and payment, to the extent of one-half, of the clerk's account in a reference betwixt the pursuers and the defender, under the Lands Clauses Consolidation Act, in which the arbiters found that the defender was not entitled to any compensation whatever. The pursuers had paid their own expenses and the arbiters' fees, and they had also been obliged to pay the account of the clerk to the arbiters. The defender maintained that under section 32 of the Act he was not liable; but the Lord Ordinary has repelled his defence by the following interlocutor:—

"Edinburgh, 3d February 1866.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, Finds that under a reference or submission entered into by the pursuer as representing the Glasgow Corporation Water Works Commissioners and the defender, by nomination of arbiters, in terms of the Lands Clauses Consolidation (Scotland) Act, the arbiters appointed Mr William Traquair, writer to the signet, to be clerk to the reference, and that Mr Traquair acted as such clerk: Finds also that, after considerable procedure, in the course of which the defender made and insisted in a claim for compensation against the said commissioners in respect of certain operations by them, the arbiters issued their award or decree-arbitral, finding *inter alia* no damages or compensation due to the defender as trustee on Mr Graham's sequestrated estate, under or in respect of the said nomination of arbiters or subject-matter thereof, and declaring that 'the expenses of the arbitration and incident thereto' should be borne by the parties, in conformity with the provisions of the Lands Clauses Consolidation (Scotland) Act 1845: Finds also that the pursuer, as representing said commissioners, on the 13th of September 1865, paid to Mr Traquair £92, 10s., being the amount of his account rendered to them as clerk to the reference foresaid, conform to receipt by Mr Traquair, in which is reserved to said commissioners all the relief competent to them against the defender for the one-half of said sum, as a joint-obligant with them for Mr Traquair's account; and finds, also, that, by section 32 of the said Lands Clauses Consolidation Act it is enacted that '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:' Finds that, in these circumstances, the defender is 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. Before further answer, remits to the Auditor of the Court of Session, as a man of business, to examine Mr Traquair's account No. 7 of process, hear the parties thereon, tax the same, and report to the Lord Ordinary.

(Signed) "R. MACFARLANE."

"*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. (Intd.) R. M."

(Before Lord Mure.)

PET.—WILLIAM BARRIE AND OTHERS.

Nobile Officium. Circumstances in which a *curator bonis* appointed *ad interim.*

Counsel for the Petitioners—Mr D. B. Hope. Agent—Mr P. S. Malloch, S.S.C.

This was an application for the appointment of a *curator bonis.* The petition prayed also for the appointment of a *curator bonis ad interim*, pending the currency of intimation and service. The ground on which this was asked was that the petitioners, who

had been appointed trustees and executors under the settlement of the person requiring the curator, had "learned that attempts have recently been made to induce him to transfer a large portion of his means to persons exercising undue influence over him, and they fear that he may be liable to be subjected to further undue influence and interference, whereby his estate may be squandered."

There was no precedent cited for such an interim appointment, but Lord Mure, in the circumstances, nominated the party suggested by the petitioners, *ad interim*, and appointed intimation and service of the petition.

Monday, Feb. 5.

LANDS VALUATION COURT.

(Before Lords Kinloch and Ormidale.)

The following cases have been decided by Lords Kinloch and Ormidale as Appeal Judges, under section 2 of the Valuation of Lands Amendment (Scotland) Act, 20 and 21 Vict., c. 58, which provides that when any person shall declare himself dissatisfied with the determination of the Commissioners of Supply in counties or the magistrates of burghs in regard to the valuation of his lands, he may require the said commissioners or magistrates to state specially, and to sign, the Case upon which the question arose, together with the determination thereon, to the end that the same may be submitted to the senior Lord Ordinary and the Lord Ordinary officiating in Exchequer cases in the Court of Session for their opinion thereon; and such Judges to whom such case may be submitted shall, with all convenient speed, give and subscribe their opinion thereon; and according to such opinion the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed.

SUTHERLAND *v.* GORDON OF CLUNY.

Valuation of Lands Act—Lands and Heritages. Held (per Lords Kinloch and Ormidale) that a person deriving rent from a tenant for a right to gather seaware and manufacture kelp on the seashore should be placed on the valuation roll as an owner of lands and heritages.

Counsel for the Respondents—Mr Millar.

This was an appeal by the assessor of the county of Inverness against a decision of the Commissioners of Supply for that county, finding that the kelp shores of South Uist, the property of Mr Gordon, which had been entered by the assessor in the valuation roll for the year 1865–66 as of an estimated yearly value of £1000, were not subject to assessment.

Mr MILLAR appeared to support the judgment of the Commissioners on the grounds—(1) that the manufacture of kelp afforded no profit in itself, and was carried on solely as a means of employing tenants on the estate, who otherwise would be without occupation, and unable to maintain themselves and their families, or to pay rent for their possession; (2) that the ware from which kelp is manufactured does not grow upon the rocks, but is drifted from the ocean by spring tides, and is a moveable, changeable subject; (3) that the preparation of kelp being a manufacture, the profits yearly derived from it by Mr Gordon were not returns from lands or heritages in the sense of the statute, or in any sense; (4) that if any return on account of kelp could consistently with the provisions of the statutes, be entered in the valuation roll, the value of the ware or raw material, being that which remained after the wants of the estate for manure and other purposes were satisfied, was all that could reasonably be stated; and (5) that no such entry having been made in previous years in the valuation roll, and there being no new circumstances to justify the proposed change, the past practice ought to be adhered to, and the proposed entry in the valuation roll omitted.

In the adjusted case prepared for the opinion of their Lordships, it was stated on behalf of the assessor that his attention had been directed to Colonel Gordon's estate of South Uist, and by an advertisement of its sale, from which it appeared that, in addition to the land rent, the free annual return received by Colonel Gordon from kelp, on an average of the last five years, had been £1353. That sum was accordingly included in the gross rental of the estate before making the usual deduction of public burdens; and he added that, having surveyed the ground and made inquiry on the spot, he believed £1000 was a fair and just estimate of the subjects in question. He further submitted that the subjects formed pertinents of the estate of South Uist, and were capable of actual occupation; that although kelp shores are not specified in the interpretation clause of the Act, yet that the seaweed which grew upon the shores and rocks in South Uist was part of Colonel Gordon's immoveable estate, and must therefore be held to fall under the term "heritage" in the Act.

The Commissioners having sustained the objections on behalf of Colonel Gordon to the assessor's entry, their Lordships to-day pronounced an interlocutor reversing the commissioners' decision, finding that the subjects should be valued at such sum of yearly rent as may be reasonably expected to be paid, year by year, by a tenant, to whom might be let the right of gathering and appropriating the ware growing and cast on the shore in question, together with the use of the shore for manufacturing kelp from the said ware, and remitting to the commissioners to proceed accordingly.

SUTHERLAND *v.* THE BRITISH SEAWEED CO.

Valuation of Lands Act—Lands and Heritages. Held (per Lords Kinloch and Ormidale) that persons having a right to gather ware from the seashore should be placed on the valuation roll as occupiers of lands and heritages.

Counsel for the Respondents—Mr J. B. Balfour.

The assessor of the county of Inverness having entered the respondents in the valuation roll for that county as lessees of the kelp shores in the parish of North Uist, the property of Sir John P. Orde, Bart., at a yearly rent of £800, and the Commissioners of Supply having found that the Valuation Acts did not embrace the kind of subjects of which the British Seaweed Company were the lessees, the assessor now appeals against that decision. In the adjusted case prepared for the opinion of their Lordships, it was stated on behalf of the appellant that the valuation complained of was made by him in terms of a return made by Sir John Orde, the proprietor of the subjects in question, which bore that the British Seaweed Company were tenants or occupiers of the kelp shores at a rent of £800, for a term of years, on a formal lease; that the subjects appealed against formed pendicles or pertinents of the estate of North Uist, and as such were capable of actual occupation; that although the British Seaweed Company have not an exclusive right to gather seaware, they were precisely in the same position as the other tenants on the estate, who shared with them the right of gathering seaweed for manure, and whose gross rents were included in the valuation roll; that although kelp shores are not enumerated in the interpretation clause of the Act 17 and 18 Vict., cap. 91, sec. 42, yet that the seaweed which grew upon the shores and rocks in North Uist was part of the proprietor's immoveable estate, and must therefore be deemed "heritage," and of such a nature as would make its exclusion from the roll repugnant to a fair and just interpretation of the context of the Act, as set forth in the 42d section.

It was further observed that the shores of these islands, and the margins of the numerous interior salt lakes, produce in great abundance three kinds of seaware—*ladyware*, which grows between the spring and neap and high tides; *bellware*, between low and