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.

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*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.

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*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-

tents of a promissory-note for £600, accepted by him jointly with his deceased brother, but alleged to have been so accepted solely for his deceased brother's behoof; (2) Whether he was also entitled to be relieved of certain expenses incurred by him in defending an action on the note brought against him by the holder.

In support of his allegation, that he was merely cautioner in the note, and that Alexander Thoms was the true debtor, the pursuer produced certain entries from the books kept by Alexander Thoms, and also a letter of acknowledgment by the latter of the same date as the bill. This acknowledgment was admitted to be signed by Alexander Thoms; but it was neither holograph nor tested; and the defender, in these circumstances, contended that it was not an effectual writ.

The Lord Ordinary (Jerviswoode) sustained the acknowledgment as an effectual writ, and decerned in terms of the summons.

The defender reclaimed.

Lord Advocate (Gordon) and Scott, for him, pleaded that the document was not *in re mercatoria;* that its date was not probative, and therefore it could not be assumed as *pars ejusdem negitii* with the note; and that, that being so, there were no grounds for excepting the document from the ordinary rule that writs to receive effect must be either holograph or tested. The defender also pleaded that, in any view, he was not liable for the expenses concluded for, these having been incurred by the pursuer in defending himself in an action in which he was ultimately found wrong.

Solicitor-General and Adam in answer.

The following cases were quoted in the course of the argument:—*Macandrew*, 13 D. 1111; *Hislop*, 5 D. 507; *Black*, 2 S. 118; *Crichton*, M. 17047; *Wallace*, M. 17056; *Edmonstone*, M. 17057; *Walker*, Hailes, 985; Wilson's Thomson on Bills, p. 2.

The Court to-day adhered to the Lord Ordinary's interlocutor, except as regards the expenses sued for, as to which their Lordships were equally divided, and which were thereupon given up by the counsel for the pursuer.

At advising—

Lord Cowan held that the acknowledgment and the entries in the books between them were good evidence of the pursuer's averment, and he agreed with the Lord Ordinary's conclusion on that ground, without finding it necessary to decide absolutely what would have been the effect of the acknowledgment if it had stood alone. His Lordship was, however, clear that the pursuer was not entitled to be relieved of the expenses sued for.

Lord Justice-Clerk, Lord Benholme, and Lord Neaves concurred in holding that the acknowledgment was *per se* sufficient. They held that it was properly *in re mercatoria* because the note was so; but, further, they thought that the statutes with reference to the authentication of writs had no application to a document which was merely used as evidence of a fact. These statutes were designed to secure that parties should not execute writings which created obligations otherwise than deliberately, and, to secure that, they provided in effect a power of resiling whenever the deed of obligation was not either holograph or tested. That was a principle which did not apply to a document which merely set forth a fact. A man did not need to deliberate about stating a matter of fact; and it was not material that a statement of fact might indirectly create an objection. The obligations contemplated by the statutes were obligations by which parties became directly bound, and which formed the substantive *vincula* upon which action could be raised. The fact was, that the question was just one of satisfactory evidence, and the effect to be given to a writ like the present depended just upon the value and effect which a judge or jury might be disposed to give to it in the circumstances of the case. Here there was no doubt about the genuineness of the signature, and there was certainly no presumption that the signature was not adhibited to the writing in the knowledge of its contents.

With regard to the question about the expenses, Lord Benholme could not presume, in the absence of information, that the litigation had been improper; and therefore was for adhering on this point also to the Lord Ordinary's interlocutor.

The Lord Justice-Clerk was inclined to take the same view, but desired some inquiry before deciding.

Lord Neaves agreed with Lord Cowan.

Their Lordships were unanimous in holding that the pursuer should get the whole expenses of the present process.

Agent for Pursuer—A. J. Napier, W.S.

Agents for Defender—Hill, Reid, & Drummond, W.S.

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*Saturday, December* 21.

## FIRST DIVISION.

### MACPHERSON, PETITIONER.

*Factor* loco tutoris—*Removal — Resignation — Expenses.* A petition for removal of a factor *loco tutoris* was presented. An agreement was then entered into by the parties, the factor to resign, and agree to new factor being appointed, on withdrawal of the charges made against him in the petition; both parties to get expenses out of the estate. The Court *held* that the expense of the petition itself would form a good charge against the estate, but refused to give expenses to either party out of the estate.

This was a petition for removal of a factor *loco tutoris*, and appointment of a new factor. The petition was presented by the only surviving next-of-kin of the pupil, and the ground upon which the petitioner craved removal was, that the factor, with whom the boy had resided for some time, had totally neglected the boy's education and health, and was not a fit person to hold the office of factor *loco tutoris*.

Answers were lodged for the factor, denying the charges made against him, but stating his willingness that the boy should be sent to reside with some respectable third party.

The Court, after hearing counsel, remitted to the Sheriff to take a proof, but, before the proof was taken, the matter was settled on the footing of the petitioner withdrawing the charges made against the respondent in the petition, the respondent resigning his office, and agreeing to the appointment of a new factor *loco tutoris;* both parties to get their expenses out of the pupil's estate.

Both parties now claimed expenses out of the estate.