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