and improbation of the document alleged to be forged. JOHN INGLIS, *I.P.D.*"

Agent for Complainer—John Patten, W.S.
Agent for Respondont—J. M. Macqueen, S.S.C.

MOORE *v.* FORTH IRON CO.

Process—Jury Trial—A. S. 1841. Circumstances in which a motion for absolvitor, in respect the pursuer had not gone to trial within twelve months after an issue was adjusted was refused.

This was an action of damages by a manager for wrongous dismissal. An issue for trial was adjusted on 3d February 1866. Notice of trial had been given for last Christmas sittings, but on 3d December 1866 it was ascertained that the pursuer could not go to trial at Christmas, and he accordingly countermanded his notice of trial, and gave notice of trial for the ensuing sittings. On 29th January 1866 the defenders made a tender of £1020, 5s., and expenses up to that date, and on 28th February last the pursuer, finding that he could not be present as a witness at the trial in consequence of professional engagements in Spain, intimated to the defenders' agents that he was willing to accept their tender and to pay them the expenses which they had incurred since its date. On the following day—namely, 1st March—the defenders intimated that they intended to move the Court for absolvitor under sect. 46 of the Act of Sederunt of 1841, in respect of his failure tc proceed to trial within twelve months. This motion was discussed to-day.

WATSON for the pursuer.

YOUNG and CLARK for the defenders.

The cases of Blair *v.* Buchanan, 22 D., 1271, and Angus *v.* Grier, 16 D., 303, were cited.

The motion was refused, with expenses.

The LORD PRESIDENT said—I think this motion cannot be entertained. There is no doubt that the rule of the Act of Sederunt is an exceedingly wholesome and expedient one, but it is a rule which might be strained so as to work great injustice, if a certain amount of discretion was not, as there is, left to the Court. I think there has been in this case sufficient cause shown why the rule should not be applied. The kind of investigation necessary with a view to trial was out of the ordinary course, and involved an inquiry into the going business of the defenders. It was not to be expected that they were to give up their business books, and accordingly a very reasonable arrangement was made whereby accountants for both parties, one from Edinburgh and another from Glasgow, were to examine the books at the defenders' works in Fifeshire. This arrangement, however, was calculated to cause delay, and we find that it did so. Then on 3d December last, the pursuer's agent, seeing that the investigation was not sufficiently advanced to justify his going to trial at Christmas, wrote to the defenders' agent that he had countermanded the notice for trial then, and given a new notice for March. It has not been said to-day that the investigation was sufficiently advanced in December to justify the pursuer in going to trial at Christmas; and how do the defenders' agents receive the letter of the pursuer's agent? They were entitled, notwithstanding the countermand, to come to the Court and ask us to fix the trial for Christmas, but instead of that, they go on jointly with the pursuer's agent until recently in preparing for the trial in March. In these circumstances, I think the defenders' motion should be refused.

The other Judges concurred, Lord DEAS observing that, to his mind, it was not immaterial that the acceptance of the tender had preceded the intimation of this motion. The twelve months expired on 3d February, but this motion was not made till 1st March, the tender having been accepted the day before.

Agent for Pursuer—A. Kelly Morison, S.S.C.
Agents for Defenders—Lindsay & Paterson, W.S.

CAMERON AND CO. *v.* GIBB.

Reparation—Breach of Contract—Master and Servant. Circumstances in which a servant found liable in £100 damages to his employers for breach of contract of service.

This was an advocation from Glasgow. The pursuers, who are stationers in Glasgow, sued the defender for £300 damages for breach of contract, he having in September 1864 left their service without their consent, and having before throwing up his engagement clandestinely carried on business on his own account. The Sheriff-Substitute (Glassford Bell) in his interlocutor "finds that the pursuers have proved both by the defender's own admissions, when examined as a witness *in causa*, and by other evidence, that said defender broke his said engagement at the time set forth; and the defender has failed to prove that there was any sufficient ground to justify his so doing, and in particular, has failed to prove either that the pursuers themselves wished to discontinue his services, or that they, on their part, committed any breach of the terms of the engagement: Finds that the pursuers have also proved out of the defender's own mouth that he transacted business with at least thirty customers of his own between January and September 1863, when in the pursuers' employment, and the defender has failed to prove that he did this with the pursuers' consent or acquiescence; it being, on the contrary, proved that the pursuers expressly refused their consent when it was asked, and were ignorant until after the defender left them, that he was so carrying on any private business in breach of his engagement: Finds that immediately after breaking his engagement with the pursuers, the defender assumed a partner and commenced a business, under the firm of James Gibb & Company, of precisely the same character as that carried on by the pursuers, and for nearly fifteen months of the time he ought to have been in the pursuers' employment entered into an active competition with them in nearly all the districts in England and Scotland in which they had customers, whereby the pursuers' emoluments were seriously affected." He therefore found damages due, and assessed them at £150. The Sheriff (Alison) altered, but only to the effect of reducing the damages to £100.

Both parties advocated.

FRASER and R. V. CAMPBELL were heard for the pursuers.

MACKENZIE and CATTANACH for the defenders.

The Court adhered to Sheriff Alison's judgment.

At advising,

The LORD PRESIDENT—The first question is whether the pursuers have made out the two grounds of damage libelled. I can see no reason for doubting the soundness of the leading findings in the Sheriff-Substitute's interlocutor. It would be a mere waste of time to go into the evidence. The defender was not entitled to read the memorandum of engagement in the way he says he did,

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.'