

served rather than otherwise, is put in possession of a disposition without his having paid the price. Then a loan is obtained over the subjects, and the sum borrowed is received by Mr Welch, but no part of it is applied in payment of the price. The money seems to have been applied otherwise. Mr Welch gives no explanation except that his brother took charge of his cash matters. That is not satisfactory. In the meantime, Mr Jackson is proceeded against for payment of a trust debt little more in amount than the price of the subjects, and he is incarcerated for it. What is the explanation of all this? It is said there was a real burden over the subjects which had to be cleared off. There does seem to have been such a burden at one time, but there is also some evidence that it had been paid off, although there was no discharge of it. That, however, was no reason for putting Galloway in possession. It might have been a reason for suspending the settlement. I don't see that it is any excuse at all. This is not satisfactory; but it is said that Mr Jackson afterwards acquiesced in what had been done. That is not a good answer either. I don't think it is proved that he did acquiesce in the sense in which the statement is made. Therefore I think there has been a great departure from the course of conduct which this trustee ought to have followed, and irregularity of such a character that I think it not right that he should be continued as trustee. I give no opinion as to his motives. If he had sold the property at an undervalue, that would have been a case of the grossest kind imaginable. But although he did not do so, he had ulterior views, whatever they were, which were favourable to Galloway, the purchaser, and unfavourable to the trust estate. And besides, he mixed himself up with one of two parties, betwixt whom he had been empowered to act as arbiter. The judgment of the Court is that Mr Welch must be removed from office.

On the motion of the LORD ADVOCATE, Mr Welch was found liable to the petitioners in expenses, subject to some modification; and it was stated that he would not be allowed to charge his own expenses against the trust estate.

Wednesday, Nov. 8.

## SECOND DIVISION.

### WILSON v. NIGHTINGALE.

Counsel for the Pursuer—Mr Mackenzie and Mr Orphoot. Agents—Messrs Traill & Murray, W.S.

Counsel for the Defender—Mr Fraser and Mr Scott. Agent—Mr James Nisbet, S.S.C.

This is an action at the instance of Mr Richard Wilson, chartered accountant in Edinburgh, against Mr Edward William Nightingale, clothier there, in which he concludes for the sum of £97, 15s. 11d., conform to account rendered for professional business done by him on account of and under the employment of the defender. The defender does not dispute the employment of Mr Wilson, but maintains that his charges are quite exorbitant, and that the understanding between them was that Mr Wilson was not to charge the full fees of an accountant. After the Lord Ordinary had repelled a preliminary plea stated by the defender, to the effect that the pursuer had not relevantly set forth the grounds of his claim by specific accounts, the parties agreed to refer the matter to Mr John Hunter, Auditor of the Court of Session, *qua* accountant, whereupon the Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

“The Lord Ordinary, having heard counsel and made avizandum, repels the first plea in law stated for the defender, and of *consent* remits to the Auditor of Court, *qua* accountant, to examine into the nature and extent of the services rendered by the pursuer which are set forth on the record as the ground of the claim made by him under the conclusions of the present action, with power to the

said Auditor to call for documents and explanations from the parties, and take such probation by examination of havers and witnesses as may be necessary to enable him to carry out this remit; and grants commission to him, and diligence against said witnesses and havers accordingly; and thereafter to report what sum in his opinion would amount to adequate remuneration to the pursuer for work done by him on behalf of the defender.”

Upon this a long proof followed before the Auditor, in the course of which several objections were taken by the defender, and brought by him, by appeal, under review of the Lord Ordinary. Mr Hunter reported that the work which Mr Wilson had been employed to do for the defender was of such a nature as to be suitable only for a professional accountant, and that his charges were extremely moderate, and ought to be sustained in full. Against this report the defender lodged a number of objections, and a full discussion took place before the Lord Ordinary both upon these objections and on the objections that were raised in the course of the proof. The Lord Ordinary repelled all the objections, sustained Mr Hunter's report, and found the defender liable. To-day the Court concurred in the result of this judgment, but held that they could not enter on the objections which were taken in the proceedings before the reporter. The parties had preferred that manner of ascertaining their rights to going, in the usual way, through the courts of law, and they must be held bound by their own acts. The remit to Mr Hunter was not a judicial reference, but a private arrangement among the parties, and Mr Hunter had thereby conferred upon him a discretionary power with which the Court could not interfere, and which they were not by any means prepared to say he had exceeded.

### MACBRIDE v. CLARK, GRIERSON, AND CO.

Counsel for the Pursuer—Mr Pattison and Mr Watson. Agent—Mr James Renton, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Clark. Agents—Messrs A. G. R. & W. Ellis, W.S.

This is a question as to the construction of a cautionary obligation. It arises in the following circumstances:—In 1861 the company of William Anderson, Son, & Clark, of St Vincent Street, Glasgow, obtained from the Union Bank a cash credit upon a current account to the amount of £3000, upon their granting a bond along with several co-obligants. The said company, and the individual partners of it, Mr James Gemmell, Glasgow; Mr James Munn, Glasgow; and Clark, Grierson, & Co., Argyle Street, Glasgow, as a company; and Robert Bland Clark, and William Grierson, the individual partners of the company, all bound and obliged themselves as full debtors and co-obligants to pay to the bank whatever might be found owing by the firm of William Anderson, Son, & Clark. This firm became bankrupt in 1861, and at that time there was due by them to the bank, in respect of their operations on the cash credit, a sum of £2790, 6s. 3d. of principal, besides interest on the current account. After the insolvency various payments were made by several of the co-obligants in implement of their obligation. Among other payments some were made from time to time by the pursuer, who is judicial factor on the estate of Mr Munn, now dead, one of the co-obligants, and an action is now brought by him to determine what are the several obligations of the parties. The question which truly arises is whether Robert Bland Clark and William Grierson signed merely as partners of Clark, Grierson, & Co., and in corroboration of the company signature, or added their individual obligations to that of the company. The pursuer, on the one hand, contends that according to the sound legal construction of the bond there are five separate cautionary obligants; while the defendants, on the other hand, contend