third party, and the assignee might raise action on that obligation of delivery against the ironmaster. He no doubt would be liable to be met by all exceptions pleadable against the party from whom he acquired it; but still, so far as the relevancy of his action is concerned, I should not expect him to say much more than that this was an obligation for delivery of pig iron which had been received by Messrs Campbell Brothers, or whoever the party might be, in the ordinary course of trade, from Dixon, and that it had been sold and assigned to them, and that they sued as assignee of Campbell Brothers. Or even this case might easily be supposed—that Campbell Brothers having bought from Dixon a certain quantity of iron, immediately entered into a contract of sub-sale with Colvin, and sold the same iron to him, and to prevent circuity asked Dixon, as the original seller, to grant an obligation of delivery direct to the sub-vendee. An action raised upon such a document as this, in these circumstances, would also be very easily stated, and very easily sustained as regards relevancy. But the essential difference between all these cases and the present is this—that in these cases the pursuer of the action would set himself out distinctly in his character of sub-vendee, a character which existing in him necessarily implies the existence of two contracts of sale, one from Dixon to the party from whom the pursuer acquired, and the other from that party to the pursuer. But in the present case there is nothing of that sort. There is a complete blank in point of averment between the pursuer and Dixon, and the only way in which that blank is sought to be filled up is by saying there was a contract between me and Campbell Brothers, but as to the relation between Campbell Brothers and Dixon I know nothing. They gave me this; where they got it, or how they got it, or how Dixon came to grant it, I decline to give any explanation of. That is the position in which the pursuer stands, and it appears to me that that is not a good ground of action. I therefore concur with your Lordships in holding that this action must be dismissed; but for reasons which I have suggested I can quite understand that an action may yet be laid upon this same obligation, and may be so averred as to be perfectly relevant and sufficient.

Action dismissed, with expenses.

Agent for Pursuer—James Webster, S.S.C.

Agents for Defenders — Melville & Lindesay, W.S.

Friday March 15.

SECOND DIVISION.

HENDERSON *v.* PAULS.

Arbitration — Remuneration of Arbiter — Implied Contract—Moral Obligation. (1) *Held* that in the absence of stipulation an arbiter has no claim to remuneration; but (2) circumstances in which *held* that the parties to a submission had impliedly bound themselves to remunerate the arbiter equally; (3) *Dictum* of Lord Medwyn, in *Fraser*, 16 S. 1057, repudiated, and *held* that one of two parties implementing a *moral* obligation has no title to enforce relief from the other party *at law.*

This case, which depends betwixt the same parties as that of Pauls *v.* Henderson *(ante*, p. 179 and 246), came up to-day upon a question as to payment of the arbiter's fee, amounting to £31, 10s. That had been paid by the pursuer, and he now sought to recover the one-half from the defenders.

The pursuer made the following averment:—"In addition the said David Henderson has paid to the referee the very reasonable fee of £31, 10s., for relief and repayment of which the said Andrew Walter Paul, and Thomson Paul, are liable to him. This he did after proposing to the said Thomson Paul, for himself, and as acting for his brother, to meet and adjust the amount, but having received no reply, he intimated on 3d June 1864 that he considered the said sum of £31, 10s. a fair and reasonable fee for the referee, and would pay it to him in the course of the following day, and claim repayment thereof from the defenders; but there was no reply given to the intimation, nor objection to his doing so stated by the defenders. The amount of the sums due the pursuer as at date of the summons, amounts, including the amount of the arbiter's fee, as per state produced herewith, to £118, 10s. 7¼d., and the defenders are liable in further interest on £115, 3s. 3d. of that sum, being principal, from the date hereof till payment. The pursuer has often desired and required the defenders to make payment of the sums found due by the decreet-arbitral, and of the fee paid to the arbiter, but they have refused, or at least delayed, so to do. Denied that any such notice as stated in the defenders' answer to this article was made to the pursuer or his agents."

To which the following answer was made by the defenders:—"Denied that the defenders are due the sums here stated or any of them. With regard to the alleged fee of £31, 10s. said to be paid to the referee, the statements here made are denied, and it is explained, that notice was made to the pursuer's by the defenders' agent, that the alleged decreet-arbitral was objected to, and was to be brought under reduction. *Quoad ultra* denied."

The Lord Ordinary (Ormidale) found the defenders liable, and added the following note to his interlocutor:—

"The Lord Ordinary refers to his note subjoined to the interlocutor in the reduction case as fully explaining the grounds on which he proceeded in assoilzieing the pursuer from that action.

"The only matter involved in the present action which was not also involved in the reduction case, and disposed of by the interlocutor therein, is the fee of thirty guineas paid by the pursuer to Mr Maitland, the arbiter, and one-half of which, as having been so paid, is now sought to be recovered from the defenders. The defenders nowhere say that the fee was extravagant or unreasonable, and the proceedings in the submission amply instruct that it was not so. It is apparent, indeed, that the defenders have not stated, and did not intend to state, any objection or defence to the claim in question, or indeed to any of the sums concluded for, except in so far as they might be established in their action of reduction. In other words, it is plain, the Lord Ordinary thinks, that the defenders relied solely on the reduction, and neither stated nor intended to state any defence apart from or independent of the reduction. Accordingly, after setting out the particulars of their defences, they, in the 11th or final article of their statement, say—'In these circumstances, the defenders have been advised to raise, and are in the course of raising, an action of reduction of the pretended decreet-arbitral, on the several grounds above indicated;' and the defenders' pleas in law are stated on the same footing. They contain no indication

of any separate or specific objection to the arbiter's fee.

"But, at any rate, and even supposing there had been a separate and specific defence to the action in so far as it concludes for the arbiter's fee, the Lord Ordinary does not see how, in the circumstances, it could be given effect to. It is a moderate and reasonable fee in itself; and the defender did not at the debate, any more than in the record, say it was not. The only objection—hinted at rather than seriously urged by them at the debate—independently of the reduction of the decreet-arbitral, was, that the office of an arbiter was honorary, and no legal obligation existed or could be enforced for payment of remuneration to him where no stipulation for such remuneration had been made previous to or at the time the submission was entered into. However any such question might be determined when properly and purely raised, the Lord Ordinary considers that, in the special circumstances of the present case, the defenders have no sufficient defence against relieving the pursuer of one-half of the fee which was actually paid to the arbiter; for not only was the fee moderate and reasonable in itself, but the defenders (see Condescendence VI.) allowed it to be paid without objection of any kind, after due intimation had been made to him that it was to be paid on the footing that repayment of the one-half thereof was to be claimed from him. The present, therefore, is a peculiarly favourable case for enforcing the principle of liability, given effect to by the Court in the case of Jolly, 12th December 1834, 13 Shaw, 188, and adverted to as settled law by Lord Medwyn in the subsequent case of Fraser, 26th May 1838, 16 Sh., 1049, where (p. 1057) he remarked, that 'although remuneration be not stipulated, if one of the parties acknowledges his liability therefor, which is a moral if not a legal obligation, and pays what is reasonable, he can recover the half from the other party.'"

The defenders reclaimed.

G. H. PATTISON for them.

ORR PATERSON in answer.

At advising,

LORD JUSTICE-CLERK—There are two points on which the interlocutor reclaimed against is sought to be altered; one in so far as relates to the remuneration of the arbiter, the other as to expenses. The second materially depends upon the result of the first.

The Lord Ordinary has decerned against the reclaimers for one-half of the fee paid by the respondent to the arbiter, and it is objected that the payment cannot found a good claim against the reclaimers, because the office of an arbiter is gratuitous, and a voluntary payment of a sum not legally exigible cannot be the foundation of a legal claim.

It is answered that the parties must in this case be held to have acted upon an understanding or agreement, to be read out of the facts of the case and the nature of the pleadings, that the arbiter should be remunerated—that payment of the arbiter's fee was made in implement of the understanding or agreement so established, and that it therefore stands upon a good legal basis. A second and separate argument is advanced upon the authority of Lord Medwyn as expressed by that very able judge in delivering his opinion in the well-known case of Fraser—the proposition being that where one of two parties, mutually under a moral obligation not perfect or complete in law, pays what is right and reasonable, he may recover from the party who is bound along with him under that moral obligation one-half of what he has so paid.

I may state at once that I do not hold that second argument of the respondent to be sound. I see no case in which effect has been given to any such doctrine; and it seems to me to be opposed to sound legal principle. A payment by one man of what another is under *moral* obligation to pay can never vest that party with a legal right to enforce the obligation. The utmost extent of right which a party so paying can set up is that of an assignee or implied assignee of the party to whom he has made the payment, but if the obligation which a third party has satisfied is only *moral*, the satisfaction of it by that third party can never convert it into a legal one in his person. If, therefore, that were the only ground on which the interlocutor could be supported, I should be prepared to recal it; but the proposition maintained by the respondent that there is here evidence to be found establishing an understanding or obligation that remuneration should be paid to the arbiter rests upon stronger grounds.

An understanding or agreement may exist between the parties submitting as in a question *inter se*, or it may exist as between them and the arbiter. It would be enough if it were made out that the two parties, contemplating the payment of the arbiter to be employed, came under a mutual understanding or obligation of relief to each other of the share of any sum to be paid by either of them.

No one can dispute that if parties enter into a reference upon a clear understanding that remuneration shall be given, there is no ground upon which effect should not be given to it. The arbiter may make the stipulation that he shall be remunerated at the commencement of the arbitration. It may be different when, having proceeded upon the footing of gratuitous services, he arrests the further progress of proceedings until he shall have obtained an obligation to pay him remuneration. There is nothing improper in the payment of any arbiter for his trouble in the adjusting of the matters brought before him. Where an arbiter is a professional man, paid in the exercise of his profession, for duties of a kind similar to those which he is called on to exercise as arbiter, there is the greatest possible reason in equity why he should be remunerated. In support of the case of the respondent, it does not seem to me to be necessary that the understanding of parties should be embodied in writing, far less that the written acceptance of the arbiter should be qualified by the condition of remuneration. The observations of one of the arbiters in the case of Fraser were founded on in the judgment, and the fact of a minute having been prepared with a view to execution, was held material. If an understanding can be established by parole evidence, and by remarks made in conversation, it must, I think, be competent to prove the understanding by facts and circumstances. If I can arrive at that conclusion, the matter resolves into a jury question, and the issue would be whether there existed a mutual understanding between the parties when they entered into the submission as to payment of the arbiter, and mutual relief from any payment in excess of the party's share. So viewing the question, I come to the conclusion upon the whole matter that the payment was made in implement of an understanding which existed when the submission was entered into.

The parties at the time of the submission were in Court under an action of count and reckoning.

The question related to the extrication of an account arising from numerous intromissions with rents and payments in respect of the property. It involved nothing but an examination into accounts. The submission substituted an accountant for the Court. Had the action been sent to the accountant by judicial remit, and that same party had reported to the Court the very same matter which was embodied in the decreet-arbitral, which the Court must have given effect to by merely formal findings, the right would have confessedly arisen. The distinction is one in form rather than in substance. The decree to be given under the conclusions of the action in either case was truly to be fixed by the accountant.

The party selected was a professional man, plainly selected for that very reason. A gentleman whose time was, in the ordinary exercise of his profession, occupied in the examination of accounts, and when so employed by individuals paid for that examination, was selected. The pursuer was a gentleman resident in New York, the defender a draper in Linlithgow. The arbiter was not said to be acquainted with any of the parties, and no possible inducement can be figured for his undertaking the duty on any other footing than that of remuneration. The parties came with a process involving complicated accounting before a professional accountant, whom neither, so far as we know, ever saw before in their lives, and asked him to undertake the examination and settlement of the accounts as to which they were at law. If I am asked to say whether they did so on the footing that the party whom they invited to undertake the duty was to carry it out on a gratuitous and honorary footing or on one involving payment, can I resist the conclusion that the invitation assuredly proceeded upon the footing of remuneration? I think, in point of fact, that the parties conceived that they were going to an accountant on the footing of payment. The presumption, no doubt, is that an arbiter acts without any right to remuneration; but the presumption is capable of being redargued, and I find what satisfies me in the facts of the case, that the presumed condition did not hold in this case. The pleadings seem to me strongly to confirm this view—namely, that it was the understanding of parties all along that the arbiter should be paid. The record made up with reference to this claim, *inter alia*, contains no special reference to this head of demand, or to the special legal ground of objection that an arbiter is not entitled to remuneration. There is enough, perhaps, to satisfy the legal requirement of a plea in law, though that may be doubted, in the general negation embodied in the 8th plea, which simply affirms that the sums sued for are not due. I think this plea was intended to mean that this sum was not due, because the decreet-arbitral on the reclaimers' assumption was bad, and that consequently the arbiter could have no claim for remuneration on account of abortive proceedings. Then notice is given of the intended payment of this fee, and nothing said as to any specific objection on that ground. It is, in a case so strongly contested on all possible points, highly improbable that the special defence should not be hinted at, if it was the view of parties at the commencement and during the progress of the submission that the arbiter should not be remunerated. I read that fact, which *per se* would not be sufficient, in conjunction with the whole facts and pleadings, as an element in the case. On the whole, I think we are warranted in concluding that this fee was paid conformably to the understanding of parties. I reach this conclusion with some difficulty, but I think that we are warranted in adhering to the judgment of the Lord Ordinary.

Lord COWAN—I agree with the Lord Ordinary in holding that the question as to the claim by the pursuer for payment and relief of one-half of the arbiter's fee occurs here for decision in very special circumstances.

The remuneration of an arbiter when not stipulated for beforehand cannot be made the subject of a legal claim by him or by any one in his right. As he cannot sue directly in his own name, he cannot place another in any better position as his assignee. There is no legal claim capable of assignation which can be made the subject of an action. Entertaining this view, I hesitate to adopt the general proposition stated to have fallen from Lord Medwyn in the case of Fraser, and referred to in the note to the interlocutor. A moral obligation incapable of legal enforcement cannot be made binding by a third party satisfying it without the authority or sanction of the alleged debtor. Had the decision of this case therefore depended upon the soundness of that proposition, I could not have concurred in the interlocutor.

The circumstances of this case, however, are peculiar, and such as, in my opinion, to justify the inference that there was from the first an implied understanding and agreement between the parties and their agents that the arbiter should be remunerated, so that on one of them making payment of a fee to the arbiter not open to be objected to as unreasonable, and, after due intimation and no interpellation, the other should relieve him to the extent of one half. An express agreement to that effect before procedure in the submission would have been binding; and the question is, whether there is enough in the circumstances to support the pursuer's claim on the ground of implied contract?

The summons brought into Court, and which was superseded by the reference, concluded for count and reckoning of the defender's whole intromissions as factor with the rents and produce of certain heritable subjects and for expenses. It could not have been carried on judicially without a remit to a professional accountant; and what was submitted to the arbiter for his decision was "the foregoing summons with the whole conclusions thereof, and all defences thereto competent." The arbiter selected was a professional accountant of eminence, whose services neither of the parties could have expected to secure without remuneration. The reference was not judicial, and no interposition of the Court was necessary to give the decreet-arbitral validity, but legal proceedings were by it superseded. There is thus a presumption, at least, that, when the reference was adjusted and accepted, there was an implied understanding on all sides to the effect I have stated. I do not think it could possibly have entered into the imagination of either the one party or the other that the referee was not to be paid for his services; but if so, then payment of reasonable remuneration by one of them must carry with it the right of enforcing relief from the other to the extent of a half. In this way, the parties who have got the benefit of the services of the arbiter are placed on an equality as regards the cost of those services.

The circumstances in which payment was made by the pursuer of the arbiter's fee cannot be explained on any footing other than that such an understanding and agreement as to this matter

subsisted between the parties. These are detailed in article 6 of the condescendence in these terms. [Reads it and the answer to it.]

The letter referred to proves the statement of the pursuer to be true; and, although notice was given that the decreet-arbitral was to be brought under reduction, such notice was no reason for the arbiter's fee not being paid. It is not alleged, and is not the fact, that on receiving the letter of 3d June 1864, the defender or his agent repudiated liability in the matter of the arbiter's fee, or warned the pursuer not to make payment so far as the defender was concerned. Then, when the action of constitution was brought into Court, there is no defence or plea stated to the effect that remuneration to the arbiter was not legally due, and that no claim for relief and payment could be maintained by the pursuer of the money so paid by him to any extent. The ground taken in the defences and record by the defender was that the whole claims advanced under the decreet-arbitral were untenable because of the various objections taken to it on the grounds afterwards made the subject of the reductive process—viz., corruption on the part of the arbiter, *ultra fines compromissi*, and non-exhaustion of the matter submitted. Supposing all these repelled, as they have been, and the decreet-arbitral to be valid, it is not pleaded that no part of the fee paid to the arbiter could in any view be the subject of legal claim. On the contrary, observe the term of the prayer of the reclaiming note against the first interlocutor pronounced by the Lord Ordinary in decerning for the whole £31, 10s. It is for an alteration only as to one-half of that sum — the general ground of defence being repelled.

Altogether, it appears to me that the circumstances of the case, and the principles recognised by the Court in the cases referred to, and founded on at the debate, support the conclusion at which the Lord Ordinary has arrived.

The other Judges concurred. and the Lord Ordinary's interlocutor was therefore adhered to.

Agents for Pursuer—J. & A. Peddie, W.S.
Agent for Defenders—Thomson Paul, W.S.

SECOND DIVISION.

NOTE—RONALD JOHNSTONE.

Expenses. A trustee whose name had been used as a party to an action after he had resigned, allowed the expenses of getting his name withdrawn, and these taxed as betwixt agent and client.

One of certain trustees, hearing that his co-trustees had resolved to raise an action, intimated to them that he resigned office. His name was thereafter used as a pursuer in the action without his knowledge. Upon an application to the Court his name was allowed to be withdrawn from the process. He was appointed to lodge an account of expenses connected with the withdrawal which the Auditor taxed as between agent and client. Upon objection, the Court sustained the principle of taxation, and of consent pronounced decree for the expenses against the other trustees in the process in which the application was incidentally made.

Counsel for Petitioner—Mr MacLean. Agents—M'Lachlan, Ivory, & Rodger, W.S.

Counsel for Trustees—Mr Arthur. Agent—W. Officer, S.S.C.

Tuesday, March 19.

FIRST DIVISION.

NEILLS *v.* LESLIE.

Stamp Duty—Mutual Deed. Held (alt. Lord Mure) that unstamped missives of sale betwixt the pursuer and defender of an action which were founded on by the pursuer alone, fell, in the first place, to be stamped at the expense of the pursuer.

This was an action for implement of a missive of sale and purchase. After a record had been made up and evidence led in the cause, the Lord Ordinary (Mure) *ex proprio motu* took the objection that the document founded on was not stamped, and appointed the stamping to be done "at the joint expense of parties."

The defender reclaimed.

JOHN M'LAREN, for defender, argued—The interlocutor appoints the stamping to be done at the joint expense of parties *now*. The defender does not found on the document, and is willing that the case be decided irrespective of it. In such circumstances, the pursuers as alone founding on the document, ought, in the first instance, to have the document stamped at their individual expense, leaving the question of ultimate liability to be determined at the end of the case.

W. N. M'LAREN, for pursuers—The interlocutor may be read in either of two ways—(1) as disposing finally of the question of expense of stamping; or (2) as determining only *ad interim* upon it. In either view it is correct. The penalty and expenses of stamping are fiscal matters, and not, properly speaking, expenses in a cause. The document is of the nature of a mutual contract, and should be stamped at the joint expense of the parties.

The following authorities were referred to:—Smaill *v.* Potts, 16th July 1847, 9 D. 1502; Flowers *v.* Graydon, 18th Dec. 1847, 10 D. 306; Law *v.* M'Laren, 20th July 1849, 11 D. 489; Logan *v.* Ellice, 6th March 1850, 12 D. 841; Wylie & Lochhead *v.* Times Assurance Co., 15th March 1861, 23 D. 727; Grant *v.* Walker, Grant, & Co., 16th Dec. 1837, 16 S. 246.

At advising,

The LORD PRESIDENT—The interlocutor of the Lord Ordinary in this case was, during the argument, subjected to various interpretations, and therefore the first thing we require to do is to ascertain its meaning. What he does is this, "sists process for ten days in order that the minute of sale No. 10 of process may be stamped, and appoints the same to be done at the joint expense of parties." The minute of sale is the pursuer's ground of action, and what I understand his Lordship by this interlocutor to intend is that, in order to make that minute of sale evidence, the parties are to get it stamped at their joint expense. So construing the interlocutor, I think it is ill-founded, and I think, moreover, it is unprecedented. Among the various authorities that were cited in support of the interlocutor, I find none that does support it. The stamp laws provide that when a document is offered in evidence which ought to be stamped and is not, no court of law shall look at it to any effect. The natural inference is, that when a party tenders the document in evidence it is stamped, but, if it is not, some delay may be allowed, and generally is as a matter of indulgence to him, to enable him to get it stamped. Now, if there had been a practice to