under a reference of this kind, are as great, and can as little be interfered with, as the powers of an arbiter under a voluntary arbitration. I therefore think that the referee having now done his duty by hearing parties, we cannot review the award he has pronounced merely on the ground that it was erroneous. The error was said to be that he did not take the asistance of any auditor. I think it was competent for him to decide the matter without taking such assistance. If he finds himself in a position to give an award of expenses, it is not necessary for him to remit either to the Court or to any other person. This Court could do it. They generally take assistance; but they might, if they pleased, award a slump sum of expenses. The Court cannot, on the ground stated, take upon itself to upset the award of the arbiter.

Lord Deas—I am of the same opinion. The judicial reference in this case was a reference of the whole process, with power to award expenses. It is not disputed that the referee was to have power to dispose both of the expenses of process and of the reference before himself. And the objection is not that he had not power to award expenses against the party whom he found in the wrong, but that he did not take the proper means of ascertaining the amount. There was an argument stated, that where there was a judicial reference of a cause, and the whole expenses, it still belonged to the Court to deal with the expenses, and to remit to the auditor, and dispose of objections to his report. There is no authority for that. The idea is quite incongruous. The whole matter goes to the referee. Therefore the objection resolves itself into this, that the referee did not take the assistance of the auditor in disposing of the question of expenses incurred by the parties. I am of the opinion that has been expressed, that there was no necessity for his taking the assistance of the auditor in this matter. He was to judge of that. He need not have given effect to the report of the auditor if he had remitted to him. If the plea stated here could have been carried the length, that in respect of what he had done, or had failed to do, he was guilty of corruption, that might have been a ground for recalling the reference. I give no opinion on that. I see no reason why it should not have been. The difference between a judicial reference and an extra-judicial submission is that in a judicial reference you may come to this Court on points arising in the course of the reference. That was the case here, and we remitted to the referee to hear parties. He has now heard parties. He thinks the sum he gave was not too large a sum under the detailed account before him. There is no averment of any wilful wrong on his part; no averment of any thing that under the statute would constitute corruption. There is no motion before us to recal the reference. The motion is to remit to the referee. We have no power to do that. Supposing the referee had remitted to any other person, as, for example, to the clerk to the reference, to make a report on the expenses, there was nothing to prevent him from giving effect to that. We must presume that he did take the assistance of the clerk to the reference, who was the sheriff-clerk, a person perfectly well qualified to decide. He thinks that £50 is a proper sum. There is nothing on the face of that to find fault with. it might be perfectly right and just, and far better not to put the parties to the expense of a remit to the auditor. It is contrary to all settled procedure that we should interfere. We cannot order the referee to take one report more than another. We may order him to hear parties, but we cannot make him take the assistance of the auditor more than of counsel, or any one else. What he has done was within his power.

Lord Ardmillan—This is a question of great importance, and I have had some difficulty in coming to a conclusion on the matter. I concur in the general principle announced by Lord Curriehill and Lord Deas, that where we are called on to deal with an award by a judicial referee we cannot touch it, because we think the referee might have been better advised. The aspect of difficulty which the case presents is this:—Is it competent for a judicial referee practically to audit the account of expenses himself? Here the referee does not remit to an auditor. He awards a sum which he calls modified expenses. The pursuer says that that is more than the actual expenses of the whole suit, and that this would be seen by the auditor. That is startling; but after consideration I have come to the conclusion that where a judicial referee has, as here, a distinct power to deal with the question of expenses, and deals with it as the referee has done, we cannot touch his award. This was a reference of an existing cause, with expenses at that date. It will not do for us to refuse to recognise his award of expenses because he audits the account himself, and is so satisfied with the justness of it that he does not get it taxed. Though it is to be regretted that the referee did not take some means of ascertaining the proper amount of the account, the Court must not interfere.

Lord President—I have some difficulty in this case, but I have come to agree with the view stated by your Lordships. I thought that making a judicial referee the complete master of the question of expenses—so that he might give any sum he thought fit in name of expenses, however much it might exceed the actual amount incurred—was a very dangerous power to give to any man. But I am satisfied that the true limit of that power is, that if any great injustice was done by the referee, redress would be had on the ground of corruption.

Agent for Pursuer—W. S. Stuart, S.S.C.
Agent for Defender—J. Somerville, S.S.C.

Thursday, July 4.

ASHBURY RAILWAY CARRIAGE CO. *v.* NORTH BRITISH RAILWAY CO.

Issues—Adjustment—Report to Inner-House. Held competent for a Lord Ordinary to report a case on issues verbally to the Inner House at the first meeting for adjustment.

At the first meeting for the adjustment of issues in this case, the parties not agreeing on the terms of the issue, the Lord Ordinary (Jerviswoode), on the motion of the pursuers, reported the case verbally to the Court. The object of the pursuers was to get the issue adjusted so as to go to trial at the next jury sittings, this being the last day for giving notice of trial. The defenders objected, on the ground that by the invariable practice of the last seventeen years the statute (13 and 14 Vict., c. 36, § 38) had been so construed that a case could only be reported on issues after a second meeting for adjustment had been held. A first meeting was appointed. That was for the purpose of hearing the views of parties and of the Lord Ordinary. If parties did not agree, then a second meeting was

appointed; and if at that meeting issues were not adjusted, the case would then be reported. What was now proposed was to compress all that into one meeting. The defenders were not prepared at present to discuss the issue proposed.

MACKENZIE and SHAND for pursuers.

YOUNG and KEIR for defenders.

LORD PRESIDENT—It seems to me that the only point for us to determine, in the first place, is the competency of this proceeding. As to the question of expediency, we shall be glad to hear parties afterwards, if it turns out that there is a difficulty in the case. As to the competency I have no doubt. The practice may have been for all that time to hold first one meeting and then another. But unless that be indispensable under the Act, it is impossible for us to hold that the course now adopted by the Lord Ordinary is incompetent; and if it be not incompetent, we must hear parties on this report. The clause contemplates this, that when the pursuer has lodged the issue he proposes, or the pursuer and defender respectively have lodged the issues they propose, there is to be a meeting with the Lord Ordinary at chamber, for adjusting the issue or issues; and when that takes place, it is contemplated, first, that the issues may then be adjusted; but if they are not adjusted, the course of the Lord Ordinary is alternative, either he may appoint a second meeting or he may report. If he appoint a second meeting, another attempt is to be made at that meeting to adjust the issues, but if that fail the Lord Ordinary is to report. But that a report is as competent at the first meeting as at the second is quite plain.

LORD CURRIEHILL took the same view. As to the practice of which the defender spoke, no doubt in all those cases the Lord Ordinary has seen cause to appoint a second meeting. Here he had not seen cause to do so, but had reported the case at once.

LORD ARDMILLAN also held that there was no incompetency in the present procedure. His recollection of the Outer-House procedure certainly was that, in the very great majority of cases, the first meeting was rather for the purpose of allowing each party to hear what the other party and the Lord Ordinary had to say than for settling the issue. But on the question of competency there was no doubt.

LORD DEAS declined.

After hearing the pursuer on the issue proposed by them, the Court were of opinion that the issue would require further consideration before final adjustment, and the case was adjourned till next week. It was held that the case was now in the Inner-House without any further report by the Lord Ordinary.

Agents for Pursuers—Mackenzie & Kermack, W.S.

Agent for Defenders—Stodart Macdonald, S.S.C.

Thursday, July 4.

MACLEAY *v.* SINCLAIR.

Teinds—Locality—Stipend—Obligation of Relief—Real Burden—Singular Successor. A minute of sale in 1740, conveyed the lands of N. free of all stipend, &c., and contained an obligation to convey the lands of K. in real warrandice. The obligation remained personal, and there was no conveyance of K. in real warrandice. Held, on objection to an interim scheme of locality, that a singular successor in the lands of K. was not bound to submit to be localled upon for the stipend effeiring to the lands of N., reserving right to proprietor of lands of N. to enforce his claim in a suitable action.

This was a question arising in the locality of Wick, between Mr Macleay of Keiss, and Mrs Sinclair of Freswick. In the interim locality Mr Macleay was localled on for stipend, not only in respect of his own lands of Keiss but also in respect of the lands of Nybster, belonging to the respondent. He claimed to have the scheme of locality rectified and to be relieved of the stipend localled on him in respect of Nybster. The respondent, on the other hand, maintained that the objector was bound to relieve her of all stipend and augmentations of stipend in respect of Nybster, in virtue of an obligation which had been recognised and acted on in all localities since 1772. This obligation is contained in a minute of sale of the lands of Nybster by Sinclair of Dunbeath to Sinclair of Freswick in 1740. By that deed the seller bound himself to deliver to the purchaser a disposition of the lands of Nybster, with the teinds, "free of all stipends, schoolmaster's fees, and other public burdens and impositions whatsoever;" and also of the lands of Keiss, "in real warrandice and security of the said lands of Nybster, teinds and pertinents thereof. No conveyance of the warrandice lands was ever executed. Keiss was acquired by Sinclair of Ulbster from Sinclair of Dunbeath, and subsequently passed into the hands of the objector's uncle. The objector is therefore only the singular successor of Sinclair of Dunbeath, who executed, as seller, the minute of sale in 1740. No constitution of the burden is alleged to exist in any of the feudal titles of either party.

The Lord Ordinary (BARCAPLE) found that the respondents had not set forth any ground sufficient in law for localling upon the objector's lands in respect of the lands of Lybster belonging to the respondent Mrs Sinclair, and remitted to the clerk to correct the interim scheme in terms of this finding.

His Lordship after stating in his note the facts of the case said:—"In these circumstances it is clear that, so far as regards the minute of sale and the titles, there not only is not and never has been any real burden imposed upon the lands of Keiss for the relief of Nybster from stipend, but the objector is not under any personal obligation, as the singular successor of Sinclair of Dunbeath, in the lands of Keiss. The Lord Ordinary does not understand that this is disputed by the respondent, who rests her case upon the plea of *res judicata* under previous localities, and a long course of payment and acquiescence. It appears to be the fact that in all the localities since the purchase of Nybster by Sinclair of Freswick, beginning with 1772, the proprietor of Keiss has been localled upon for the share of stipend effeiring to Nybster. The respondent states (Art. X.) that in the first locality there is a note signed by the minister bearing that 'the estate of Keiss is liable in the stipend and augmentation for Nybster by bargains 'twixt the late Freswick, who purchased Nybster, and the said Sir William Sinclair of Dunbeath. This principle of localling appears to have been then adopted, and to have been unchallenged ever since. But it does not appear that any question was ever raised in regard to it. In these circumstances, the Lord Ordinary does not think that the mere unchallenged adoption of this mode of localling in previous localities