posal of the case; as, for example, where the arbiters have themselves clearly indicated that they have made a different decree. On the other hand, it may be that the decree is in possession of the clerk in such circumstances as to make clear that it is a final decree. His official custody of it remains so long as the parties have not taken it up. It is not necessary for him to put it on record in order to make it an issued arbitration."

Now this gentleman bringing his action, is met by the defence that this award, which was signed, and has now been actually delivered, was not delivered at the time the action was raised, and was not delivered prior to the death of the referee. That may be true in fact, but who is to prove the truth of it? The award is issued. It is in the hands of the parties, and is acted on. The party who alleges that it did not exist at a specified date is bound to prove his allegations. The pursuer says that "Mr Maitland delivered his report, with the process, to me, as clerk to the reference, to be held by me *till payment of the fees.*" I have no doubt that if nothing remained to be done to the award in the hands of the clerk, it is a delivered award. It cannot be that the withholding of payment of the fees keeps the award in suspense. It might be that the subject was of such trifling importance, that no one had an interest in following out the reference, and the clerk would have to remain without his fees. I have no doubt that Jackson left the matter on the evidence at a point which does not sustain his objections.

Agents for Reclaimer—Duncan & Dewar, W.S.
Agents for Respondent—D. N. & J. Latta, S.S.C.

---

*Friday, December* 20.

JENKINS AND OTHERS *v.* MURRAY.

(4 Macph. 1046., *ante.* iii. 368.)

*Expenses — Auditor — Three Counsel — Jury Trial.* Circumstances in which the Court gave the defender, who obtained a verdict in a second trial in absence of the pursuer, the expenses of the first trial, in which he had been unsuccessful. Expense of third counsel disallowed.

This was a question between W. Jenkins, jun., Stirling, and others, and Lieut.-Colonel Murray, of Polmaise, as to the right of the public to use a road, called the Bearside Road, through the lands of the defender, in the vicinity of Stirling.

The jury returned a verdict for the pursuer. On 12th July 1866 the Court set aside the verdict, and granted a new trial, reserving all questions of expenses. The second trial was appointed for the Spring Sittings. The defender moved for a special jury. The Court granted the motion. The case came on for trial on Thursday, 11th April 1867. No appearance was made for the pursuers. The special jury was empannelled, and a verdict was returned for the defender. Thereafter, on the motion of the defender, the Court, on 24th May 1867, pronounced this interlocutor:—

"Apply the verdict found by the jury on the issue in this cause, and in respect thereof assoilzie the defender from the conclusions of the libel, and decern: Finds the defender entitled to expenses; allows an account, &c."

The auditor taxed the account at £563, 1s. 4d., "reserving for consideration of the Court (1) whether the general finding of expenses contained in the interlocutor dated 24th May 1867, includes the expenses of the first trial, in which the defender was unsuccessful, these expenses amounting to £252, 8s. 3d.; (2) whether the expense of a third counsel ought to be allowed."

JOHNSTON, for defender, contended that the expenses of the first trial, and also of a third counsel, ought to be allowed.

No appearance was made for pursuers.

LORD PRESIDENT—There is great specialty in the present case, for practically there was only one trial, although two verdicts, and, as I understand the case, the evidence led at the first trial was such, with reference to the law applicable to that evidence, that the verdict ought to have been for the defender. Now the defender, by the subsequent proceedings, has got his verdict, because the pursuers felt that they could not get a verdict, and therefore did not repeat their evidence. It seems to be very much a case where there is one trial on a matter of fact, and a verdict for the defender. My impression is that the defender ought to have the expenses of the first trial. It is a very special case. I think the expense of the third counsel cannot be allowed.

LORDS CURRIEHILL and DEAS concurred.

LORD ARDMILLAN—I am satisfied that the verdict was held by the Court to be a verdict contrary to evidence. There has been no second trial, and if the defender did not get the expenses of the first trial, the result would be that he would not get the expense of leading that body of evidence on which he got a favourable judgment. On the question of the expense of a third counsel, I concur.

Agents for Defender—Russell & Nicolson, C.S.

---

*Friday, December* 20.

## SECOND DIVISION.

THOMS *v.* THOMS.

*Promissory-Note—Cautioner—Letter of Acknowledgment—Entries in Books*—Res Mercatoria—*Executor—Relief.* A joint acceptor in a promissory-note maintained, in an action of relief brought by him against the executor of the other acceptor, that a letter of acknowledgment, neither tested nor holograph, but signed by the acceptor, showed that he was only cautioner in the note, and therefore that he was entitled to be relieved by the executor. He also founded on certain entries in the acceptor's books. *Held* that the letter, as much as the note, was *res mercatoria*, and did not require to be either tested or holograph in evidence of the fact that the pursuer was only cautioner.

LORD COWAN (dub.)—Whether the letter of acknowledgment, without the entries in the books, was sufficient?

*Observed*—That the statutes providing for the authentication of writs do not apply to documents which are merely framed for the purpose of evidencing facts.

This was an action of relief brought by Mr John Thoms of Seaview, St Andrews, against the executrix of his deceased brother, Alexander Thoms of Rumgally, and the questions were—(1) Whether the pursuer was entitled to be relieved of the con-