begins. I am somewhat sceptical if any definition could be framed that would meet the various circumstances to which that definition would fall to be applied. And yet in spite of the difficulty of definition, I do not think that in a concrete case there is generally very much difficulty in coming to a conclusion whether the question submitted to the Court depends upon a view of the facts or on a legal view. It is easier to illustrate than it is to define, and it is easiest to illustrate by taking a case at each end of the scale. The case that was recently sent to Seven Judges (*Dobson* v. *United Collieries*, 43 S.L.R. 260), in which the whole matter of the application of the colliery rules was considered, was a case where obviously the considerations which ruled were truly legal considerations. On the other hand it is very easy to fancy cases where the question is a pure question of fact and nothing else. When it is a pure question of fact there can be no appeal upon the consideration of whether the arbitrator has arrived at a perfectly just conclusion, although there may be always an appeal upon this ground, that the facts themselves as proved do not afford any foundation whatsoever on which to rest the arbitrator's decision. In a case like that there has always been review, and I think it is within the last few days that I had occasion to make that remark in the decision which we pronounced in the case between William Baird & Company and Mrs Savage (43 S.L.R. 300, at p. 302).

Now when I come to the present case I am bound to say that I do not think there is any question of a legal complexion in the matter. The only point is whether, from the facts proved, the learned Sheriff-Substitute as arbitrator has or has not drawn the right inference. Upon that matter I do not consider that I am entitled to review his decision. If he had drawn an inference which could not possibly, in any view of the proved facts, have been supported by them, I should have considered myself entitled to review his decision. But I find it impossible to say that the facts could not support the inference he has drawn. I might say that, sitting as an arbitrator, I should not have come to the same conclusion or drawn the same inference; but if I were to say that, I do not think I would have advanced the case, for I would only be saying that if I were arbitrator I would have come to the opposite conclusion. That being so, this seems to me a case in which we cannot interfere with the findings of the Sheriff, and that, accordingly, the question in law ought to be answered in that way.

LORD M'LAREN—I concur.

LORD KINNEAR—I am of the same opinion. It very often takes a good deal of law to determine whether a question is a question of law or of fact, and I do not think any general definition could be safely laid down for distinguishing between the two categories. I think, however, that if a Sheriff finds certain facts as to the conduct of a workman, and then proceeds to find that the conduct so specifically described was wilful misconduct in the sense of the Act, or was not wilful misconduct, the question whether the conduct described by the Sheriff answers the description of wilful misconduct in the statute is a very proper question for the consideration of this Court of Appeal. But that is assuming that the Sheriff has drawn the last inference of fact that could be drawn and has left no facts undescribed, and has then found that the facts so described inferred serious and wilful misconduct in the sense of the statute. I do not think that the case before us presents that kind of question at all. I confess that if I had only to deal with the specific facts as stated by the Sheriff, and from these facts and nothing more, was asked to draw for myself the inference that the man had been guilty of wilful misconduct, I might not be prepared to draw the same inference as the Sheriff did. But then I think it clear that in this case the Sheriff did draw, as an inference of fact, that there was really wilful misconduct; and I agree that that is a decision of a case on fact which we are not entitled to review.

LORD PEARSON—I take the same view as your Lordships.

The Court pronounced this interlocutor:—"In respect the case does not set forth a question of law: Dismiss the appeal, and discern. . . ."

Counsel for the Appellant—Maclennan, K.C.—Lippe. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Respondent—G. Watt, K.C.—A. M. Stuart. Agent—Alexander Ramsey, S.S.C.

Saturday, February 3.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WELSH & FORBES *v.* JOHNSTONS.

Agent and Client—Contract—Company—Law-agents' Claims against a New Company Charged against the Original Firm—Contract between Company and Firm—Law-agent not Named or Defined in Contract—"Jus quæsitum tertio"—Title to Sue.

A firm having resolved to turn their business into a limited company, instructed Messrs W. & F., law-agents, to act for them in the matter, and a preliminary agreement, declared only to be binding if adopted by the company, was thereafter entered into between the Firm and W. (of Messrs W. & F.) on behalf of the proposed company. This agreement, *inter alia*, provided that the Firm should pay all the expenses of the flotation up to the allotment of the shares, including a

commission to the agents of the company. After the company was formed, a minute, on the narrative that the company had agreed to adopt the preliminary agreement, and for that purpose to enter into the present agreement in order that the terms of sale might be binding on it, was entered into between the firm and the company. This minute gave the full terms of the sale and also contained a stipulation that the Firm should pay all the preliminary expenses up to the allotment of shares.

Messrs W. & F., who were not parties to or named in either agreement, having carried through the whole transaction, raised an action against the partners of the now dissolved Firm and the Firm for payment of their commission as agents for the company, which they averred fell in terms of the agreement to be paid by them and not by the company.

Held that as Messrs W. & F. were neither parties to the agreement nor properly defined therein they had no title to sue thereon.

Agent and Client—Company—Flotation—Business Account in connection with Flotation—Charges for Promotion—Applicability of Table of Fees—Charges Properly Made in Form of a Commission, and where Company Formed to Take over Property or Business the Charge against Promoters Includes the Ordinary Commission Chargeable against a Buyer.

Opinion per curiam that the table of fees is not applicable to the business of the promotion of a company, and that such business was rightly charged in the form of (1) the charge of a commission, depending in amount on the labour involved, against the promoters of the company, and (2) where the company was formed to take over a property or business, and the same agent carried through the whole transaction, the charge against the sellers, of the ordinary commission according to scale chargeable against a seller, but without any corresponding charge against the company of the ordinary commission chargeable against a buyer, such buyer's commission being covered by the charge against the promoters.

This was an action at the instance of Messrs Welsh & Forbes, law-agents and conveyancers, Edinburgh, against James Wilson Johnston, 22 Great King Street, Edinburgh, and George Harvey Johnston, 22 Garscube Terrace, there, sole partners of and as trustees for the dissolved Firm of W. & A. K. Johnston, Engravers and Publishers in London, Edinburgh, and Glasgow, and the said Firm of W. & A. K. Johnston, Edina Works, Easter Road, Edinburgh. The summons concluded for payment of the sum of £601, 12s. 6d., the balance which the pursuers alleged to be due on a current account between them and the defenders.

Prior to the raising of the action the defenders J. W. Johnston and G. H. Johnston, then the sole partners of the Firm of W. & A. K. Johnston, having resolved to sell the business to a limited company to be formed for the purpose of its acquisition, instructed the pursuers to act as their agents in regard to the formation and flotation of the company. As a preliminary to the formation of the company a minute of agreement, dated December 1900, giving the terms and conditions of sale, was entered into between the defenders, first parties, and Thomas Scott Welsh (one of the partners of the firm of Welsh & Forbes) for and on behalf of the proposed company, second party, by which it was, *inter alia*, provided—"(*Tenth*) The first parties shall pay all the costs of and incidental to the preparation and execution of this agreement, and of the memorandum and articles of association of the company, and of the registration thereof, and of all stamp duties, fees, and legal expenses incident to the formation of the company and the issue of its capital, including a commission to the agents of the company at such rates as are charged by Messrs Davidson & Syme, Writers to the Signet, Edinburgh, or by other legal firms of like standing in the formation of limited liability companies, and in general all preliminary expenses whatever incurred in relation to the company up to and including the allotment of the shares thereof. . . . (*Twelfth*) In respect these presents are entered into by the second party for and on behalf of the company, the same shall not be binding on him personally, and shall only be binding on the first parties if and so far as the same may be adopted by the company after its incorporation."

The Company having been formed, a minute of agreement dated January 1901 was entered into between the Firm of the first part and the company of the second part, which proceeded on the narrative that the preliminary agreement had been made, that the company had agreed to adopt it, and that for that purpose, in order that the terms and conditions of sale might be binding on it, it had agreed to execute the present agreement. This "adopting" agreement gave the full terms and conditions of sale and, *inter alia*, provided—"(*Tenth*) The first parties shall pay all the costs of and incidental to the formation of the company and the issue of its capital, and in general all preliminary expenses whatever incurred in relation to the company up to and including the allotment of the shares thereof."

Messrs Welsh & Forbes, the present pursuers, were not a party to or named in either of the agreements. In regard, however, to the provision in the preliminary agreement quoted above they averred—"The special stipulation contained in this agreement as to the remuneration of the agents was inserted therein at the request and for behoof of the pursuers, and was agreed to by the defenders in view of the nature of the duties and responsibilities which the pursuers would be called on to perform and undertake in connection with

the matters referred to. The said stipulation was made for the following reasons, viz.—(*a*) In order that the pursuers might be remunerated on an appropriate footing, having regard to the fact that their services would not be merely ordinary professional services, but would involve work and responsibility of a character which made it proper that special terms of remuneration should be provided for; and (*b*) because the rate in the table of fees is indefinite, and it was desired to adopt the rates which were charged by the first class firms referred to in the agreement as being reasonable and appropriate in the circumstances. . . . It is usual for solicitors and their clients to make special agreements as to the rate or mode of remuneration, or to fix a slump sum for similar services in connection with the formation and flotation of companies. All this was explained to the defenders, and in full knowledge of the circumstances they consented to the stipulation as being proper and reasonable."

The pursuers had duly carried through the formation and flotation of the company, which was registered under the Companies Acts on 24th December 1900.

The pursuers pleaded—"(1) The pursuers having, on the employment of the defenders, made the disbursements and rendered the services set forth in the condescendence, on the terms agreed to by the parties and embodied in the minute of agreement narrated in the condescendence, are entitled to decree in terms of the conclusions of the summons. *Separatim*, the charges and commissions being reasonable and proper, having regard to the special services and responsibilities rendered and undertaken by the pursuers on the employment of the defenders, the same ought to be sustained. (2) The stipulation agreed to by the parties and embodied in the minute of agreement of December 1900, referred to in the condescendence, regarding the method of determining the remuneration payable to the pursuers, is reasonable in the circumstances, and is binding on the defenders."

The defenders pleaded—"The pursuers' business accounts ought to be remitted for taxation as between agent and client, and all excessive or illegal charges and commissions for work done ought to be excluded therefrom."

On 25th February 1903 the Lord Ordinary (KINCAIRNEY), before further answer, remitted the account sued on to the Auditor to tax and to report.

In a note to the interlocutor making the remit his Lordship stated—". . . I understood the pursuers to desire that their account might be remitted to Davidson & Syme that they might fix their commission, or that, if a remit were made to the Auditor, it should be with instructions that he in his audit should adopt rates similar to those allowed by Davidson & Syme or similar agents.

"Several questions appear to arise in reference to the clause in question—(1) Is it binding, seeing that it has not been adopted by the company? (2) Are the pursuers in a position to plead it as *jus quæsitum tertio*, or was the preliminary contract a contract between the parties to it only, in which the pursuers had no right? (3) If these points were determined in favour of the pursuers, is it a contract which can be enforced between agent and client? And (4) what does it mean, and to what part of the account does it relate?

"If these questions have to be solved, it may be that that cannot be done without some inquiry.

"But it seems natural to think that if the ordinary course were followed and this law-agent's account were remitted *simpliciter* to the Auditor, his audit might satisfy both parties, so that no question would arise at all, or, if not, the questions might be raised in a clearer and more definite form by objections to the report. I shall therefore, before answer, remit to the Auditor to audit and tax the account, and I suppose that the vouchers of the pursuers' outlays may be produced before him. . . ."

In his report, dated 16th June 1904, the Auditor stated—". . . The professional charges contained in the account-current remitted to the Auditor may be divided into three groups—*A*, Charges for which detailed business accounts have been produced in ordinary course, and miscellaneous charges; *B*, Charges entered in subsidiary accounts, the balances on which are carried into the principal account-current; and *C*, Fees in respect of which no detailed accounts have been produced. The following are the details of these several groups and the amounts at which they have been sustained by the Auditor:— . . ."

In Group A item 10 was—"*Mar.* 13, 1901. To agents' commission on flotation of company at 1 per cent. on capital, including all charges for meetings, correspondence, &c., and all work preliminary to allocation of shares, £1075 restricted to £686, 12s." It was dealt with thus—

"Amount debited.	Taxed off.	Amount as taxed.
£686 12 0	£180 14 10	£505 17 2"

In Group B item 2 was—"*Dec.* 31, 1900. To agreed-on fee in respect of personal guarantee by Mr Welsh to British Linen Company Bank, £210." It was dealt with thus—

"Amount debited.	Taxed off.	Amount as taxed.
£210 0 0	£172 10 0	£37 10 0"

In Group C the items were—"(1) *Dec.* 14, 1900. To agency negotiating terms of sale, preparation and adjustment of agreement of purchase, &c., at ½ per cent. as per table of fees (£107,500) £537, 10s." "(2) To agents' fee preparing and adjusting prospectus, the proposed arrangements having been repeatedly altered and modified, and its adjustment having been extended over a period of nearly two years, and revising proofs, &c., £105;" and "(3) *Nov.* 6, 1901. To agents' commission as against new company payable by Messrs Johnston in terms of adopting agreement, including commission on shares subscribed for through agents, the stockbrokers selected by directors having withdrawn immediately before prospectus advertised; agents' intromissions with company's capital, settlement of purchase price, payments to Messrs

Johnston, &c., £537, 10s." Of these three items the Auditor had disallowed entirely 1 and 3 and had dealt with 2 thus—

"Amount debited.	Taxed off.	Amount as taxed.
£105 0 0	£94 10 0	£10 10 0"

The Auditor stated his reasons for dealing with a number of the professional charges in the manner reported, and, *inter alia*, with the above stated charges, viz.—

Group A, item 10—"A commission on flotation of the company being, in the Auditor's opinion, inappropriate in the circumstances, he has allowed in lieu thereof the account of detailed business performed by the pursuers, amounting as taxed to the sum of £505, 17s. 2d."

Group B, item 2—"It appears to the Auditor that this is not a kind of service that any charge is usually made for by a law-agent. It is to be presumed that Mr Welsh undertook this obligation because he was so familiar with the whole position of the parties concerned that in point of fact he was running no risk in doing so, but no doubt the guarantee was an accommodation to Messrs Johnston, and if the Lord Ordinary should be of opinion that in equity some remuneration should be allowed for it, the Auditor thinks that £37, 10s. would be a fair allowance, being ½ per cent. on the amount of the overdraft."

Group C—"(1) The charge of £537, 10s. is not in the circumstances a proper one. There was no other negotiation by the pursuers than is disclosed in their business accounts, the charges in which, as taxed, form the proper remuneration for the work in connection with the sale. (2) There is no warrant in the table of fees or in practice for a random charge such as the pursuers have stated, viz., £105 for preparing and adjusting a prospectus. The work actually done will be very fully remunerated by the fee of £10, 10s. fixed by the Auditor. (3) There is nothing to justify the commission of £537, 10s. charged against the new company. The pursuers will be properly remunerated by the charges relative to the business contained in their business accounts."

In support of the method in which they had made the charges objected to by the Auditor, Welsh & Forbes produced a copy of a letter written by Mr White Millar, S.S.C., dated 14th October 1876, the arbiter in a reference as to the charges for the flotation of the Straiton Estate Company, which was in the following terms:—

"Messrs Tods, Murray, & Jamieson, W.S.

"*Straiton.*

"Dear Sirs,—I have considered the matter referred to me by you and Messrs Keegan & Welsh. I understand I have nothing to do with the latter's charges against the new company, but only with those which I think should be payable by Brash's trustees. I am of opinion that Messrs Keegan & Welsh are entitled to the following charges:—

Commission for making the sale, as per table of fees . . .	£182 10 0
This charge is strictly confined to *making* the sale.	
But Messrs Keegan & Welsh had also not only to find a purchaser, but in effect to create one by getting up a company to purchase, and for this I think they are entitled to one per cent. on the £68,000, or .	£680 0 0
I think they are further entitled to the *ad valorem* fees of drawing the missives of sale, in so far as no deed follows thereon on which an *ad valorem* fee is chargeable. They will have an *ad valorem* fee on £40,000 for preparing the disposition to the heritage. I therefore think they are entitled to an *ad valorem* on the £28,000. This by the old table would have been £49, 17s. 6d., but by the new table is only £10, 10s., and as I understand the transaction took place since the new table of fees came into operation, I propose to allow them the	10 10 0
	£873 0 0

"As I have indicated above, I think Messrs Keegan & Welsh will be entitled to an additional commission from the company in connection with its formation, but I think they are entitled to the above sum from Brash's trustees.—Yours faithfy."

Objections and answers to the Auditor's report having been lodged, the Lord Ordinary (KINCAIRNEY) after hearing counsel for the parties, by interlocutor of 22nd December 1904 assoilzied the defenders.

Opinion.— . . . [*After narrating the nature of the previous steps in the action, supra*] . . . "The pursuers' objections do not cover the whole of the audit. The Auditor has struck off several sums to the deduction of which the pursuers have not objected. The sums so struck of without objection amount according to my calculation to £74, 9s. 11d., which falls to be deducted, in the first place, from the balance of £601, 12s. 6d. sued for, reducing that balance to £527, 2s. 7d.

"The pursuers' objections to the audit are, I think, five in number, and are these—

1. To a deduction of £180, 14s. 10d. from a charge of £686 under date 13th March 1901, for agent's commission on flotation.
2. A deduction of £172, 10s. from a charge under date in the Auditor's report 31st December 1900 of £210, said to be a fee agreed on in respect of a personal guarantee by Mr Welsh to The British Linen Company Bank.
3. A total disallowance of a charge under date 14th December 1900 for £537, 10s. of commission at ½ per cent. on the whole price for 'Agency negotiating terms of sale and adjustment of agreement for purchase.'
4. A deduction of £94, 10s. from a charge of £105 as agent's fee for preparing and adjusting prospectus; and
5. A total disallowance of £537, 10s. charged under date 6th November 1901 as agents' commission as against the new company, payable by Messrs Johnston in terms of adopting agreement, including commission on shares sub-

scribed for through agents and for other particulars mentioned.

"The Auditor has stated his reasons for that apparently somewhat stringent audit. On considering these reasons, with the pursuers' objections, and the oral argument, I have come to doubt whether it would be safe to sustain the audit in reference to the first three of these items without inquiry into the pursuers' allegations that the defenders had agreed to them, and into the grounds for the charges.

"But it appears to me that the case is different with regard to the fourth and fifth items of the audit. The fourth is a charge of £105 for preparing the prospectus. Now that is a charge which seems to me to fall properly within the Auditor's functions and his ordinary duties as auditor. I do not think it is justified by any allegations of agreement, and I can find no sufficient grounds for overruling the Auditor's decision on this point. With regard to the fifth objection, which refers to a total disallowance of £537, 10s., being in fact ½ per cent. on the capital, I can find no ground for questioning the Auditor's decision, and no relevant averments on the subject. I am of opinion that the Auditor's award on this point must be allowed to stand.

"Assuming that to be so, then the balance of the pursuers' account will be wholly wiped out, and the defenders will be entitled to absolvitor, whatever judgment were come to in regard to the first, second, and third items. Is it necessary or worth while to order a proof upon these items? For the purposes of this case I may assume them all to be decided in favour of the pursuers. But that would not bring out a balance in their favour on the account sued for, nor disentitle the defenders to a judgment of absolvitor. I think that, therefore, I ought to decide the case on that footing.

"The pursuers complain that the Auditor has dealt with them very severely. But I think the nature of the transaction has to be considered. Because, after all, it was only a financial operation. It was not a real sale, and there seem (so far as appears) to have been no conflicting interests. The account runs from July 1899 to March 1902, and amounts, I think, to about £3000 or more, which, even when strictly audited, seems to amount to adequate and liberal remuneration."

The pursuers reclaimed.

In the Inner House the defenders amended by adding, *inter alia*, the following additional plea-in-law—"(5) In making the business charges contained in the account . . . the pursuers are not entitled to found on the tenth article of the minute of agreement, . . . in respect . . . (*b*) The pursuers are not parties to it."

Argued for the pursuers and reclaimers—The provision in the agreement as to the pursuers' remuneration ought to be given effect to. The table of fees did not apply to such work as the formation and flotation of companies. That being so, a law-agent was entitled to make such an agreement as that in question—*Galloway* v. *Ranken*, June 11 1864, 2 Macph. 1199. The agreement was a nominate contract though unusual in its terms, and therefore might be proved *pro ut de jure*—*Scotland* v. *Henry*, July 19, 1865, 3 Macph. 1125; *Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, 14 S.L.R. 672; *Moscrip* v. *O'Hara, Spence, & Company*, October 23, 1880, 8 R. 36, 18 S.L.R. 12; *Jacobs* v. *M'Millan*, November 8, 1899, 2 F. 79, 37 S.L.R. 58. In any event the charges made being outwith the table of fees were not ruled by it—*Galloway* v. *Ranken*, *cit. sup.*—and were proper for the work done. A proof as to the customary remuneration should be allowed, or otherwise a remit to a man of business. The Lord Ordinary was in error in supporting the findings of the Auditor. The Auditor had no special knowledge as to the usual and proper charges in connection with the flotation of companies. Reference was also made to the table of fees, secs. ix., xii., and xx, and to the general notes appended thereto—notes 6 and 8 (*vide* P.H. Book, part G, pp. 11, 14, 21, 22).

Argued for respondents—The Auditor was right in disallowing the items referred to. The charge made for adjusting the prospectus was excessive, as the Auditor had allowed separate charges for meetings in connection therewith. This was not a case of company promoting; it was purely a transfer of the firm's business to a company in order to extend the capital of the business. The work done by the pursuers was usual work for law agents to do, and they were entitled to payment according to the table of fees (*cit. supra*). A client was entitled to have his agent's account taxed—*Cockburn* v. *Clark*, March 3, 1885, 12 R. 707, 22 S.L.R. 475. A law-agent was not entitled to more than the table of fees allowed or to bargain with his client for a higher rate of remuneration—Begg on Law Agents, 131; *Tyrrell* v. *Bank of London*, February 1862, 10 Clark's H.L.C. 26; *O'Brien* v. *Lewis*, January 30, 1863, 32 L.J. (n.s.) Ch. 569, at p. 572; *Jacobs* v. *M'Millan* (*cit. supra*); *Johnstone* v. *Thorburn*, February 19, 1901, 3 F. 497, 38 S.L.R. 343. In any event the defenders could not be charged with the share of expenses falling to be paid by the new company—*in re Empress Engineering Company*, July 21, 1880, L.R., 16 Ch. Div. 125.

At advising—

LORD PRESIDENT—This is an action in which a firm of law-agents and conveyancers sue the members of a dissolved partnership, which was formerly called Messrs W. & A. K. Johnston, for various services rendered by their firm in connection with the promotion of a limited company for the purpose of taking over the business of the dissolved firm of W. & A. K. Johnston.

Certain agreements, which I will presently have to advert to, were entered into between some of the parties; but at present let me direct your Lordships' attention to the account on which this summons has been raised. That account was for various services done, but it contains in particular three items to which attention must be directed.

It contains an item dated December 14th, 1900, in these terms—"To agency negotiating terms of sale, ½ per cent. as per table of fees—price £107,500—£537,10s." Then it contains another item of date March 13th, 1901—"To agents' commission on flotation of company at 1 per cent. on capital, being rate fixed by Mr W. White Millar, S.S.C., in the reference with Messrs Tods, Murray, & Jamieson, W.S., for the flotation of the Straiton Estate Company, including all charges for meetings, correspondence, &c., and all work preliminary to allocation of shares, £1075—restricted to £682, 12s." And finally it contains another item of date November 6th, 1901—"To agents' commission as against new company in accordance with the before-mentioned award by Mr White Millar, and payable by Messrs Johnston in terms of adopting agreement, including commissions, . . . &c., £537, 10s." Now, a considerable sum had already been paid by the defenders in this action, so that although the account is rendered as an account, yet the summons only concludes for the balance still due.

The case depended in the Outer House before Lord Kincairney, and what Lord Kincairney did was that, in spite of the protest of the pursuers, he remitted the pursuers' account before further procedure to the Auditor of the Court of Session. The Auditor called upon the pursuers for a document which is commonly known by the name of a "note of trouble," and the pursuers, while not admitting that the action should be disposed of in this way, yet very properly furnished this note of trouble for the consideration of the Auditor. The Auditor then took the note of trouble and treated it as an account, and the sum of the matter is contained in a report, which after doing so the Auditor presented to the Lord Ordinary. Now, the gist of that report, for the purpose for which I am at present speaking, may be simply taken, and I think it is quite clearly stated in the appendix. The Auditor says this—"A commission on flotation of the company being in the Auditor's opinion inappropriate in the circumstances, he has allowed in lieu thereof the account of detailed business performed by the pursuers, amounting as taxed to the sum of £505, 17s. 2d." That of course deals with that sum which I have already mentioned, namely, £1075, restricted to £686, 12s. Then when he comes to the charge of £537, 10s. made against the old firm he says this—"The charge of £537, 10s. is not in the circumstances a proper one. There was no other negotiation by the pursuers than is disclosed in their business accounts, the charges in which, as taxed, form the proper remuneration for the work in connection with the sale"; and when he comes to the second charge of £537, 10s. against the new firm he says—"There is nothing to justify the commission of £537, 10s. charged against the new company. The pursuers will be properly remunerated by the charges relative to the business contained in their business accounts."

To put it in a single sentence, the Auditor disallows those whole three sums and he allows instead charges as on an ordinary business account, these charges being estimated at the figure which he thought proper. The pursuer, not unnaturally, protested against this way of dealing with his claim, and stated objections to the Auditor's report, and the matter was debated before the Lord Ordinary. I said a moment ago that this action was really an action for the balance of an account, and therefore it follows that, if it is possible—to use an ordinary expression—to knock off enough from some of the charges to extinguish the balance sued for, it does not matter whether the account was properly stated or not; and the Lord Ordinary really disposes of the case on that footing. He practically took two items,—there was a slip in regard to one of them, but I do not think it necessary to go through the somewhat tedious process of explaining what that slip was because parties are agreed regarding it,—but what he meant to do was to take two items, one of 100 guineas charged for preparation of the prospectus, and the last item of £537, 10s. 3d. charged against the new company; and he disallowed both of these—disallowed the first on the ground that there was no warrant for it and that the sum was far too much, as reported by the Auditor, who said that ten guineas was enough, and the other on the ground that he thought there was no justification for the charge against the new company at all. It is admitted that if you take off 90 guineas and £537, 10s. you take enough off to extinguish the balance. Against his Lordship's judgment the present reclaiming note has been brought.

Now, as far as the actual case is concerned, I think it permits of being disposed of in a very simple manner. As set forth in the account which I have read, the pursuer here founds upon certain agreements, and obviously he must so found because otherwise he, as a law-agent, would only have a right to charge as against the firm of W. & A. K. Johnston the work he had done for the firm of W. & A. K. Johnston, and not any work he had done for the company at all. So that I must first direct your Lordships' attention to these agreements that were made. They were two in number. There was, first, a preliminary minute of agreement between Messrs W. & A. K. Johnston—whom for short I shall always hereafter call the Firm—and Mr T. L. Welsh, who is a partner of the pursuers, but who appears in this minute of agreement not in the capacity of a partner of the pursuers or as representing the pursuers, but on behalf of the limited company which was not yet in existence. That class of agreement is a perfectly familiar one, and it is also familiar law that it does not bind a new born company unless and until the company, after its birth, chooses to adopt and ratify the agreement. Now that agreement did two things. It narrated the terms upon which the sale of the business from the Firm to the company was to be made and provided for the formation of the company, and it also had a clause in it

that the first parties—that is, the Firm—should "pay all the costs of and incidental to the preparation and execution of this agreement"— . . . and of what I may call floating the company—"including a commission to the agents of the company at such rates as are charged by Messrs Davidson & Syme, Writers to the Signet, or by other legal firms of like standing, in the formation of limited liability companies."

The company thereafter was floated and formed, and after its birth came that which is the second minute in question, which is called an "adopting minute of agreement," between the Firm and the company. The terms of that adopting minute of agreement recite that there had been the preliminary agreement and that the parties wished to carry it out. It then states in a series of clauses the terms upon which the business is to be transferred from the Firm to the company, and the tenth clause provides that "The first parties"—that is, the Firm—"shall pay all the costs of and incidental to the formation of the company and the issue of its capital, and in general all preliminary expenses whatever incurred in relation to the company up to and including the allotment of the shares thereof."

Now, I think two things are perfectly clear about this second agreement. In the first place it did not need to displace anything for there was no displacing in the matter. It was the operative agreement, for really the first agreement bound nobody. That bound the first parties if afterwards adopted; but until adopted it bound nobody. It might have been adopted simply in terms, in which case it would have been binding according to its terms though with different parties; but if parties choose to go into another agreement in which they re-state the various articles one after another, then it is the second which is the ruling agreement and not the first. The second point is this, that obviously the only parties to this agreement are the Firm and the company; and Welsh & Forbes are no parties to it, and *prima facie* have no title to sue on this agreement at all. Now, of course I am very well aware that according to the law of Scotland it is perfectly possible for a person to have rights under an agreement, and to be able to sue for these rights, who is not a party to the agreement. It is the familiar doctrine of what is known in our law as *jus quæsitum tertio*. But while that is so, I know of no authority to support the view that there can ever be an action unless the tertius is a designed person. The usual way is to design the tertius by name, but it may very well be that you design him sufficiently by stating the position he holds, such as—to take a very familiar example—the tertius may be a feuar, and so in a contract between the superior and one feuar, you may bargain for the rights of another coterminous feuar, and bargain in a perfectly certain way, though of course you do not design the coterminous feuar as A B, and his name may not be A B when the agreement comes to be enforced. But still, at the same time, I know no exception to the rule that the tertius must in some way be properly defined. Now, here the only agreement is that the Firm shall pay the expenses incidental to the preparation of the agreement and the formation of the company. If a person came to me and said, "I will bind myself to pay all expenses of the furniture which I understand you are going to put into your new house," that would be a perfectly good agreement as between him and me, and I might enforce it, having bought my furniture; but it would surely be out of the question to suppose that, if I went to some tradesman in the United Kingdom and ordered a piece of furniture, that furniture dealer would have an action against my friend. Now, though I do not say that this agreement could not easily have been framed so as to give a *jus quaesitum*, yet I have no hesitation in saying that that has not been done by this article. And accordingly that seems to dispose quite simply of this last charge of £537, 10s. which is debited against the new company. That might or might not be a good charge against the new company but it is not a good charge against the old Firm, and though the company might recover from the old Firm I fail to see that the solicitors, Welsh & Forbes, have any title whatsoever to recover too. That accordingly disposes of this one item, £537, 10s.

The other item I need say little about. I entirely agree with the Lord Ordinary and the Auditor. I think 100 guineas was quite too large a charge for the preparation of the prospectus and that 10 guineas is enough, seeing that they had already, according to the Auditor, got payment for various meetings which seemed to have been held in regard to the formation of the company. Accordingly, with the correction of the slip that the Lord Ordinary made as between the two items, I am of opinion that the Lord Ordinary's decision is right and that we ought to adhere to it.

But though I do not think it is your Lordships' practice to go beyond what might be called the immediate necessities of a case, I think it would be unfortunate to leave this case disposed of on these grounds; because there has been raised, so far as I know for the first time before this Court, a very important question of practice in the matter of such charges, and because I am not of opinion that the way in which this case has been disposed of would have been a satisfactory or proper one if it had not been for the accident that in this instance it was only a balance that was being sued for, and so to get rid of one item or two items was enough to get rid of the rest of the claim. Supposing that there had not been a balance sued for but that the whole of the account was open, I do not think the way in which the Lord Ordinary treated the case would have been a proper one, because I do not think that the question of the fees for the promotion of a company fall under the particularly rigid view which the Auditor of the Court has taken here. The Auditor of Court has treated the whole matter as simply a business account falling under the

table of fees. I do not think that anyone could look at the table of fees without seeing that it does not meet this case. After all, the table of fees is just a scale of charges fixed by general consensus of the profession as the proper charges for the ordinary incidents of a professional business, and as such it has with the Court very high authority, that is to say, supposing a difference of opinion arose between a solicitor and his client with regard to payment for ordinary professional business, I cannot imagine that your Lordships would ever depart from the table of fees; nay more, I think your Lordships would look with considerable suspicion on any procedure by which a solicitor tried to get from his client a promise that for any ordinary business that he did he would be remunerated at a higher rate than that scale. But one cannot help seeing that for the business of promoting a company the table of fees makes no provision whatever. It practically, I think, says so on its own face in dealing with the matter of commission, because, while laying down the ordinary rate for an ordinary piece of business, such as an ordinary case of purchase and sale, it says equally plainly that the commission might vary according to circumstances and that it must not be taken as a general rule. Nor do I see how the table of fees could be made to suit a piece of work like the flotation of a company, because that is a piece of work which varies extremely, the flotation of some companies being a gigantic piece of work and the flotation of others being comparatively simple. Accordingly I am not surprised at the Lord Ordinary wanting such help as he could get from the Auditor of Court, yet I do not think the case of a flotation of a company can be simply sent to the Auditor of the Court of Session and treated as if it were an ordinary law-agent's account. But as little do I think that the sort of standard that has been suggested here on the other side is the right one. The pursuers seems to have pinned their faith on a certain award that seems to have been made by Mr White Millar in a reference between Mr Brash's trustees and the Straiton Estate Company, which was floated for the purpose of taking over a shale field which Mr Brash's trustees had. Now Mr White Millar is a gentleman in a very good professional position, but at the same time his views are not binding upon us, and I am bound to say I think his views in that reference, though they may have been just as for the case in hand, are, when used to establish a general rule, quite wrong. The way in which he dealt with the matter was this, the point being as to what Brash's trustees, the sellers of the mineral field, were to pay to the law-agents—He charges first of all "commission for making the sale as per table of fees, £182, 10s.," but then he goes on thus—"But Messrs Keegan and Welsh," the agents who were to have the bill paid, "had also not only to find a purchaser but in effect to create one by getting up a company to purchase, and for this I think they are entitled to one per cent. on the £68,000," coming to a certain sum. And then he says—"As I have indicated above, I think Messrs Keegan and Welsh will be entitled to an additional commission from the company in connection with its formation." That of course is a little ambiguous. Whether by that he means an additional commission as on the purchase or an additional commission both on the purchase and on the flotation I cannot say, but I shall assume that he means the lesser of these two—merely an additional commission on the purchase.

Now the first thing which I think is wrong is the idea that there should be any commission charged against the sellers for the flotation of the company, and here let me make myself perfectly clear. When a company is promoted somebody of course must promote it, and he is generally known as the promoter, and in promoting a company he of course incurs a certain amount, it may be possibly a great deal, of expense. Presumably it is all with a view to his own future advantage in some way, but he, the promoter, or the band of promoters, whoever they may be, are the only people who are liable for that expense, though of course they may take any other person bound to relieve them of that expense. And accordingly, if for instance here Brash's trustees had agreed with a certain person that he was to promote the company and had agreed to pay the expenses, then they would have been bound to relieve him. Or, if they chose to do the work of promoting the company themselves and employed a law-agent, they must of course be liable to that law-agent for what he had done; but then they would be liable directly as promoters themselves and not in any way as the sellers of the subjects. To go on to the next step, of course promoters do not get up companies to benefit the world generally, but to benefit themselves, and therefore a very usual stipulation to put in the articles of association of the new company, and a very natural and proper one, is to make the new company relieve the promotors of the expense they have incurred in the promotion of the company. There have been plenty of decisions on that subject, and it has been perfectly well settled that a new company can never be liable in any expenses incurred before its birth unless that liability is assumed by the instrument which brings it into the world, namely, the memorandum and articles of association. Accordingly, this account seems to me to be stated in the wrong way. I do not mean that in this case Messrs Keegan & Welsh should not have been paid their commission for the floating of the company by someone, but that they ought to have been paid by someone with whom they had bargained beforehand to that effect. Brash's Trustees could never be liable as expressed in this award, for as sellers all they did was to sell something, for which to take a commission of one-half per cent. on the sale was obviously an adequate commission.

But now let me go on to the next step, and I think it will be made clear by taking first of all an ordinary transaction of a sale

and purchase between A and B. Let me suppose that A sells a property to B, then A's law-agent is entitled to his commission according to the table of fees, and B's law-agent is entitled to his commission according to the table of fees. They are the same in amount, but the one is the commission of the seller and the other the commission of the buyer. Now let me suppose that B is not an individual but is a company—that it is a company which has just been brought into the world. With B's promotion expenses I have already dealt. When you come to a sale to B, supposing it was years afterwards, then of course the position would be precisely as I put it between the two individuals; but where the coming into the world of the company and the taking over of the property is one and the same thing—that is to say, where the only meaning of the company is to take over the property or business, as is the case here, and was the case with the Straiton Estate Company—then I do not think the accounts should show a charge for the same thing twice over, and really there the expenses of creating the company would be equivalent to the buyer's commission. Accordingly, to go back to the Straiton Company's case, or taking this case—for they are the same—suppose the whole thing were to be begun again, the proper way would be that the law-agent would be entitled to a commission, as on a sale, against the Firm of one-half per cent. on the value, and that over and above that the law-agent, if he were the person who had done the work of floating the company, would be entitled to commission on flotation, but that commission would be chargeable in the first place against the promoters, whoever the *de facto* promoters were who started the agent on the work, and that liability could not have been charged at all by way of relief against the new company, except in virtue of a provision inserted in the articles of association, or against anybody else unless by special bargain. And in a case like this the charge for the flotation of the new company would necessarily be the same thing as the purchase of the property by the new company; and therefore the new company, as such, could not have been liable for any further commission as buyers.

I have thought it better in the interests of everybody to go into this somewhat long discussion on this subject, so that there could be no doubt on the matters connected with it. Your Lordships, however, will observe that I have very carefully abstained from stating what I think is the proper commission for the flotation of this company; and I do so for the reason that I do not think that a general principle can be laid down for such matters. When you come to a commission for a multifarious business like the flotation of a company it is a thing that will vary enormously. I should say that, if people want to charge more than say one per cent., it would be well to bargain before they began, but if they do not I suppose we would have to arrive at the proper commission, not by a general rule, for I do not think there could be such a rule, but by informing ourselves what sort of work had been done, and then fixing what we thought an appropriate commission. The commission might vary enormously, for the flotation of some companies would call for very little except mere clerk's work, and inquiries as to whether the promised business was really being done, and minor investigations of that sort, while in other cases the preliminary work entailed might be of a most arduous description.

LORD M'LAREN—I agree in the decision, and assent to all the observations that have fallen from your Lordship in the chair. I shall add a sentence only on each of two points.

The one point is in reference to the proper mode of dealing with promotion expenses. While I think your Lordship's exposition of that part of the law is perfectly sound and irrefragible, I am not satisfied that in the award by Mr White Millar in the case of Brash's Trustees, which has been referred to, his decision was unsound with reference to the particular case in which it was given. I rather incline to think it had been misapplied in applying it to the present case, because, though I know nothing whatever about the case except what I see in the papers, I rather think that Brash's Trustees were the real promoters who employed the agents to get up the company. Then I think that the real promoters should pay the promotion expenses, unless they are able to induce the shareholders whom they take into their company to accept that liability as an element in the constitution of the company.

The other point, which I merely touch, is the rate of remuneration. Now, there are cases—suppose the case of companies that apply to the public for subscriptions, where the actual flotation—I mean the finding members willing to subscribe—is done by stockbrokers, and they receive a commission in accordance with the rules of their own profession for doing that business. In such cases the lawyer is merely a man of business who employs brokers and other sub-agents, and whose proper function is the preparing of the memorandum and articles of association. It is quite plain that in such a case the rate appropriate for remuneration to a law-agent would be less than in a case where he himself did the stockbrokers' work, and amongst his own clients and friends was at the trouble of finding people willing to put capital into the concern. I think it is only necessary to look at these cases in order to see that there cannot be an invariable commission, and in fact it would be desirable in all such cases that the rate should be agreed on in advance.

LORD KINNEAR—I agree with your Lordships in all that has been said, and I only desire to add, with reference to what Lord M'Laren has said as to Mr White Millar's award, that I agree with his Lordship, and I do not suppose that I differ from your

Lordship in the chair, in thinking that we can express no opinion—for my part I have no opinion—as to whether the award in the case by Mr White Millar was right or wrong. That is not a question with which we are concerned, and if it had been raised directly by parties between whom he was arbiter we could not have entertained the question. But what I hold to be wrong is the statement of a rule for fixing commission, which is said to be embodied in the letter from Mr White Millar to Messrs Tods, Murray, & Jamieson, in so far as that is to be made applicable to the question now before us. I agree with your Lordship that the rule as so applied is not a sound rule, and therefore in all that has been said on that part of the question in your Lordships' opinions I desire to concur, without saying anything at all as to the soundness of the award in the case in which it was given.

LORD PEARSON concurred.

At the close of the advising the LORD PRESIDENT added—In so far as the observations of Lord M'Laren refer to Mr White Millar's award I entirely agree. My criticisms of course were upon the way in which the award was framed, and the application that was sought to be made of it to this case. The award itself may have been perfectly right, and indeed it probably was perfectly right if as a matter of fact Brash's trustees were the true promoters.

The Court pronounced an interlocutor of new assoilzing the defenders.

Counsel for the Pursuers and Reclaimers—Younger, K.C.—D. Anderson. Agents—Welsh & Forbes, W.S.

Counsel for the Defenders and Respondents—Scott Dickson, K.C.—T. B. Morison. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, February 6.

FIRST DIVISION.

[Sheriff Court at Glasgow.

HORN & COMPANY, LIMITED *v.* TANGYES, LIMITED.

Process — Appeal — Competency — Sheriff Court Act 1853 (16 *and* 17 *Vict. c.* 80), *sec.* 24 — *Sisting Process — Order to Find Caution and Sisting Procedure till Caution Found—Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 69.

Held that an interlocutor pronounced in the Sheriff Court ordaining a limited company (in virtue of section 69 of the Companies Act 1862) to find caution for expenses of an action in which they were pursuers, and sisting procedure until such caution should be found, was an interlocutor sisting process, and therefore appealable.

The Companies Act 1862 (25 and 26 Vict. c. 89), sec. 69, enacts — "Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

The Sheriff Court Act 1853 (16 and 17 Vict. c. 80), sec. 24, enacts—"It shall be competent, in any cause exceeding the value of £25 to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses . . .; but it shall not be competent to take to review any interlocutor, judgment, or decree of a Sheriff, not being an interlocutor sisting process, or giving interim decree for payment of money, or disposing of the whole merits of the cause as aforesaid. . . ."

This was an action of damages brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of John Horn & Company, Limited, coalmasters, having their registered office at 79 West Regent Street, Glasgow, against Tangyes, Limited, engineers, 96 Hope Street, Glasgow, for payment of £4000 as damages for breach of contract in connection with the supplying of a pump.

The Sheriff-Substitute (DAVIDSON) having allowed a proof, the defenders lodged a minute in which they stated—"The defenders aver that the pursuers have no assets, or at least insufficient assets to pay the defenders' costs in the event of the defenders being successful in their defence, and they crave that an opportunity may be given to them (the defenders) in terms of the 69th section of the Companies Act 1862, of producing credible testimony in support of the said averment, and that upon the following statement of facts being proved to the satisfaction of the Court, the pursuers be required and ordained to find sufficient security for such costs within a certain short space, and in the event of the pursuers failing to find such security that the action be dismissed. . . ."

On 12th October 1905 the Sheriff-Substitute (DAVIDSON) allowed a proof of the averment contained in the minute.

The pursuers appealed to the Sheriff, who ordained the pursuers to answer the defenders' minute.

Thereafter, on 6th December 1905, the Sheriff (GUTHRIE) pronounced this interlocutor—"Having considered the minute for the defenders . . . and the pursuers' answers thereto and heard parties' procurators, recals the interlocutor of 12th October last, ordains the pursuers to find caution for the expenses of process, and sists procedure until such caution shall be found."