as at the date of the feu-contract. (2) The vassal was bound not only to build the houses on the line to be fixed by the superior, but also to maintain them in good and sufficient repair. That showed that the obligation was continuous and not limited to the original building—*Forrest* v. *Governors of George Watson's Hospital*, December 15, 1905, 8 F. 341, 43 S.L.R. 183. It was to be presumed that the line had been duly fixed by the superior — *Sutherland* v. *Barbour*, November 17, 1887, 15 R. 62, 25 S.L.R. 66.

At advising—

LORD PRESIDENT—By feu-contract dated 19th April and 11th June 1845 the factor and commissioner of General Duncan Darroch of Gourock feued out to John Knox Stuart, surgeon in Glasgow, certain pieces of ground marked Nos. 1, 2, 13, and 12 on a plan annexed to the feu-contract. By the said feu-contract the vassal bound himself to build a dwelling-house of a certain description and value on each piece of ground feued. The feu-contract further provided—"And the said John Knox Stuart further engages and binds and obliges himself and his foresaids to keep the said houses to be built fronting to the said turnpike road at least twenty-five feet from the centre thereof . . . and to build the whole of the said houses in the exact line to be fixed by the said General Duncan Darroch or his agent."

Following upon the feu-contract the houses were built, and were built upon a line which is admittedly twenty-five feet from the centre of the road as it then existed. Since the date of the feu-contract, however, the width of the road has been increased by the addition of a strip of ground on the side away from the houses, and the successor in the feu of one of the houses, which is No. 1 on the plan, now wishes to extend the buildings on his feu up to the edge of the road as it at present exists, maintaining that, in view of the additional breadth which has been added to the road, the front wall of his house will not be less than twenty-five feet from the middle of the road.

We had an interesting argument from Mr Moncrieff on the clause "twenty-five feet back from the centre thereof," the question being whether, in view of the centre of the road being a relative term, the stipulation must not always be read in the light of the facts existing at the time of its application. This raises a question of some difficulty which I do not think it necessary to decide, because the matter is really ruled by the following clause—that the buildings are to be erected on the exact line to be fixed by the superior. That clause is obviously not meant to apply to one time alone. I think its effect was to make it a rule of the feu that the line once settled was to be thereafter maintained, and that the only person who could release the vassal from the restriction was the superior. Now, here it is the superior who is objecting to the vassal's proposed alteration, and there is no doubt of his title to do so. Accordingly, I am clearly of opinion that the practical result arrived at by the Dean of Guild was right, and that the appeal should be dismissed.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court *refused* the appeal.

Counsel for the Petitioner (Appellant)—Graham Stewart, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent Darroch—Sandeman. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Respondent the Master of Works—G. Watt, K.C.—Munro. Agents—Paterson & Salmon, W.S.

Saturday, March 2.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

BROWNLIE, WATSON, & BECKETT *v.* CALEDONIAN RAILWAY COMPANY.

Agent and Client—Transfer of Railway Company's Undertaking—Remuneration of Transferring Company's Solicitors—Basis for Fixing Remuneration—Applicability of Table of Fees.

A railway undertaking was transferred under Act of Parliament from one company to another. The solicitors of the transferring company claimed (1) an *ad valorem* fee of £1410, 3s. for revising the Amalgamation Bill, treating it as a disposition following a sale; and (2) an *ad valorem* fee of £2683, 1s. for agency in negotiating the sale. On a remit the Auditor reported that the revising fee should be disallowed, the solicitors being remunerated by proper charges for work done, but that a commission for agency in negotiating was chargeable, which, as allowed by him, came to £435, 10s. The Lord Ordinary gave effect to this report.

Held, on a reclaiming-note, (1) that the revising fee was rightly disallowed, there having been no disposition, and the charge therefor in the table of fees being inapplicable; but (2), that a commission for agency in negotiating the sale had been wrongly allowed, there having been no negotiations for a sale in the proper sense of the term, and that the proper basis for fixing the remuneration was a fee for trouble, in this case £315.

On 9th May 1905 Brownlie, Watson, & Beckett, law agents and conveyancers, 225 West George Street, Glasgow, raised an action against the Caledonian Railway Company to recover £4095, 13s. 7d., the amount of a part of their business account, relating to the sale and transfer to the

defenders of the Paisley and Barrhead District Railway. The pursuers had been the law-agents of the Paisley and Barrhead District Railway Company, and it was not disputed that the defenders were liable for that company's debts, including the pursuers' claim. The question at issue between the parties was the basis on which the pursuers were to be paid.

The considerations upon which the undertaking of the Paisley and Barrhead District Railway Company had been transferred were stated, in Cond. IV., as follows:—

"1. Cancellation of the Caledonian Railway Company's share capital in the company . £212,000
2. Cancellation of the money borrowed from them . . . 79,630
3. Advance by the Caledonian Railway Company of the sums necessary to carry on the line till amalgamation . 78,985
4. Repayment of temporary loans to the bank and others . . 100,000
5. Repayment to the shareholders of the company other than the Caledonian Railway Company 66,000

Total £536,615"

The *facts* of the case are given in the findings in fact of the Lord Ordinary (ARDWALL), who, after a proof, on 8th November 1905, pronounced this interlocutor—"... *Finds* (1) that the Paisley and Barrhead District Railway Company, hereinafter referred to as 'the company,' was incorporated by Act of Parliament in 1897; (2) that on 6th October 1897 Mr Joseph Watson, a partner of the pursuers' firm, was appointed secretary of the company, and on the same date the pursuers were appointed to be law-agents of the company; ... (4) that under the foregoing general appointment as law-agents the pursuers performed various business for the company, and that their general account for business up to 31st July 1902 has been paid and settled; (5) that the account now sued for is a special account headed 'Transfer of Railway to Caledonian Railway Company'; (6) that by 17th September 1901 it had become apparent that there would be some difficulty in financing the company, and a memorandum from Sir James Thompson, general manager of the Caledonian Railway Company, on the matter was submitted to the directors of the company; (7) that on 1st October the Caledonian Railway Company directors remitted to Mr Neave, their solicitor, to prepare a draft minute of agreement between them and the company; that by minute of that date the directors of the company instructed the secretary 'to communicate with Mr Neave regarding the draft agreement,' and that this agreement had for its object the amalgamation of the company with the Caledonian Railway Company; (8) that on 24th October 1901 the directors of the company took into consideration the proposals of the Caledonian Railway Company, and after consideration agreed to the principle of amalgamating the company with the Caledonian Railway Company, and remitted to the law-agents to 'negotiate and advise them as to the terms of amalgamation with the Caledonian Railway Company, and thereafter to revise the draft agreement and submit the proposals to an early meeting of the directors'; (9) that on 7th November 1901 the directors of the company agreed unanimously with the directors of the Caledonian Railway Company to take over the line per draft agreement submitted by the Caledonian Railway Company, 'subject to the approval of the draft agreement by the company's solicitors, and it was remitted to the solicitors to revise the agreement on behalf of the company, and conclude the negotiations'; (10) that the two remits above quoted constitute the only special employment of the pursuers in connection with the amalgamation of the company with the Caledonian Railway Company; (11) that thereafter the pursuers, or the said Mr Joseph Watson, performed the various pieces of business set forth in the account sued for, but that if the said account falls to be taxed item by item it will require to be determined in such taxation what items in the said account were properly incurred under the remits above quoted, or may be fairly viewed as work done in connection with said remits, and what items, if any, may be considered as attributable to Mr Watson's position and duties as secretary, or as chargeable against other clients of the pursuers' firm; (12) that the pursuers' said account as now stated practically consists of two items, viz., an *ad valorem* fee of £1410, 3s. for revising the Amalgamation Bill, and another *ad valorem* fee of £2683, 1s. charged for agency in negotiating the sale of the Paisley and Barrhead District Railway to the Caledonian Railway Company; (13) that the sum on which the said fees are charged is £536,615, as stated in Cond. IV (*supra*), but that the only consideration which passed from the Caledonian Railway Company to the shareholders of the company in respect of said amalgamation was £66,885, 9s. 1d., the remainder of the first-mentioned sum consisting of moneys which either belonged to the Caledonian Railway Company or for which they were liable: With these findings, remits the said account to the Auditor to tax and report: Reserves meantime all questions of expenses."

Opinion.—"The foregoing findings sufficiently set forth my views on the facts of this case, and I do not think it necessary to deal further with these except to remark that the interposition of the Caledonian Railway Company in the affairs of the company is explained by the fact that the latter was really the creature of the former. ... Before deciding whether the pursuers are entitled to charge their account as they have done, or whether I should order the account to be restated and thereafter to be remitted to the Auditor for taxation, I desire to have the opinion of the Auditor upon the account as it at present stands, as I desire to be informed on the question whether, in view of the terms of the pur-

suers' employment, the mode of stating and charging the account has or has not the sanction of practice, or to what extent it has that sanction. Should the Auditor be of opinion that the account is properly charged by way of *ad valorem* fees, he will tax it as it stands; if, on the contrary, he thinks it should be remodelled and stated as an ordinary business account, with charges entered opposite to each item, I should, upon his report to that effect, order a remodelled account to be lodged, and remit it to him for taxation and report, so that I may have the whole matter before me before finally deciding the case."

On 30th January 1906 the Auditor reported—"1. That in his opinion the method adopted by the pursuers of stating their account is so far improper, inasmuch as there is no precedent for charging an *ad valorem* fee for revising a disposition in a case such as the present, where there has been no disposition, but the property has been transferred by force of statute. The agents in such a case fall to be remunerated by their proper charges for work done in connection with the procuring of the Act of Parliament under which the undertaking is transferred.

"2. That in the Auditor's opinion a commission for negotiating the sale by the Paisley and Barrhead Railway Company to the Caledonian Railway Company is fairly chargeable, the pursuers having been instructed to negotiate and having in point of fact done so. The Auditor refers to the Note No. 6 appended to the Table of Fees for conveyancing and general purposes which states—'A commission is a remuneration for trouble and responsibility, and its amount should therefore be regulated by the extent of that trouble and responsibility.' Acting on this principle, the Auditor's practice has been, where an agent of a company has negotiated a sale in conjunction with the directors to allow a modified commission, and in the present case he considers a quarter per cent would be suitable remuneration. If, however, the pursuers should prefer to have their detailed charges for the business covered by commission, they ought to be allowed the option of stating them.

"3. The other items in the business account, amounting to £2, 9s. 7d., were not objected to, and have been sustained by the Auditor."

On 7th March 1906 the Lord Ordinary pronounced this interlocutor—"Appoints the pursuers to restate their account so far as they consider the items thereof are not covered by the commission proposed to be allowed by the Auditor, and that either by filling in upon the account the fees applicable to the various pieces of business there charged, or by lodging a new account containing the items of business performed by them which they consider are not covered by the commission proposed to be allowed by the Auditor; and further, of new remits to the Auditor to state upon what sum, in his opinion, the proposed commission of ¼ per cent. ought to be allowed, and to tax the restated account as above allowed to be lodged, and to report."

In obedience to this second remit the Auditor reported—"1. That he has re-taxed the business account at the sum of seventy-nine pounds and elevenpence (£79, 0s. 11d.) sterling.

"2. That in the Auditor's opinion the sum on which commission should be allowed is One hundred and seventy-four thousand two hundred pounds eighteen shillings and eightpence (£174,200, 18s. 8d.). At one-quarter per cent., the rate proposed by the Auditor in his former report, commission on this sum amounts to four hundred and thirty-five pounds ten shillings (£435, 10s.).

"Strictly speaking, the sum on which commission is to be allowed should probably be the full value of the undertaking transferred, which amounted to £536,615, but the Auditor considers that it would in the circumstances be unreasonable to deal with the matter on that footing, the defenders being already in a sense proprietors as regards upwards of £360,000. The basis proposed by the Auditor is that on which the Inland Revenue has proceeded in fixing the amount of stamp duty. In any view the Auditor thinks the amount of commission proposed by him a sufficient remuneration for the pursuers' services in the negotiations."

On 20th March 1906 the Lord Ordinary gave decree against the defenders for £514, 10s. 11d. in full of the conclusions of the summons, with expenses.

Opinion.—"Several questions arise here on the two reports which have been lodged by the Auditor. The first is as to the fee of £1410, 3s. which is charged for revising the conveyance of the Barrhead Railway by way of provisions in the bill before Parliament, and the consideration is said to be £536,615, and upon that the usual *ad valorem* fee is charged. The Auditor has reported, and I entirely agree with him, that it is out of the question to charge an *ad valorem* conveyancing fee as for a disposition following a sale in respect of an Act of Parliament, and that for this obvious reason that the clauses of the Act of Parliament which, taking the most favourable view for the pursuers, embodies a sale, are adjusted most carefully, and expenses are incurred in adjusting these clauses and otherwise in promoting the bill and in getting it passed in Parliament, and to say that in addition to these expenses the Railway Company should be charged as for a disposition following a sale seems to me to be ridiculous; and I am very glad to say that the same view was taken by Lord (Thomas) Mackenzie in a case decided a good many years ago, and a copy of the valuable decision in which the Auditor has transmitted with his report. I entirely agree with the Auditor that that sum of £1410, 3s. must be struck out.

"The next question is, what is the remuneration that is to be given to the pursuers for what is called negotiating the amalgamation of the two railway com-

panies? Now, that there were negotiations does not, in my opinion, admit of doubt, and it is still less doubtful that instructions remitting to the law agents to negotiate and advise as to the terms of amalgamation with the Caledonian Railway Company were given in the terms quoted in my interlocutor of 8th November 1905.

"Now, the question is, what remuneration are the solicitors to get for carrying out these remits? and I may say at once that I think that that remuneration can hardly be calculated by mere ordinary business charges. As is well known, there is a great amount of trouble which cannot very well be charged under the table of fees, and I think therefore the pursuers are entitled to a special fee for these negotiations. The question comes to be, on what basis is that fee to be fixed? The Auditor has suggested that it might be fixed by way of commission, and he has suggested that the sum on which that commission should be fixed should be the sum of £174,200, which is the sum at which the railway changed hands, less the sums which belonged really to the Caledonian Railway Company. Now it may be said that the Auditor has not followed altogether a logical course in taking that sum. There are stateable objections to his view, but on the whole I think he has taken a common-sense view of the question, and has dealt with it on sound business lines; and further, this has to be said, that the Auditor has really to consider what would be a fair fee in the circumstances. If a sum on which commission is to be charged is a very large one, the rate of commission will probably be less, and the Auditor might have seen fit and proper to allow a less commission than he has done if there had been a larger sum on which it fell to be charged. Everyone knows that there is, so to speak, a system of give and take in fixing remuneration by commission.

"The Auditor has fixed the commission in relation to the particular sum of £174,200, and he supports the fee he recommends by saying that the amount of commission proposed by him is a sufficient remuneration for the pursuers' services and negotiations. Nobody is better qualified to judge of that than the Auditor is, and I think when we consider the sum at which he has arrived, and further that the fee allowed is a sufficient and proper fee for the services rendered, I think the proper course is to approve of what the Auditor has done in fixing the fee for negotiations at £435, 10s. The rest of the account has been taxed in the usual way, and amounts to the sum of £79, 0s. 11d., bringing out in all £514, 10s. 11d. as due to the pursuers.

"But two questions raised are still to be dealt with, viz., interest and expenses. In the first place, with regard to expenses, there is no tender in the case, and I never, unless I am compelled to do so, depart from the salutary rule that where there is no tender a decree for expenses must follow the result of the action, and I shall accordingly find that the pursuers are entitled to their expenses. But with regard to interest the matter stands in a different position altogether. The pursuers rendered their account in a form very different from that in which they are now getting it paid after a considerable amount of procedure, and I cannot say that the defenders were in *mora* in refusing to pay an account rendered in the form the account in question was. The rule about interest is that it only runs on sums that have been properly demanded, and it cannot be said that this was so in this case when the sum originally demanded was no less than £4095, and the pursuers have ultimately been found entitled to only £514, 10s. 11d.

"I shall therefore grant decree for that sum without interest, but with expenses to the pursuers in respect that there was no tender of any sum."

The defenders reclaimed, and argued—The Lord Ordinary was right in disallowing the *ad valorem* fee for revising a disposition which had been charged in the pursuers' account, but he had erred, following the Auditor, in allowing the pursuers a commission for agency in negotiating the transfer. That was a wrong principle, and it was the principle more than the amount that the reclaimers objected to. The transaction here was of a peculiar character, and the table of fees did not apply. The pursuers had likened it to a sale of heritage, but it was not a sale of heritage as was shown by there being no disposition, and consequently none of the trouble preliminary to a disposition. All the solicitor had done was to see that the terms on which the directors had agreed to transfer the undertaking were given effect to. He could at most have asked a fee for revising, say 200 guineas, and to be paid ordinary business charges for any incidental work. The account should be sent back to the Auditor to be taxed as an ordinary business account.

Argued for respondents—The interlocutor of the Lord Ordinary should be affirmed. The transaction between the companies was a transfer of properties for a price—the sum paid being at least £174,000. It was really therefore a sale. Mr Watson had conducted the negotiations, and acted as solicitor throughout. In so doing he had performed the kind of work contemplated in head 20 of the table of fees (P.H. Book, G. 21), for which a commission on the purchase money was properly chargeable—the commission to cover everything, negotiations, meetings, correspondence, and interviews prior to the transfer.

LORD PRESIDENT—The pursuers in this case are a firm of solicitors in Glasgow, who were solicitors of the Paisley and Barrhead District Railway Company, incorporated by Act of Parliament in 1897. I need not go minutely through the history of that company, but it is enough to say that, although it was an independent company, it was largely financed by the Caledonian Railway Company, that is to say, that the Caledonian Railway Company lent it money and held some of its shares. After a time it was apparent that the Paisley and Barr-

head District Railway Company could not go on unless it got more money, and it was quite evident that it would be very difficult, if not impossible, to get money from the public; and accordingly negotiations were entered into between the directors of that company and the directors of the Caledonian Railway Company with the view of the company being taken over by the Caledonian Railway Company, and that eventually was carried through under another Act of Parliament. Under the provisions of that Act of Parliament the Caledonian Railway Company became liable for the debts of the Paisley and Barrhead District Railway Company, and the present action is an action by the pursuers against the Caledonian Railway Company for payment of a portion of their accounts as solicitors. I say "a portion," because it is admittedly for a certain special account only that they are suing now. Their ordinary accounts have been already paid, and this special account has to do entirely with the sale and transfer of the one company to the other.

Now, the Lord Ordinary allowed a proof on the matter, and after that he pronounced certain findings. These findings are set out in the interlocutor of 8th November 1905, and after setting forth the facts which I have paraphrased to your Lordships, the Lord Ordinary finds these special findings—[*His Lordship read the Lord Ordinary's findings Nos.* (6) *to* (11).] Then the Lord Ordinary goes on to find—"(12) that the pursuers' said account as now stated practically consists of two items, viz., an *ad valorem* fee of £1410, 3s. for revising the Amalgamation Bill, and another *ad valorem* fee of £2683, 1s. charged for agency in negotiating the sale of the Paisley and Barrhead District Railway to the Caledonian Railway Company; (13) that the sum on which the said fees are charged is £536,615 as stated in article 4 of the condescendence but that the only consideration which passed from the Caledonian Railway Company to the shareholders of the company in respect of said amalgamation was £66,885, 9s. 1d." With these findings he remitted the account to the Auditor to tax and report.

Now, the Auditor upon that made his first report on the case, which is printed in the joint appendix, and in that he first of all reported against the idea of charging an *ad valorem* fee for revising the disposition—there having been in fact no disposition whatever, the property having been transferred by force of statute. But then he went on to say—"2. . . . [*quotes Article* 2 *of Auditor's Report of January* 30, 1906]. . . ."

Now upon that report the Lord Ordinary pronounced a second interlocutor. He appoints the pursuers to restate their account, and of new remits to the Auditor to state upon what sum in his opinion the proposed commission of ¼ per cent. ought to be allowed. And upon that remit the Auditor gives in a second report, in which he states—"(1) That he has retaxed the business account at the sum of seventy-nine pounds and elevenpence (£79, 0s. 11d.) sterling. (2) That in the Auditor's opinion the sum on which commission should be allowed is One hundred and seventy-four thousand two hundred pounds eighteen shillings and eightpence (£174,200, 18s. 8d.)," which taken at ¼ per cent. brings out a certain sum, and for this sum the Lord Ordinary has granted decree.

Now upon the first point, namely, that the Auditor held that there was no case for charging an *ad valorem* fee for revising a disposition, in which decision the Lord Ordinary agreed with him, I have no doubt whatsoever. It seems to me utterly out of the question to apply to a transaction of this sort the ordinary *ad valorem* revising fee for a disposition. The whole reason of the table of fees—which is, after all, as your Lordships remember, a guide and not a rule—is that a law-agent has certain responsibilities connected with a disposition, which responsibilities are, in a pecuniary settlement, proportioned to the value of the subjects that have been dealt with. But here there was no such responsibility at all. The whole question whether the transference was well or was not well effected, was a question which arose on the Bill, and of course the fees for drafting the Bill are otherwise provided for.

About the other part I confess that I am rather puzzled with the way in which it is dealt with, because I should have thought that if there was commission to be charged on this part of the transaction, the commission would necessarily have been charged, according to the findings of the Lord Ordinary, on £66,885, and I do not understand the Lord Ordinary remitting that matter again after he had already found that the sum on which fees were to be charged was £66,885. But it was remitted, and the Auditor fixed it at a different figure.

But I do not trouble with that point, for I do not think work of this sort ought to be charged by a commission on the supposed value of the transfer at all. The truth is, that I think the Auditor was led wrong by what is, in one sense, a play upon words. The general principle which the Auditor has followed has been this, that where an agent of a company has negotiated a sale in conjunction with the directors, he allows a modified commission. Well, I do not doubt that would be, in an ordinary case of ordinary sale, a very proper thing to do. If an agent negotiates a sale with an ordinary client in an ordinary way—that is to say, offers to find a purchaser and to treat with him—he gets his commission according to the table of fees, and it may be that in certain cases, owing to the magnitude of the transaction, the *ad valorem* commission in the table of fees would not be a proper commission, and that there should be, as the Auditor says, a modified commission. But in this case I hold that there was no negotiation in that sense at all, and that the Auditor has been misled by the words in one of the findings of the Lord Ordinary, quoting the resolution of the company in which the directors of the company agreed unanimously with the directors of the Caledonian Railway Com-

pany to take over the line per draft agreement submitted by the Caledonian Railway Company, "subject to the approval of the draft agreement by the company's solicitors, and it was remitted to the solicitors to revise the agreement on behalf of the company and conclude the negotiations." Well, that is quite a convenient word to use, but these "negotiations" are not negotiations for the sale. The whole thing was done at that time. Of course I do not mean to say for one moment that this was not work for the solicitors to do, for which they ought to be paid. There was the work of the revisal of the agreement, and they had to see the constituents whom the directors represented, and show them that this arrangement which the directors were making was a good arrangement. But all that was not negotiations with the other parties for a sale, and therefore I think in dealing with this matter the allowance of a commission was quite wrong, and I am not surprised at all at the evidence of Mr Neave—I mean I am not surprised at it from my own knowledge—that there have been many transactions of this sort and no one ever heard of an agent being paid an *ad valorem* commission. How absurd it comes to be is well illustrated in this case. According to the Lord Ordinary's first view, the consideration was £66,000 and the value of the whole property was £536,000. According to the second view it was £174,000—though the genesis of that sum we really do not know. We only know this about it, that that is the sum on which the stamp was fixed in the question with the Inland Revenue. But whether it was £536,000 or £174,000, that to a great extent depends upon a circumstance which was more or less an accident, viz., that the Caledonian Railway had been lenders, and in one sense were buying back their own property, while in another sense—in the sense of a conveyance—it was not their own property. In other words, if I bought an estate the consideration would not be less because in point of fact I happened to hold an heritable bond over it. I am only saying this to show how necessary it is, if you come to commission in a case of this sort, to know what the exact amount will be, and I am not surprised to learn that this is the first time that charging such an account in this way has been thought of. In my opinion the pursuers here ought to be allowed a fee for their trouble; and the Court are of opinion that they are entitled to a fee of three hundred guineas. That of course falls to be added to the £79 brought out in the business account, and decree will be given for that amount.

LORD M'LAREN—I concur. I hold that when a transfer of a railway undertaking is to be made from one company to another that is an object which cannot be accomplished without an Act of Parliament; and if an Act is passed it must be assumed that the powers that are given are all that the Legislature thought proper to give, and that the agent who prepares the deed incurs no responsibility whatever if it turns out that the powers are not sufficient. It follows, I think, that the table of fees for ordinary professional business is altogether out of the case, and that the agent is neither entitled to be paid by an *ad valorem* fee, nor by a varying percentage, such as was suggested by the Auditor in this case. We propose that the agent in this case should be remunerated by a fee of a fixed sum—three hundred guineas. How a fixed sum is to be arrived at in such a case is not difficult to see. Like all other matters of contract, primarily it ought to be settled by agreement between the parties. When a railway company has a transaction of this kind it would probably say to its agent, "Now we wish you to carry out this Parliamentary arrangement, and we shall give you a fee of three hundred guineas," or whatever may be the sum offered; and if the agent is not satisfied with the fee offered, and does not like the arrangement, he may leave it. If he carries out a transaction as to which no fee has been fixed, then he is entitled, on the principle of *quantum meruit*, to receive a fee which is to be calculated on the usual scale of remuneration for business of that class. I agree, of course, that the sum of £79 which the Auditor has found due for ordinary professional business is to be allowed in addition.

LORD PEARSON—It was explained that the purpose of the defenders in presenting this reclaiming note is not so much to object to the figure fixed by the Lord Ordinary but rather to challenge the basis on which the calculation rests, although they also object to the figure itself as being too high. On their general argument I think the defenders are right in protesting against the table of fees being held applicable to this case, except to the extent of the charges amounting to £79, 0s. 11d., which were not disputed. In respect to all beyond that figure I think this case is quite exceptional and must be treated as outside the table of fees in the matter of remuneration. That the Lord Ordinary was right in disallowing the conveyancing *ad valorem* fee of £1410, 3s. is, I think, quite clear, for the reasons which he states. As to the still larger fee charged for negotiations, the mere statement of the figure, when compared with the work done and the responsibility attaching to it, as these appear from the documents and the proof, demonstrates that the amount is excessive. On the other hand it does not follow that the ordinary charges which I have already mentioned are all, or nearly all, that the pursuers can get. On the contrary, I think they are entitled to a substantial fee for their trouble and responsibility, such as it was, and the question is how that is to be calculated. The pursuers claim to be paid by commission, and the Lord Ordinary, following the Auditor's report, has sustained this claim. Now, the ordinary commission of ½ per cent. has not been allowed. The Auditor has allowed ¼ per cent., and that on a modified sum of capital. I cannot assent to this mode of calculating the

remuneration. I think it has no application to the case, and no necessary relation whatever to the fairness of the remuneration. It seems to me that unless the calculation is purely fortuitous it really involves a preliminary estimate in a general way of what would be a fair fee, and then the application to that of an amount per cent. which will come near it in the result. I prefer to negative that method of calculation, and to sustain the Railway Company's contention that the proper way of arriving at a sum in this case is by considering what a man of business, having knowledge of the question, would fix as fair remuneration. In this view the sum allowed by the Auditor is too high, and I agree with your Lordships that a fee of three hundred guineas would be a fair remuneration to the pursuers.

LORD KINNEAR was absent.

The Court recalled the Lord Ordinary's interlocutor and gave decree for £394, 10s. with interest thereon at 5 per cent. from 9th May 1905, the date of the summons, in full of the conclusions thereof, and allowed no expenses due to or by either party.

Counsel for the Pursuers and Respondents — Solicitor-General (Ure, K.C.) — Cullen, K.C.—Spens. Agent—F. J. Martin, W.S.

Counsel for the Defenders and Reclaimers —Clyde, K.C.—Blackburn, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Thursday, March 7.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BRUCE *v.* THE SCOTTISH AMICABLE LIFE ASSURANCE SOCIETY.

Right in Security—Bond and Disposition in Security—Assignation by Heritable Creditor in Possession under Decree of Maills and Duties—Obligation of Creditor to Assign—Assignation without a Clause Acknowledging that Amount Due is Correctly Stated on a Settlement of Accounts—Scope of Penalty Clause in Bond.

A heritable creditor in possession under a decree of maills and duties was tendered the amount of the principal sum and also the amount of interest which he alleged to be still due under his bond; but the debtor did not admit that the amount of interest was correctly stated, reserved his right to challenge the creditor's intromissions, and refused to allow the insertion in the assignation of the bond in favour of a third party which he demanded, of a clause stating that the amount of interest was acknowledged to be correctly stated after a settlement of accounts. The creditor refused to grant the assignation without the clause, maintaining that the expenses to be incurred in defending the threatened action as to his intromissions fell within the usual penalty clause of his bond and disposition in security, and that he was entitled to retain the security subjects as security therefor if he were successful and until he had a final clearing-up of accounts.

Held, in an action of declarator brought by the debtor, that the expenses of the threatened action would fall within the penalty clause of the bond and disposition in security, and consequently that the creditor was not bound to grant an assignation without a final settlement of accounts.

Orr v. *Mackenzie*, June 20, 1839, 1 D. 1046, *followed.*

Right in Security—Bond and Disposition in Security—Discharge—Discharge by Consignation—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 49.

The Conveyancing (Scotland) Act 1874, section 49, enacts—"Where the debtor in any heritable security, whether granted before or after the commencement of this Act, shall have exercised the power or right of redemption contained therein, but where, from the death or absence of the creditor, or any other cause, the debtor cannot obtain a discharge of the incumbrance created by the security, it shall be competent to him to consign the amount, principal and interest, due, and thereupon it shall be competent to any notary-public to expede a certificate in, or as nearly as may be, the terms of Schedule L, No. 2, hereto annexed, and the recording of the said certificate in the appropriate register of sasines shall, provided the principal debt and all interest due thereon in terms of the security shall have been so consigned, have the effect of completely disencumbering the lands contained in such heritable security of the debt and of all interest and penalties corresponding thereto."

Opinion per the Lord President that the above section is applicable only in cases where the debtor cannot get a discharge, and does not apply to a case where the difficulty is that the parties cannot agree as to the terms of an assignation of the bond and disposition in security.

Right in Security—Bond and Disposition in Security—Discharge—Premonition—Necessity of Premonition where Creditor in Possession under Decree of Maills and Duties.

Held per Lord Salvesen, Ordinary, that a creditor's having obtained decree in an action of maills and duties on a bond and disposition in security, and being in possession thereunder, does not dispense with the necessity of premonition if the debtor desires to pay the debt.

On September 11, 1906, John Wilson Bruce, accountant and property agent, Glasgow, brought an action against the Scottish