Argued for the appellant—The distinction drawn in the books between life and fire insurance was unsound. In the case of the *Scottish Union and National Insurance Company* (*cit. supra*) the point now raised as to deducting unexpired risks did not seem to have been fully argued, and accordingly the rule there laid down ought to be reconsidered, especially as it operated substantial and cumulative injustice in the case of companies like the present with an increasing business. Moreover, the rule in question was really one of convenience and not one of principle, and ought not therefore to be regarded as sacred. To take into account merely the actual receipts and the actual outlays without allowing for unexpired risks was unfair. The view that failure to deduct unexpired risks in any one year was made up by their being allowed for in the subsequent year was unsound, for its effect was to tax the appellants on profit which was never earned—*in re County Marine Insurance Company* (*Rance's* case) (1870), L.R. 6 Ch. App. 104, per James, L.J. In the case of the *Imperial Fire Insurance Company* (*cit. supra*) there was no specific statement as to the element of unexpired risk. The manner in which the company's accounts were stated might render the general rule stated by Kelly, C.B., in that case inapplicable; *per* Amphlett, B., and Huddleston, B.

Counsel for the respondent were not called on.

LORD M'LAREN—There is no doubt that the question which has been argued before us is a question of great importance to insurance companies, whose business in the aggregate is very large, and if it had come up for the first time we should have desired to hear a full argument upon it. But the point is not new, because it was first considered nearly thirty years ago by the Court of Exchequer in England in *The Imperial Fire Insurance Company* v. *Wilson*, and eighteen years ago it was considered by this Division of the Court in the case of *The Scottish Union and National Insurance Company*. In the collective opinion of the Court, which was delivered by Lord President Inglis, the distinction (which had long before been recognised) is clearly drawn between the character of the business done by fire insurance offices and the character of the business done by life insurance offices, the one being an annual contract of indemnity, and the other being a prospective contract which may endure for the whole course of the life of the person making the contract, provided he continues to pay his premiums. Obviously these two classes of insurance business have to be treated on different principles. Now, with regard to fire insurance, their Lordships, who had the English case before them, were satisfied with the rules there laid down, and they were content in a single sentence to express the ratio of that judgment—that the contract was an annual contract, and that while a complete deduction could not be made in the year in which the premiums were paid, yet what was not made in that year was allowed in the following year, and thus approximate justice was done between the Crown and the subject. That, according to the opinion of the Court of Exchequer in England and the Court of Exchequer in Scotland, is the best approximation we can make to profits under the somewhat stringent conditions of the Income Tax Acts. Now we are asked to reconsider the question. I do not think that any of your Lordships would hold that this Division of the Court would take it upon itself to consider the question as if it had not been already decided by our own Division, and I do not see anything in the circumstances of the case which ought to lead us to refer it to a larger Court. I think, on the contrary, the acquiescence for eighteen years in the principle of that decision shows that the insurance companies have not felt aggrieved by the rule there laid down. But, sitting as one Division of the Court, I think it is enough to say that we confirm the decision of the Commissioners.

LORD KINNEAR—Mr Constable conceded that he could not prevail in this case unless we are to overrule the judgment in the case of *The Scottish Union and National Insurance Company*, and the other case which was considered at the same time. I cannot doubt that that decision is binding upon this Court, and I think we are not entitled to disregard it. If it is to be challenged, it must be challenged elsewhere. So far as we are concerned, we are bound to follow it.

LORD PEARSON—I take the same view.

The LORD PRESIDENT was absent.

The Court affirmed the determination of the Commissioners, sustained the assessment, and decerned.

Counsel for Appellant—Dean of Faculty (Campbell, K.C.)—Constable. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for Respondent—Cullen, K.C.—A. J. Young. Agent—Solicitor of Inland Revenue (Philip J. Hamilton Grierson).

Wednesday, June 12.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.
[Lord Mackenzie, Ordinary.

BROWN'S TRUSTEES *v.* HORNE.

Right in Security—Heritable Security—Trust—Heritable Creditor in Possession—Expenses of Management—Power to Employ and Pay Co-Trustee as Law Agent.

A truster by his trust-disposition and settlement provided—"And to enable my trustees to carry out the purposes of this settlement, and of any codicils

hereto, I confer upon them all requisite powers, and particularly (but without prejudice to the said generality) power to . . . appoint any one or more of their own number, or any other person, to be law agent or factor for the trust, and to allow the usual remuneration for services rendered." Part of the trust estate consisted of heritable securities. The trustees entered into possession, drew the rents, and paid the ground annuals and other outgoings in connection with the property. *Inter alia*, they incurred an account of expenses to a firm of law agents in which one of the trustees was a partner. *Held* (*aff.* judgment of Lord Stormonth Darling) that the trustees were entitled to charge the amount of the account against the owner of the security subjects.

Arbitration—Process—Judicial Reference—Fines Compromissi—Amendment of Record.

In an action raised to recover a sum of money, a record was made up from which it appeared that the sum in question was the unpaid balance of a much larger sum brought out against the defender in accounting to him for the possession had by the pursuers, as mortgagees, of heritable subjects belonging to him. The defender had challenged and refused to pay the sum in question as being made up of items not chargeable against him, and in paying the rest of the account he had also reserved right to recover the amount of one item. The legal question of the chargeability of the items constituting the sum in question having been decided by the Court against the defender, the parties referred to a judicial referee "the whole cause and the expenses therein," and authority was interponed to the joint minute so doing. The defender applied to the judicial referee to allow an amendment of the record whereby he sought to set against the sum sued for, income tax on sums of interest, no income tax thereon having been deducted, debited him in the accounting. The judicial referee refused the application, and the Lord Ordinary, having been applied to, also refused it.

Held, on a reclaiming note, that the judicial referee had rightly refused the application, inasmuch as it sought to import matter *ultra fines compromissi*, and interlocutor of the Lord Ordinary *affirmed*.

Observations on the amending of the record where a case has been referred to a judicial referee.

On May 11, 1904, the trustees of the late John Brown brought an action against David Horne, builder, Glasgow, in which they sought to recover £411, 7s. 11d., with interest and expenses. As appearing from the condescendence this sum was the balance of an account amounting to £1947, 14s. 11d., the defender having paid on 29th September 1903 £1536, 7s. The account was in connection with the possession by the pursuers as mortgagees of certain heritable subjects belonging to the defender and purported to bring out the amount still due by him. The £411, 7s. 11d. which the defender had refused to pay was made up of law agent's charges in connection with the management of the heritable subjects and interest thereon.

The defender pleaded, *inter alia*—"(5) The legal charges sued for having been incurred by the trustees of John Brown to a firm of which one of them is a partner, are illegal, and the defender is not liable therefor."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (STORMONTH DARLING), who on 15th December 1904 repelled the fifth plea-in-law for the defender.

Opinion—"The late Mr John Brown, coffee planter in India, who died in 1883, was proprietor of building ground in Glasgow, parts of which were sold by him and parts by his trustees to Mr David Horne, builder, or rather to his nominee, for whom he accepts responsibility. First Brown and then his trustees advanced money to Horne in order to finance his building operations, and in security for these advances Horne granted in favour of the trustees a bond and disposition in security and two *ex facie* absolute dispositions over certain subjects in Belmont Street. The trustees entered into possession in the year 1884, and continued in possession till 26th September 1903. This they did by virtue of the bond, and also of a probative letter addressed to them by Horne's nominee, of date 4th November 1884, by which he authorised Messrs Craig & Risk, writers, Glasgow, who were expressly described in the letter as 'your agents and factors,' to uplift and apply the rents in payment of rates, taxes, repairs, interest, expenses, and other outgoings in connection with the subjects. On 29th September 1903 an interim settlement took place between the parties, whereby the trustees delivered to Horne deeds of reconveyance and disburdenment, and he made payment to them of a sum of £1536, 7s., leaving for after settlement an additional sum of £411, 7s. 11d., for which the trustees asserted, and he denied, his liability. This is the sum sued for, and it almost entirely consists of professional charges and commission debited against the trustees by Messrs Craig & Risk in connection with the management and disposal of the properties. The trustees admit that they have not actually paid these charges, but they acknowledge their liability therefor, and they are of course willing to have Messrs Craig & Risk's accounts taxed. A formal letter, granted by Horne, and accepted by the trustees at the time of the interim settlement, expressly reserved the trustees' claim for this further sum of £411, 7s. 11d., and Horne's answer to that claim. It also reserves his right to challenge and recover payment of sums amounting to £67, 10s., which he asserts to have been improperly included in the payment of £1536, 7s., the trustees making no admission on the subject.

"In these circumstances both parties concur in asking me to clear the ground by deciding at this stage the legal point raised by the fifth plea-in-law for the defender. It is in these terms:— . . . (*quotes supra*) . . . I have no hesitation in repelling that plea.

"The right of the trustees to employ one of their number, or the firm to which he belongs, as their law agent, on the usual terms as to remuneration, depends entirely on a clause in the trust deed empowering them to do so. This, the defender admits, would bar the beneficiaries called by the truster from challenging business charges made by a trustee, or by his firm, duly appointed by the body of trustees in the exercise of that power. By a curious process of reasoning he says that *he* is a beneficiary under the trust, and yet maintains that the challenge is open to him. His claim to be treated as a beneficiary rests on the ground that every mortgagee in possession holds a fiduciary relation towards the mortgagor. In a certain sense that is true, in the sense, viz., that the reversion belongs to the mortgagor, and that it is the duty of the mortgagee not to injure the reversion, except in so far as necessary to recover payment of his debt. There is no other sense in which a mortgagee can be said to be a trustee for the mortgagor, because in all other respects they stand at arm's length.

"But if it be a correct use of language (which I doubt) to call the mortgagor a beneficiary of that highly artificial kind, why should he not be bound in the same manner as other beneficiaries to submit to a regulation instituted by the truster? It is clear that the common law prohibition against a trustee acting as the remunerated law agent of the trust does not rest upon its being a thing *malum in se*. 'The rule is not founded,' said Lord Justice-Clerk Inglis in *Lauder* v. *Millar*, 21 D. 1353, 'on the consideration that it is *contra bonos mores* that a trustee should be agent for a trust, but on certain considerations of policy which have induced the Courts, both here and in England, to fix what is now a well-established rule in the law of trusts. This being so, the truster, or the parties having a beneficial interest under the trust, may make a law for themselves.' To the same effect spoke Lord President Macneill at p. 1148 of 20 D. in the Whole Court case of *Goodsir* v. *Carruthers*, which decided that a power conferred on trustees by the truster 'to appoint agents and factors either of their own number, or other fit persons,' implied an intention—not inconsistent with public policy—that the trustee so appointed should receive remuneration. It follows that none but a beneficiary can object to a solicitor trustee receiving what are called in England profit-costs. It also follows that a beneficiary himself cannot object if the truster has made such employment the law of the trust. Therefore the result is the same whether the defender be reckoned a beneficiary or not. But as the latter is the capacity which he claims to possess, I may point out the curious result which the success of his plea would lead to. A beneficiary who states an objection of this kind usually states it for the benefit of the trust estate. Here the result would be to prejudice the trust estate, for the trustees are undoubtedly liable for the account of their validly appointed agent, and so the estate would suffer the loss.

"Hitherto I have been considering the defender's plea as if the trust to which it refers were the trust created by John Brown, and I think I was bound to do so, because the illegality of which the plea complains is an illegality committed by John Brown's trustees. But it very soon appeared, as the argument developed, that the real case for the defender had no connection with John Brown's trust. It all rests on the constructive trust set up by the relation of mortgagor and mortgagee in possession—a relation which John Brown had no hand in creating, and in which (if it was in any real sense a trust relation at all) the truster was truly the mortgagor himself, and the trustee was the mortgagee as such. This becomes manifest when one examines the case (*in re Doody*, [1893] 1 Ch. 129) on which the defender chiefly relies, and in which it was held that a solicitor mortgagee, acting as solicitor for himself and his co-mortgagee, cannot charge any profit-costs against the mortgagor either as to proceedings in an action or business done out of Court. Illustrations were there taken from the law regulating the rights of solicitor trustees as to profit-costs. But the opinion of Lord Lindley (then Lord Justice) in the Court of Appeal showed conclusively that the question depended not on any fanciful regarding of the mortgagee as trustee for the mortgagor, but on the contract between the parties. 'I will begin,' he said, 'by taking the simplest case, that of a solicitor being sole mortgagee and acting as solicitor on his own behalf. What costs can he get? Only costs out of pocket, not because he is a trustee, but because the bargain is that the mortgagor may redeem on payment of principal, interests, and costs, *i.e.*, costs incurred by the mortgagee, which do not include remuneration for his own personal trouble.' If anything more be required to make this perfectly clear, I may refer to the case of *in re Wallis* (1890), 25 Q.B.D. 176, where all the Judges of the Court of Appeal deal with the liability of a mortgagor for costs incurred by the mortgagee in relation to the security subjects as depending entirely upon the contract between them. The rule thus established in England by a train of decisions was altered by the Mortgagees Legal Costs Act 1895. Under that Act any solicitor to or in whom, either alone or jointly with any other person, any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, is entitled to charge against the security, for business of the kind here in question, all such usual professional charges and remuneration as he or they would have been entitled to receive if the mortgage had been made to, and had remained vested in, a per-

son not a solicitor, and such person had employed the solicitor or his firm to do such business. The Act is expressly made not applicable to Scotland, and I refer to it merely as showing a change of policy in the law of England on this subject. But even although that change had not taken place, such cases as *in re Doody* would not have helped the defender's case. On the contrary, they would, so far as they applied at all, have helped the pursuers. For they would have shown that the law thereby established was not a branch of the law of trusts but a branch of the law of contract. The reason, be it good or bad, which disqualified the solicitor-mortgagee from charging fees against the mortgagor on redeeming the security, was that he had chosen to act for himself as an individual (or for himself and his co-mortgagee, which was treated as the same thing), and that the contract with the mortgagor debarred him from receiving remuneration for his own personal trouble. Such a conclusion could never have been reached if instead of acting for himself the solicitor had been employed by a client having the right to employ him. For then the contract between the client and the mortgagor would have bound the latter to pay all proper costs incurred by the client.

"Here the contract was that Messrs Craig & Risk, as the agents and factors of the pursuers, should uplift the rents and apply them in a specified way. They did so over a long period of years, and it clearly follows from the contract that the pursuers are entitled to recover from the defender the proper business charges which they have incurred to that firm for acting in the stipulated way.

"This question being decided, there remains nothing for inquiry so far as the sum sued for is concerned. There is a question of interest on the business accounts, but for that no oral proof is necessary; the only question of fact involved in it is, at what dates were the accounts rendered and charged against the pursuers?

"There is, however, a question about £67, 10s. of 'advance fees' (whatever they are), which sum the defender says was included in his interim payment of £1536, 7s. on 29th September 1903, but as to which in the formal letter of that date he expressly reserved his right of challenge. Mr Johnston for the pursuers asked me to hold the defender's statement on that matter irrelevant, and he said a good deal tending to show that this question ought to have been raised in a litigation which took place between the defender and Messrs Craig & Risk in 1891–2, up to which time that firm admittedly acted as agents for the defender as well as agents for the pursuers. But I cannot say that it appears from the defender's statements that the question ought to have been raised with Craig & Risk. On the contrary, he avers that, in their character as agents for the pursuers, that firm followed the same course of dealing as they had done with him, and in this manner they illegally retained the amount of £67, 10s. It seems to me that the proper method of clearing up this part of the case—at all events in the first instance—is to make a special remit to the Auditor to report whether the sum of £1536, 7s., paid by the defender to the pursuers as shown in the statement, included advance fees deducted from the sums paid to the defender by Messrs Craig & Risk as agents for the pursuers, and whether, having regard to the fact that Craig & Risk were, at the dates when the said payments were made, also acting as agents for the defender, these sums formed proper deductions according to the table of fees.

"The remit may be made to include any accounts which are subject to taxation in the ordinary way. I shall be glad to have the assistance of counsel as to the precise terms of the remit."

The defender reclaimed.

On 15th March 1905 the Court adhered.

LORD ADAM—The only question argued to us under this reclaiming note was whether the Lord Ordinary was right in repelling the fifth plea-in-law stated for the defender.

The question arises in these circumstances—The pursuers are the trustees of the late Mr Brown. Mr David Craig, of the firm of Messrs Craig & Risk, writers in Glasgow, was and is one of the trustees appointed by Mr Brown.

Mr Brown was the proprietor of certain building ground situated at Hillhead, Glasgow. By minute of agreement and sale, dated in March and July 1882, he sold part of this ground to a Miss Horne, who was the nominee of the defender and whose actings through the transaction in question he adopts. By minute of agreement and sale, dated in February 1883, Mr Brown's trustees sold certain other parts of the ground to the defender.

In order to enable the defender to erect the buildings which he was bound to erect on the ground, Mr Brown and his trustees agreed to make and made advances of money from time to time to him.

In security of these advances the defender granted to the pursuers a bond and disposition in security over the subjects in question, dated 11th November 1882, and also two *ex facie* absolute dispositions, dated respectively 9th June and 6th July 1883.

It further appears that the pursuers in November 1884 entered into possession of the subjects under the bond and disposition in security, and the *ex facie* absolute dispositions and relative letter of date 4th November of that year.

The pursuers continued in the possession and management of the subjects until 26th September 1903, and of course had to account to the defenders for their intromissions during that time.

They claimed that a sum of £1947, 14s. 11d. still remained due to them. The defender admitted that a sum of £1536, 7s. still remained due by him, leaving a balance of £411, 7s. 11d. in dispute between the parties. Thereupon the parties came to an agreement, which will be found in a back letter

dated 29th September 1903, addressed by the defender to the pursuers and accepted by them, under which the defender was retrocessed in the subjects under reservation, on his part, of his right to claim repetition of a sum of £67, 10s. included in the payment made by him, and on the pursuers' part of their right to sue for and recover the balance of £411, 7s. 11d. claimed by them.

The present action is brought to recover payment of that sum.

As I have previously stated, Mr David Craig is one of Mr Brown's trustees, and it appears that the trustees employed his firm of Messrs Craig & Risk to act as their agents and factors in the management of the security subjects of which they were in possession.

It is stated that the sum sued for consists almost entirely of professional charges and commission debited to the trustees by Messrs Craig & Risk in connection with their management and disposal of the properties.

In these circumstances the Lord Ordinary says that both parties concurred in asking him to dispose of the defender's fifth plea-in-law, which is in these terms—. . . (*quotes supra*) . . . The Lord Ordinary has disposed of the plea by repelling it, and I think he is right.

As I understand the law, there is nothing illegal in a body of trustees employing one of their number as agent or factor. It is true that in a question with the beneficiaries under the trust, if the trust-deed is silent on the subject, such agent or factor can only recover his outlay on the ground that he is not entitled to make a profit out of the trust. But if the beneficiaries do not object I do not know that it is in the mouth of any third party to do so. But it is unnecessary to consider that question in this case, because the trust-deed contains a clause empowering the trustees to appoint any one or more of their own number, or any other person, to be law-agent or factor for the trust, and to allow the usual remuneration for services rendered, any rule of law or equity to the contrary notwithstanding.

It is said that the trustees have not yet paid Messrs Craig & Risk's account, but that is immaterial, because beyond all question they are liable for and bound to pay it.

I think accordingly that it is the duty of the Auditor to tax the account as if it had been incurred to an entirely independent agent or factor, and to allow the "usual remuneration" in such cases, for which the defender will be liable.

I think this is so entirely a matter of Scots law and practice that it is unnecessary to consider the law of England as regards a mortgagor and mortgagee; but I may say that I concur with the Lord Ordinary's observations on that matter.

I think the reclaiming note should be refused, and on the same grounds the reclaiming note in the other case (*i.e.*, that regarding the Simpson Street subjects).

LORD M'LAREN—I concur.

LORD KINCAIRNEY—This action by Brown's trustees against David Horne, builder, Glasgow, has arisen out of transactions between them relating to certain building ground in Glasgow which belonged to Brown's trustees and was purchased from them by Horne with the view of erecting buildings on it. It may be premised that David Horne is the only defender, Elizabeth Horne whose name is used in some of the deeds having no interest, and being merely the nominee of the defender David Horne. The reason why her name was used has not been explained, and is, I suppose, of no consequence. The record appears to me to be complicated and rather obscure, but the main facts seem to be these:—By minute of agreement between Brown's trustees and Elizabeth Horne (nominally) dated 14th March and 28th July 1882, Brown's trustees agreed to sell and she (for David Horne) to purchase portions of the building ground which belonged to Brown's trustees, the price agreed on being a ground annual of £70.

Horne had not sufficient funds for building the houses which he contemplated, and he borrowed £2200 from Brown's trustees to enable him to do so; and it was agreed by back letter dated 28th July 1882 that until that advance was repaid, Brown's trustees should not be obliged to grant a title. Notwithstanding this agreement, I understand that from time to time dispositions of various portions of the building ground were granted by Brown's trustees to Horne; and Horne, on the other hand, executed a bond and disposition in security for £2300, dated 11th November and recorded 19th December 1882 over the subjects which Brown's trustees had disponed to him.

In condescendence 5 Brown's trustees aver that as the advances by them had not been repaid they entered into possession of the subjects in virtue of the bond and disposition in security, and also in virtue of a letter dated 4th November 1884 addressed to Brown's trustees by Elizabeth Horne, and granted apparently merely to save the expense of an action of maills and duties, which letter bore to authorise Craig & Risk, writers, Glasgow, "your agents and factors" (*i.e.*, agents and factors of Brown's trustees), to uplift and apply the rents. For this letter David Horne accepts responsibility. In his answer to this condescendence Horne admits that the pursuers "entered into possession of the security subjects," but states that they had not accounted for the rents collected. It thus appears that the parties were agreed that the position was this, that Horne was proprietor of the subjects in question, and that Brown's trustees were in possession as creditors under the disposition in security granted by him, and were uplifting the rents as creditors under that deed. Horne, on the other hand, was the owner, and was indebted to Brown's trustees in the

sums which they had advanced, and Brown's trustees were in the course of recouping themselves of their advances by uplifting and applying the rents. I think the record is framed on that view, which appears to me to be correct. In this action arising out of that condition of affairs Brown's trustees conclude for payment of £411, 7s. 11d., which is the difference between £1947, 14s. 11d., which they regard as the true balance to which they are entitled in accounting with Horne, and the sum of £1536, 7s. which Horne admits to be due and has paid. But he disputes his liability for the balance of £411, 7s. 11d. And the question in this case is whether Brown's trustees are entitled to receive and Horne is bound to pay that sum. It consists mainly of professional charges debited against Brown's trustees by their agents Craig & Risk in connection with the properties of which Brown's trustees had entered into possession, and of commission on the rents collected by Craig & Risk.

The pursuers, Brown's trustees, maintain that in accounting for the rents collected by them they are entitled to take credit for this sum as being part of the expense of collecting the rents and managing the subjects into possession of which they had entered.

The defender Horne, while not disputing the claim of Brown's trustees to their expenses generally, disputes their right to take credit for this particular sum, and he has expressed the ground of his objection in his fifth plea, which is thus expressed— . . . (*quotes supra*). . . . This plea the Lord Ordinary has repelled, and the question which has been discussed is that which is expressed in that plea. The other subordinate findings have not been debated.

The fact on which the plea is based is this, that Mr Craig, who is a partner of the firm of Craig & Risk, law agents for Brown's trustees, is also one of these trustees, and as such a pursuer of this action.

The question appears to be simply this, whether creditors in possession under a bond and disposition in security are entitled in the circumstances to credit for the professional charges incurred to the law agent whom they employ in collecting the rents and managing the property. Now that is a question with which the Courts of Scotland are quite familiar, and for the solution of which it seems hardly to be necessary to resort to the law of England.

The first contention of the defender is that, even if they were entitled to take credit for the expense incurred to a law agent in the general case, they are not entitled in this case, because the law agent whom they employed, or one of the firm of such agents, is himself a trustee. As a general principle that plea might be good if the truster had not specially authorised the employment of one of the trustees as agent, on the principle that a trustee cannot profit by his office. But in this case the trust deed confers that power in perfectly general terms. The clause has not itself been printed. But it is averred by the pursuers "that in Mr Brown's trust-disposition and settlement his trustees were empowered to appoint any one or more of their own number, or any other person, to be law agent or factor for the trust, and to allow the usual remuneration for services rendered, any rule of law or equity to the contrary notwithstanding;" and that averment is not denied on record and was not disputed at the debate, and it is well settled that in such a case an agent who is a trustee may be employed to do professional work for the trust and may charge the usual accounts against the trust estate. In this case Craig & Risk would be entitled to recover the usual professional remuneration from Brown's trustees which any other law agent not a trustee would, if employed by the trustees, have been entitled to charge against the trust. (See *Goodsir* v. *Carruthers*, 1858, 20 D. 1141; *Ommaney* v. *Smith*, 1854, 16 D. 721.) Such charges, therefore, become a part of the legitimate expenses of the trust. But then the defender Horne maintains that although Craig & Risk's account might be legitimately charged against the trust, it did not follow that it was chargeable against him; and it seems to be maintained as a general rule that a creditor in possession employing a law agent or factor to manage the property and collect the rents could not in any case take credit for the law agent's account incurred in collecting the rents, and that a factor's fee was not an item of expense which could be allowed to the creditor. For that proposition he cited the case of *Kildonan* v. *Douglas, Heron, & Company*, 16th June 1785, M. 14,135, a case which certainly appears to support the defender's contention.

But Mr Johnston, for Brown's trustees, maintained that the report of this case was erroneous, and was not justified by the session papers, and that the judgment as reported went beyond the prayer of the petition. I think both the report and also the record as appearing from the session papers are obscure and unsatisfactory. But, besides, it does not appear that the judgment as reported has been followed in practice. It is cited in a note in Bell's Com. i. 701. But it is strongly questioned by Professor More in his Notes on Stair, vol. i., cclxi, and also by Professor Bell, Lectures, ii. 1159, and it appears to be contrary to general practice.

I think these considerations sufficient for judgment, and that it is unnecessary to consider the law as to the trust said to be implied in a bond and disposition in security when the creditor enters into possession.

On the whole I am of opinion that the judgment of the Lord Ordinary ought to be affirmed, and that the case should be remitted to his Lordship for further procedure.

After sundry procedure the parties lodged a joint-minute in the following terms:—"CHREE for the pursuers, and IRVINE for the defender, concurred in stating that the parties had agreed to refer the whole cause

and the question of expenses therein to Mr Alexander John Forbes Wedderburn, Solicitor in the Supreme Courts of Scotland, Edinburgh, as judicial referee; and they accordingly moved the Lord Ordinary to interpone authority hereto."

On 15th November 1906 the Lord Ordinary interponed authority to the joint-minute, and remitted the process to Mr Wedderburn as judicial referee.

On 9th January 1907 the defender submitted to the referee the following minute of proposed amendment of the record—[Cond. 7 gave the items of the alleged balance resting due of £411, 7s. 11d., and the answer was a general denial with a demand for receipts.] "The defender moved the judicial referee to allow him to amend the record in the action by adding to answer 7 the following:—'In any event the defender is entitled to credit for the income tax on interest to the amount of £2217, 17s. 10d. debited by the pursuers to him in the account bringing out a balance of £1947, 14s. 11d. specified by the pursuers in condescendence 6.' A statement showing how the said sum of £2217, 17s. 10d. is arrived at is herewith produced and referred to—and to add the following plea-in-law:—'In any event the defender is entitled to credit for the income tax specified in his answer to condescendence 7.'"

On 8th May 1907 the referee refused to allow the proposed amendment. In a note of proposed findings the referee explained his reasons for the refusal as follows:—"If the referee were of opinion that he could competently open up and amend the record, he would be disposed to . . . ; but he has arrived at the conclusion that he can only dispose of the case as it stands on the record remitted to him. The process, notwithstanding the remit, continues to depend before the Court, and it appears to the referee that if he were to authorise amendments of the record he would be usurping the functions of the Court, and in the end might be reporting on a totally different case from that which had been remitted. Reference is made to Mackay's Manual, p. 279, par. 1. The referee is all the more constrained to this view for the reason that involved in the question of the defender's right to make the amendment there appears to be the question whether the defender, by the terms of the back letter of 29th September 1903, is barred from raising any objections to the account sued on other than the objection to the advance fees and the objections to the items making up the difference between the totals of statements A and B." [Statement A was an account bringing out the sum paid by Horne, and statement B the sum claimed.] "It seems clear to the referee that he would be acting *ultra vires* in disposing of any such question. If the defender wishes to bring the amendment before the Court, the referee will delay issuing his final report to give him an opportunity of doing so."

On 25th May 1907 the defender moved the Lord Ordinary (MACKENZIE) to allow the record to be amended in terms of his proposed minute of amendment. The Lord Ordinary refused the defender's motion and granted leave to reclaim.

The defender reclaimed, and argued—What was referred was "the whole cause," and that included the cause with all its potentialities by way of amendment—*Hope* v. *Derwent Rolling Mills Company, Limited*, June 27, 1905, 7 F. 837, *per* Lord President (Dunedin) at p. 845, 42 S.L.R. 794, at p. 800. The question between the parties was whether the defender was due the sum of £411, 7s. 11d. to the pursuers. The claim for repayment of income tax was a good defence to the pursuers' claim. It was therefore *intra fines compromissi*, and the referee in refusing to allow the proposed amendment was refusing to exercise his jurisdiction. In point of fact the referee was willing to allow the amendment, and he refused it only because he thought that if he allowed it he would usurp the functions of the Court. The judicial reference did not take the case out of Court. The Court still had jurisdiction to see that the referee had fully exercised his powers—*Shiels* v. *Shiels' Trustees*, February 11, 1874, 1 R. 502, *per* Lord President (Inglis) at p. 506. The case being still in Court, the Court could exercise all the powers of amendment conferred by section 29 of the Court of Session Act 1868 (31 and 32 Vict. c. 100). The statement in Mackay's Manual, p. 279, was misleading. The cases cited—*Roberts* v. *Roberts*, December 13, 1833, 12 S. 210, and *Clyne's Trustees* v. *Edinburgh Oil Gas-Light Company*, August 27, 1835, 2 S. & M'L. 243—were distinguishable. In these cases the referee had given his decision, whereas in the present case the questions were still pending before the referee. Even if a judicial reference were in the same position as an ordinary arbitration, the amendment was competent and should have been allowed—*Moore* v. *M'Cosh*, June 9, 1903, 5 F. 946, 40 S.L.R. 691; *Christison's Trustees* v. *Callender Brodie*, June 21, 1906, 8 F. 928, at p. 931, 43 S.L.R. 701, at p. 703.

Argued for pursuers—The only questions left open by the agreement of 29th September 1903 were (1) whether the defender was liable for the sum of £411, 7s. 11d., and (2) whether the defender was entitled to repayment of the sum of £67, 10d. The present claim was for repayment of income-tax on sums of interest included in the sum of £1536, 7s. paid by the defender to the pursuers in terms of the agreement of 29th September 1903, and was thus an attempt to rip up that transaction. The defender was therefore not entitled to raise the question which the amendment was intended to raise. Further, the reference of the whole cause was a reference of the whole cause as it stood at the date of the reference—*Roberts* v. *Roberts*, *cit. supra*. Any other view would make the referee the judge of questions which the parties never intended to refer. The argument that the Court retained all the powers of amendment conferred by section 29 of the Court of Session Act was fallacious. It involved the conse-

quence that the Court might introduce a new defender. The proposed amendment was therefore incompetent. In any event, the question whether the amendment should be allowed was for the referee. He had decided that question adversely to the defender, and his decision was final—*Mackenzie* v. *Girvan*, December 19, 1840, 3 D. 318; *Walker* v. *Stewart*, August 14, 1855, 2 Macq. 424 at 428.

LORD M'LAREN—This reclaiming note arises out of an attempt, in a case which has been made the subject of a judicial reference, to have the record amended. Two questions have to be considered—first, whether this is a case in which a party has any right to make an amendment, and, secondly, if so, how is it to be made—whether by the arbiter or by the Lord Ordinary, who still has the control of the process, at least for the purpose of making the arbiter's award effectual.

We must keep in view that this is not an action of accounting between the parties in which everything was open. The parties had come to an arrangement under which, out of a sum of over £1900 which was claimed by the party making the advances, more than £1500 had been paid, and the balance of £411, 17s. 11d. was alone the subject of dispute between the parties. Further, it had been agreed that by repaying the £1500 the builder (to whom the advances had been made) was not to be prejudiced in his objections to the outstanding claim of £411. Accordingly the pursuers who made the advances brought this action for the purpose of enforcing their claim to the £411, and, in consequence of the reservation that had been made at the time of payment of the £1500, it was still open to the defender to dispute such items as he might select out of the unpaid balance of £411. Then, after accounts had been given in and some progress made with the case, the parties referred the whole cause to the decision of Mr Wedderburn in a judicial reference.

Now it has been made perfectly clear to me that the claim which it is now proposed to introduce by way of amendment—a claim for deduction of income-tax upon interest—is one which, if it were to be made at all, should have been made at the time that the interim payment was arranged, because that interim payment consisted to a large extent of interest on advances. That was the time to claim abatement in the usual way of the amount of the creditor's income-tax upon his interest. But that was not done; and it is quite clear that the point that is raised now is not with regard to a sum that enters into the constitution of the £411 that was reserved for the decision of the arbiter, but is an entirely separable and separate claim, and is, moreover, a claim for repayment of what had already been settled by the parties in the accounting.

I am not surprised in these circumstances that the arbitrator refused to allow the amendment proposed. He could not deal with the subject except on an amendment of the pleadings, and it is a condition of the case that these items of income tax are no part of the £411 that was reserved for the consideration of the arbiter. The arbiter, without giving an opinion, was willing that the parties should have an opportunity of going to the Lord Ordinary, who he thought might possibly have larger powers in the direction of introducing new matter into the action, but the Lord Ordinary has not taken a different view from the arbiter and has refused the application for an amendment of the record.

These are all the considerations that enter into the question except this, that I observe it is not stated by the party who makes this claim—the debtor in the building advance account—it is not stated by him that he had in fact paid his creditor's income tax to the Inland Revenue Department, and of course the condition under which a debtor is allowed to deduct income tax in settling with his creditor is that he has either paid, or admits his liability to pay, that sum to the Inland Revenue, on the principle of the tax being collected at its source. I do not think, however, that this circumstance affects our decision although it may possibly account for the claim not having been made at an earlier stage.

I think that the Lord Ordinary, and also the arbiter, though with his judgment we are not at present concerned, has rightly dealt with this application in holding that he had no power to give effect to it. The question referred to arbitration was the whole cause, which must be taken to mean the cause as it existed when the minute of judicial reference was signed. I cannot conceive that in referring the whole cause the parties intended to reserve a right to litigate upon any new matter between them which might transpire and which one of them might think could be introduced into the cause. On the contrary, I think their object was to put an end to litigation as quickly as possible and to substitute a summary method of procedure before the arbiter for the procedure of an ordinary action.

The power of amendment is a very important incident of procedure in our Courts, and I should be sorry to see it in any way abridged, but it appears to me to be essentially one of those things that belong to the region of the *lex fori*, and it exists only so long as the action continues to be, not merely a depending action for the purpose of decree, but a going action for the purpose of adjudicating upon the points in dispute. It does not follow that similar powers of amendment exist in arbitration cases, because the powers of courts of law to introduce new matter into actions have been not only different at different times, but have been different in regard to different courts, and it cannot be said that the powers that belong to the Court of Session are any part of the powers of an arbiter any more than those that belong more especially to the Sheriff Court.

In this case if the claim which is now made had, in the judgment of the arbiter, fallen within the conclusion of the summons—if it had been a claim that could in any

way have been held to form part of the £411 sued for—then I do not doubt that the arbitrator could have allowed a supplementary claim to the effect of raising the point, but as it was a claim independent of that sum I think it is equally clear that he was right in refusing to deal with it, because it was not a part of the case that was remitted to him. I am therefore of opinion that we should adhere to the Lord Ordinary's interlocutor.

LORD KINNEAR—I also think we must adhere to the Lord Ordinary's interlocutor. The purpose of the reclaiming note is to obtain a judgment which will have the effect of reversing the decision of the judicial referee; and that creates a formidable difficulty in the reclaimer's way at the outset, because the award of a judicial referee is just as final as the award of any other arbitrator. But then the reclaimer says, and says correctly, that an arbiter is never the final and exclusive judge of his own jurisdiction, and that if he exceeds his jurisdiction or falls short of it he may be corrected by the Court; and his case is, as I understand it, that in refusing to allow the amendment of the record which had been brought before him, he refused to exercise the jurisdiction committed to him by the contract of submission.

I should be very sorry to say that a judicial referee or any other arbiter can have no power to amend a record. It seems to me to be clear enough that he has quite sufficient control of the procedure before him to allow any amendment which he thinks reasonable and proper, provided it does not go beyond the scope of the questions submitted to him. He may alter if he thinks fit, or allow the party to alter, the pleadings before him, but he cannot alter the contract of reference. And therefore the question which arises in this case is necessarily whether he was asked to do something which was within the contract or whether he was right in thinking that he was asked to do what was incompetent, because it was subjecting to his decision a question that was not within the contract.

Now, the reclaimer argued that the question which he wished to raise was necessarily within the contract of reference, because the subject referred to the judicial referee was the whole cause, and then the learned counsel said—"Look at the summons and you will see it is a summons concluding for payment of £411, 17s. 11d., and in referring the whole case involved in that conclusion to the judicial referee the parties necessarily referred to him to consider whether that sum of £411, 17s. 11d. is really due or not; and therefore referred to him every claim that could possibly be made by the defender."

It may very well be that if the whole case had been referred upon the summons alone there would have been a great deal of force in an argument of that kind; but that is not the reference that was made. A record was made up and the action proceeded so far that a judgment was pronounced by the Lord Ordinary upon the merits of one part of the case, and the Lord Ordinary's judgment was adhered to by this Court; and it was only after that, and after some subsequent procedure, that the parties agreed to refer what was still in dispute to the judicial referee. I say "what was still in dispute," because I take it to be perfectly clear that no one could obtain a judicial reference to enable the referee to reconsider what had been already decided by the Court. That was not the purpose of the reference at all; the sole purpose of the reference was to obtain his award on questions that still remained in dispute. What was referred to him was not the case that was originally instituted but all that was left of it; and therefore the question really comes to be what was it that was left in the case at that stage.

Now, I do not repeat your Lordship's examination of the details of the record. I think it enough to say that it seems to me that the purpose of this amendment is to submit to the adjudication of the referee a question that was not raised at the time that the parties agreed to refer, which is not within the record as it stood at that stage, and which is therefore not within the reference. I am therefore of opinion with your Lordship that we cannot hold that in refusing to allow this amendment the arbiter was refusing to exercise any discretion which was committed to him. Even if he had a discretion I see no reason to suppose that he exercised it wrongly. The material point is that what he was asked to do was to allow a question to be raised which had not been raised in the case originally when the reference was made, and which had therefore not been referred to him. I agree that we should adhere to the Lord Ordinary's interlocutor.

LORD PEARSON—I am entirely of the same opinion. I think it necessary to attend precisely to the nature of the claim made in the summons, and more especially to the claim as it is set forth in the closed record, because I find that although the record was closed in 1904 the parties did not agree to refer "the whole cause" to Mr Wedderburn until the action had been more than two years in Court. The parties therefore had ample time to come to some kind of understanding as to the exact questions they intended to raise in the litigation. Now, although in form the pursuer's claim is for payment of a sum of money, £411, 17s. 11d., that was really only the disputed balance of a much larger amount which was originally in dispute between the parties, and it is I think essential in disposing of this question to keep that in view.

Before the action was raised the parties met, very sensibly, in order to narrow the area of dispute, and it appears that on that occasion the pursuers claimed £1947, while the defender was only willing to pay £1536; and that meeting ended in the defender paying £1536 to the pursuer—subject only to a reservation as to a matter of £67, 10s., which has nothing to do with any of the questions raised in the present dispute.

The result was that the pursuer sued the defender for the disputed sum of £411, 17s. 11d., which remained over after payment of the £1536; and the defender pleaded first that no part of the £411, 17s. 11d. was due, and second, that if anything was due he was entitled to a rebate of £67, 10s.

When the judicial referee took up the case the defender moved for leave to amend the record. He did so in order to add a claim for a further deduction in name of income tax, which he says ought to have been deducted from the sums of interest charged in the original account. Now all the charges of interest from which this income tax was to be deducted were contained in that part of the original account which was settled and paid, and not in that part of the original account which was objected to, or which was within the reserved area of the dispute. Therefore the question belongs really to the settled part of the claim, and the defender's proposal amounts really to this—a claim for repayment of part of the £1536 which he has already paid.

I think the peculiarity of this case is that the area of dispute was already limited by agreement of parties before the action came into Court at all, and I cannot find that the pursuers have, by the judicial reference, agreed to any enlargement so as to include matters which I think were disposed of finally before the action ever came into Court.

The Court adhered.

Counsel for the Pursuers (Respondents)—Fleming, K.C.—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Defender (Reclaimer)—Murray—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Wednesday, June 26.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MACDOUGALL *v.* BREMNER.

Contract—Pactum Illicitum—Secret Commission—Public Policy—Clerk of Works—Measurer—Stipulation for Commission by Clerk of Works as Condition of Measurer's Employment by Him.

A clerk of works with full charge of certain buildings in course of erection, unknown to his principal, stipulated with a measurer as a condition of the latter's employment for a commission on the tradesmen's accounts as brought out in the measurements. The measurer having been employed, the whole contract being verbal, the clerk of works sought to recover his commission.

Held that the alleged contract for a commission was *pactum illicitum*, and action *dismissed* as irrelevant, with expenses to neither party.

William Brown Macdougall, Fairlands, Chingford, Essex, assignee of Robert Macdougall, 44 Granby Terrace, Hillhead, Glasgow, raised an action in the Sheriff Court at Glasgow, against John Bremner, measurer, 55 Trefoil Avenue, Shawlands, Glasgow, to recover the sum of £68, 4s. 3d. with interest.

The pursuer averred that Robert Macdougall, the assigner, had full charge and control of certain buildings which were being erected by his son John Cyril Macdougall during the years 1902 to 1906, and had in employing the defender as measurer, the contract of employment being verbal, stipulated as a condition of such employment that the defender should pay him, Robert Macdougall, three quarters per cent. on the total amount of the various tradesmen's contracts as brought out in the measurements; that the measurements came to £9095, and ¾ per cent. thereon to £68, 4s. 3d.; and that Robert Macdougall had on 21st June 1906 assigned the claim to him, the pursuer.

The defender, *inter alia*, pleaded—"(1) The action is irrelevant."

On July 25, 1906, the Sheriff-Substitute (FYFE) sustained this plea and dismissed the action.

Note.—"I think that it is accepted law that innominate contracts of an anomalous and unusual character cannot be constituted by parole testimony alone. The pursuer's case is laid solely upon a verbal arrangement, under which his author was to receive the sum now sued for. The only question, therefore, is whether that arrangement founded on falls within the description of contracts which cannot be proved parole. I think it very obviously does.

"The case laid is—(1) that Robert Macdougall being the building superintendent for John Cyril Macdougall, and acting as such superintendent, engaged defender as the measurer for the building [that is to say, that Robert Macdougall as superintendent, and defender as measurer, were alike the employees of John Cyril Macdougall]; (2) that Robert Macdougall, on his employer's behalf, undertook to pay defender certain fees, but that on his own behalf Robert Macdougall arranged verbally with defender that of such fees—which were represented to the employer as going into defender's pocket—a proportion was really to find its way into the private pocket of Robert Macdougall.

"This secret commission arrangement is what pursuer wants to prove parole. I do not think the action as laid is relevant.

"I think also that the case is irrelevant in respect the sum sued for is claimed by Robert Macdougall personally. Upon pursuer's own statement of his case, Robert Macdougall could not take this sum personally, for he says he was John Cyril Macdougall's agent, and if an agent gets a rebate upon an account payable by his principal, that rebate belongs not to the agent but to the principal.

"I think, further, that the case as stated is not relevant, because a rebate upon fees cannot be claimed until the fees themselves