as the interlocutor was pronounced upon private communication with a person who had argued the cause as a party, and that this was clearly an illegal and incompetent proceeding; *Campbell* v. *M'Gowan*, 3 S. 245; *Manson* v. *Smith*, 9 Macph. 492 (Lord Neaves' opinion). (2) That when the Judges under the Valuation Acts go wrong they must be put right by the Court of Session. The Judges were members of that Court, and there was an inherent right in the Court to review their proceedings. (3) That if the Judges cannot be put right by the Court of Session, at all events the Commissioners of Supply can. They were parties to the case, and therefore the Court could prevent them proceeding with an irregular proof.

The defenders were not called upon.

At advising—

Lord President—The Lord Ordinary has dismissed this action for many reasons, but it is not necessary to discuss all these reasons to enable us to adhere to his Lordship's interlocutor.

The first allegation of the pursuer is, that something passed between the Assistant-Solicitor of Inland Revenue and the two Judges under the Valuation Acts which should not have taken place. For they aver that Mr Crole, the Assistant-Solicitor of Inland Revenue, after arguing the case for the Assessor for the county of Dumbarton, had *ex parte* and private meetings or communications with the Judges, and suggested the terms of their interlocutors. Now, it is not proved that Mr Crole argued the case before the Judges, but I assume that he did, and in that case he did what was out of his province. He was in fault in doing that, but not in anything else which he did.

The Act 20 and 21 Vict., c. 58, § 2, provides the following mode of laying a case before the Judges:—"All persons entitled to appeal against valuations made by the assessors appointed under the said Act shall also be entitled to appeal, under and subject to the like rules and regulations, against the valuations to be made by such officer or officers of Inland Revenue, appointed under this Act; and if, upon any such appeal, any officer of Inland Revenue, or the person appealing, shall apprehend the determination of the said commissioners or magistrates hearing such appeal to be contrary to the true intent of the said Act, and shall then declare himself dissatisfied with such determination, it shall be lawful for such officer or appellant respectively to require the said commissioners or magistrates to state specially and to sign the case upon which the question arose, together with the determination thereupon, and to transmit such case to Commissioners of Inland Revenue, to the end that the same may be submitted to the senior Lord Ordinary and the Lord Ordinary officiating in Exchequer Cases in the Court of Session, for their opinion thereon; and such Judges to whom such case may be submitted shall, with all convenient speed, give and subscribe their opinion thereon, and according to such opinion the valuation or assessment which shall have been the cause of the appeal shall be altered or confirmed."

Now, it is clear upon this enactment that when a case is prepared by the Commissioners of Supply, and subscribed by their chairman, their first business is to send it to the Commissioners of Inland Revenue, and they in turn have to submit it to the two Judges. The expression 'Commissioners of Inland Revenue,' means their officers; and that in Scotland means the Solicitor or Assistant-Solicitor of Inland Revenue. So, in this case, the Assistant, Mr Crole, was doing his duty in submiting the case for the opinion of the two Judges. The Solicitor or his Assistant is the proper custodier of the case, and his business is to get the opinion of the Judges written upon the case, and subscribed by them, and then to return it to the Commissioners of Supply. The Assistant was wrong in arguing the case, but not in having communication with the Judges. Article 13 of the condescendence (which contains the pursuers' averments as to the communications between Mr Crole and the Judges), is thus utterly irrelevant,—in fact, it has not even the appearance of relevancy, unless there is a charge of corruption against the Assistant or the Judges, which I do not understand there is. Even if there had been such a charge, I doubt if we could have entertained it here.

The other ground of action is the plea that the proceedings of Lords Ormidale and Mure were *ultra vires*, and incompetent under the statutes, and that the Court of Session, as the Supreme Court of the country, had right to set aside such proceedings. Now, the course pursued by these Judges may not have been advisable, but this Court has nothing to do with the matter. We have no more right to review the proceedings of the Judges under the Valuation Acts than we have to review the proceedings of the Court of Justiciary. These Judges are as much a Supreme Court as we are here. Their jurisdiction is privative in all questions regarding valuations, and we have no jurisdiction to interfere.

I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for Pursuers—Watson and Balfour. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Commissioners of Inland Revenue (Defenders)—Solicitor-General and Rutherfurd. Agent—Angus Fletcher.

Counsel for John Holm (Defender)—Fraser and Robertson. Agent—Charles S. Taylor, S.S.C.

Saturday, March 1.

OUTER HOUSE.

[Lord Shand, Ordinary.

AINSLIE *v.* AINSLIE.

(*Ante*, vol. ix. p. 546.)

Declarator of Trust—Reference to Oath—Amendment of Record.

Circumstances in which *held* that the defender's oath, while negative of a gratuitous trust, was affirmative of a trust for payment of the balance (if any) realized from the property in his hands, after payment of the debts due to him by the pursuer. Observed, that in the event of the accounting being proceeded with, an amendment of the record might be required.

This was the sequel of a case reported in the Scottish Law Reporter *ante* vol. 9, p. 546. The action was one of reduction and declarator of trust, at the instance of William Ainslie, against his brother Henry Ainslie; the brothers were formerly

in partnership as general merchants at Fort William.

The First Division held the reductive conclusions of the summons to be irrelevant, and, as regards them, dismissed the action; but they allowed the pursuer a proof by writ or oath of his averments of trust; and remitted the case to the Lord Ordinary to take the proof. The pursuer lodged a reference to oath; and the defender, Henry Ainslie, having been examined and the parties heard on the import of the proof, the Lord Ordinary (SHAND), pronounced the following interlocutor and note:—

"*Edinburgh, 17th February* 1873.—The Lord Ordinary having considered the cause, with the deposition of the defender, under the reference to his oath contained in the minute of reference No. 21 of process, and which was sustained by the preceeding interlocutor of 19th November 1872, Finds that the said deposition of the defender is affirmative of the reference to this extent, viz., that the various deeds mentioned in the conclusions of the summons which were granted by the pursuer in favour of the defender, were so granted by the pursuer and accepted by the defender on the admission and acknowledgement on the part of the pursuer, that he was at the date of granting the said deeds largely indebted to the defender, and the said deeds were so granted by the pursuer and accepted by the defender for the purpose of liquidating the debt admittedly due by the pursuer to the defender, but upon the understanding and agreement that if the property thereby conveyed should be of a value greater than was sufficient to pay the debt due to the defender, and should realize such greater value accordingly, the defender should be liable to account in respect of such greater value realized by him to the pursuer. *Quoad ultra*, and to any further effect, Finds the deposition of the defender to be negative of the reference: Finds neither party entitled to expenses since the date of lodging the said minute of reference on 18th July 1872, and appoints the cause to be enrolled for further procedure.

"*Note.*—By the interlocutor of their Lordships of the First Division of 22d June 1872, the case was reduced to one of declarator of trust, and it was found that the pursuers' averments in support of the conclusions of declarator of trust could be proved only by the writ or oath of the defender. The pursuer thereafter lodged the minute of reference No. 21 of process, by which he referred his averments in support of the conclusions of declarator of trust 'to the oath of the defender' and the reference was sustained by interlocutor of 19th November 1872. After several adjournments of the diet fixed for taking the deposition of the defender, which were to suit the convenience of the parties, the defender was examined before the Lord Ordinary, under the reference to his oath, on 16th January. The Lord Ordinary has delayed disposing of the case, as intimated to the parties, in the hope that the litigation, which is one between brothers of advanced years, and which if protracted may involve large expense to the parties, would be arranged. Having been informed that the parties have been unable to agree on terms of settlement, he has now to dispose of the question, What is the effect of the defender's deposition?

"The averments in support of the conclusions of declarator of trust are contained in articles 3 and 4 of the condescendence, and substantially they amount to this, that though the deeds bore to be granted for onerous causes they were really gratuitous, granted entirely for the pursuer's own behoof, as a temporary arrangement, and subject to an obligation on the part of the defender to denude of the whole means and estate conveyed, and to account for his intromissions on being required by the pursuer at any time to do so. It is specially alleged by the pursuer in article 2 of the condescendence that at the time when he granted these deeds he was not indebted to the defender, nor to the firm of H. & W. Ainslie, of which the brothers had both been partners, in any sum whatever, and that the statements to that effect contained in the deeds granted by him were false. The defence is, that there was no trust of any kind; that when the deeds were granted the pursuer was very largely indebted to the defender, and that the property which these deeds conveyed was received in payment and extinction of the debt due. It is not said that there was any valuation made of the property taken over, nor that the defender in respect of the conveyance which he obtained granted any discharge in favour of his brother either in whole or in part of the debt which he alleges was due to him, and the terms of the deeds, on the legal effect of which the parties have not yet been heard, certainly leave it open for contention on the pursuer's part that the defender is liable to account to him, not on the foooting certainly of the existence of a gratuitous trust, but on that of a creditor having obtained a security or fund for payment of his debts, leaving a reversion of the estate or funds conveyed, if such reversion should exist after such payment.

"On the one hand the pursuer thus avers that the deeds constituted a gratuitous trust entirely for his own benefit. On the other, the defender denies the existence of any trust, and alleges that the conveyances were absolute, and that he was under no obligation whatever to account with reference to the funds and estate conveyed to him, whatever might be the amount it might realise.

"The Lord Ordinary is of opinion that the effect of the deposition of the defender is to negative both of these extreme contentions, and that while the oath is negative of a gratuitous trust, it is affirmative of a trust for payment of debt, leaving a liability to account for such reversion of the pursuer's property, if any, as he may be able to show existed after payment of debt admittedly due by him.

"The Lord Ordinary deems it unnecessary to refer to the particular passages in the deposition, which have led him to this result. They are to be found mainly in the last 36 pages of the deposition, which consists in all of 126 pages as recorded. There is a good deal in the deposition, taken along with the states to which it refers, to lead to the suspicion that the pursuer and defender executed the deeds for a fraudulent purpose, viz., in order that while the pursuer was leaving the country his brother, the defender, should be able to beat off the creditors of his brother and the firm in their attempts to attach the property conveyed, and if the question had arisen with the pursuer's creditors, having the means of obtaining a more extensive proof than the Court has now to deal with, it may be that it would have been found that this was the true nature of the transaction. It does not appear that any creditors raised such a question, or suffered any injury from the deeds. But, however this may be, the Lord Ordinary has formed the opinion that it is not proved by the defender's deposition, with which alone the Court has to deal, that the

deeds were granted for the purpose now indicated.

"The pursuer's record is not well framed with a view to the result which has been now arrived at, but the Lord Ordinary has felt himself entitled, even in the absence of an averment of the existence of the particular trust which he has found to have been the arrangement of the parties, to pronounce a finding to that effect, because the trust which he has held to have been created, though different from, is yet within the more absolute and complete trust alleged. If the case is to be proceeded with, some additions or amendments to the record on the part of the pursuer will be necessary, and it is evident that, especially in the absence of valuation of any kind of the property conveyed, as the basis of the deeds, difficult questions as to the principles of any accounting will arise. The case has in the meantime been continued for farther procedure"

Counsel for the Pursuer—Taylor Innes. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for the Defender—M'Kie. Agents—Wormald & Anderson, W.S.

Friday, March 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

UNION BANK OF SCOTLAND *v.* MAKIN & SONS.

Agency—Express and Implied Authority—Fraud—Liability.

An English firm, by written mandate granted authority to their agent in Glasgow to draw, endorse, and discount bills as "their general representative and agent in Scotland." He forged, discounted, and embezzled the proceeds of various bills,—*Held* that the loss fell, not on the banks where the bills were discounted, but on the agent's own employers.

This was an appeal from the Sheriff-court of Lanarkshire, and the facts of the case were as follows. In the year 1869 the defenders, Messrs Makin & Sons, file and steel makers, Sheffield, appointed Samuel Watson Dempster to be their agent in Glasgow, with full power to draw, endorse, and discount bills in name of the firm. Between the months of March and June 1870 Dempster forged seven bills, which were discounted by the Union Bank, and on 1st July 1870 the Bank raised an action in the Sheriff-court of Lanarkshire against Makin & Sons, concluding for payment of the sums contained in these bills. A proof was led, and on 5th July 1872 the Sheriff-Substitute (DICKSON) pronounced the following interlocutor:—"Having heard parties' procurators on the proof and whole cause, and made avizandum, Finds that the defenders are steel and file makers in Sheffield, and that they had an agency in Glasgow, conducted by the late firm of Cathcart & Dempster for about a year before the dissolution of that firm in or about June 1869, when they appointed Samuel Watson Dempster, one of its partners, their sole agent in Scotland; finds that the defenders addressed to the pursuers a letter, dated 26th January 1870, and which was shortly afterwards delivered to the pursuers by Dempster, in which, *inter alia*, they said, 'S. W. Dempster, our manager in Scotland, has authority to sign, per procuration of our firm, all bills, cheques, cash orders, and other documents necessary to the conducting of our business, and all vouchers so subscribed will be equally binding as if signed by any member of our firm;' finds that, about the said date, the pursuers, at Dempster's request, after causing inquiries to be made in Sheffield as to the defenders' credit, opened with the defenders a discount account and an account current at their branch in Canning Street, Calton, Glasgow; finds it not proved that this was done without the defenders' knowledge or authority; finds that the pursuers, wishing to obtain from the defenders a more formal authority to Dempster, prepared through their law agents a procuration or power of attorney on stamped paper, and which having been handed by the pursuers to Dempster for the defenders' signature, was, on 5th May 1870, signed by the defenders before witnesses, and was shortly afterwards returned by Dempster to the pursuers, and duly completed in the testing clause; in which procuration the defenders say, *inter alia*—'We hereby authorise you, Samuel Watson Dempster, 34 St Enoch Square, Glasgow, our general representative and agent in Scotland, to manage our whole business and affairs in Scotland, to sign for us all documents relating to, or in connection with, our business in Scotland, and specially we authorise you to sign, per procuration, for us and our behalf, all cheques, orders, and drafts, and to draw, grant, accept, or endorse for us and on our behalf all bills, promissory notes, and negotiable documents, and to discount the same on our credit and responsibility; and we engage to meet and honour all such cheques, orders, drafts, bills, promissory notes, and negotiable documents drawn, granted, accepted, or endorsed, or bearing to be drawn, granted, accepted, or endorsed by you, the said Samuel Watson Dempster, and to keep the parties dealing with you free and skaithless; and we bind ourselves to ratify, homologate, and confirm the actings and doings of you, the said Samuel Watson Dempster, in respect of all such cheques, orders, drafts, bills, promissory notes, and negotiable documents;' finds that between the said months of January and June 1870, inclusive, Dempster operated upon the said accounts, and discounted a number of bills in the pursuers' said branch, which discounts the pursuers allowed on the credit of the defenders, and relying on the said letter and procuration; finds that, *inter alia*, Dempster so discounted the following bills, purporting to be drawn by the defenders upon, and to be accepted by, the parties following, viz.:—(1) for £96, 14s. 7d., by Brigham & Bickerton, machine makers, Berwick, dated 28th March 1870, payable four months after date; (2) for £100, by Howie & Young, engineers, Kirkcaldy, dated 19th April 1870, payable four months after date; (3) for £41, by Nevin & Rintoul, coach builders, Greenock, dated 27th April 1870, payable three months after date; (4) for £44, 10s. 9d., by Robert Russell & Sons, engineers, Carluke, dated 2d May 1870, payable four months after date; (5) for £276, 10s. 9d., by Caird & Company, shipbuilders, Greenock, dated 16th May 1870, and payable four months after date; (6) for £39, 5s. 6d., by James Hatley & Company, contractors, Carstairs, dated 23d May 1870, payable three months after date; (7) for £138, 14s. 9d., by Laing & Melvin, coach builders, Aberdeen, dated 1st June 1870, and payable four months after date; finds that Dempster signed the