Lord M'Laren's interlocutor of 6th February last, Recal the said interlocutor in so far as regards the second finding thereof, and in lieu thereof Find that the application of the accruing income to payment of premiums on policies of insurance on the life of Sir John Cathcart did not constitute an illegal accumulation within the meaning of the Thellusson Act, and that the next-of-kin have no interest in the sums so paid or thereby assured: *Quoad ultra* adhere to the said interlocutor, and remit the cause to the Lord Ordinary, with instructions to proceed therein as accords."

Counsel for Mrs Heneage's Trustees (Reclaimers)—Muirhead—Blair. Agents—Hunter, Blair, & Cowan, W.S.

Counsel for Major Cathcart's Trustees (Respondents) and Miss Cathcart's Trustees—Mackintosh—Pearson. Agents—A. & A. Campbell, W.S.

Friday, July 13.

FIRST DIVISION.

[Lord Adam, Ordinary.

ALEXANDER'S TRUSTEES *v.* DYMOCK.

Arbitration—Clause of Reference—Decree-Arbitral—Death of Party to Reference—Trust—Personal Obligation by Trustees in Trust Matter.

Testamentary trustees duly authorised by their trust-deed entered into a reference with the representatives of a firm with whom the truster had had cash transactions, for the purpose of having the true state of the accounts ascertained and the balance due by the one party to the other fixed. The minute of reference contained a provision by which the parties bound themselves and their respective heirs, executors, and successors to implement and fulfil whatever award should be issued. During the dependence of the reference, and before an award was issued, the trustees who had entered into the reference died. Thereafter the new trustees maintained that the reference had fallen by the death of one of the contracting parties. *Held* that the contracting party being the trust, which as represented by the new trustees continued to exist notwithstanding the death of the original trustees, the submission had not fallen. *Opinions* that such a reference would not have fallen by the death of the truster had he entered into it during his life, and that the new trustees were in the special circumstances of the case barred by their actings in regard to the submission from maintaining that it had fallen.

This was an action of reduction of a minute of reference, and of a decree-arbitral following thereon. The circumstances out of which it arose were as follows:—By minute of reference dated 25th and 26th August 1873, James Ritchie Dymock, as factor, and as taking burden on him for the trustees of the late Robert Lockhart Dymock, and for the dissolved firm of Dymock & Paterson, solicitors-at-law in Edinburgh, of the first part, and Alexander Learmont and Edward Black, the sole accepting trustees of the deceased John Alexander, builder in Edinburgh, who died on 4th January 1869, of the second part, agreed, on the narrative that Dymock & Paterson, and afterwards Dymock, had acted for several years as law-agents for Alexander, during which time business accounts were incurred by him, and cash transactions took place between them, and whereas "the said accounts were complicated, and it was desirable that the true state of accounts between the said parties should be ascertained," to refer to Mr Baxter, W.S., Auditor of the Court of Session, the whole cash transactions between Dymock and Dymock & Paterson on the one part, and Alexander on the other part, that he might inquire into the same, and settle and ascertain the true state of accounts between the parties, and fix the balance due by and to the other, as also tax the whole business accounts incurred by Alexander to the firm, and to Dymock, and include in his decree-arbitral the taxed amount thereof; which decree-arbitral was to be binding upon both parties.

The last clause of the minute of reference was in these terms—"And the parties hereto bind and oblige themselves, and their respective heirs, executors, and successors, to implement and fulfil whatever award the said referee shall issue." Mr Baxter accepted the reference by minute dated 2d October 1873, and various proceedings took place therein, in which Messrs Curror & Cowper acted as agents for Alexander's Trustees, and Messrs J. & A. Hastie acted on behalf of the other party. In March 1881 David Curror and Charles Neaves Cowper were assumed by deed of assumption to act as trustees in Alexander's trust along with Alexander Learmont and Edward Black, and they accepted and acted as such. Mr Black died in July 1881, and Mr Learmont in November of the same year. Mr Baxter proceeded with the reference, and had various meetings with the parties which are referred to *infra* in the narrative of his award. He prepared a draft of his proposed award, and handed it to Curror & Cowper on March 15th 1882 for perusal. Thereafter they intimated for the first time to Mr James Ritchie Dymock that Messrs Black and Learmont were both dead, and contended that by their death the reference had fallen.

On 21st March 1882 the arbiter appointed the acting trustees to sist themselves as parties to the reference. In a note to this interlocutor he explained that in his view the subsistence of the reference was not affected by the deaths of Learmont and Black, they having been parties to the reference, not as individuals but as representing a continuing trust which still survived. He also expressed the opinion that Mr Curror had by his actings made himself a party to the reference.

Mr Curror and Mr Cowper declined to sist themselves, and the arbiter proceeded in the reference without them, and upon 30th May 1882 issued the decree-arbitral which was sought to be reduced in this action. This decree-arbitral proceeded on the narrative of the reference made to him, and of his meetings with the parties, and of the assumption of Mr Curror and Mr Cowper into the trust, and the deaths of Mr Black and Mr Learmont, of a meeting with Mr Curror and the agent for Mr Dymock's trustees on 9th Feb-

ruary 1882 at which he repelled a claim for Dymock's trustees, of the subsequent adjustment of accounts and of a relative draft award handed to Curror & Cowper on 15th March 1882, of a letter by them asking for the minute of reference to enable them to revise the same, of their subsequent letter stating that in their opinion the minute had fallen, of his order that the acting trustees of Mr Alexander should sist themselves, and their refusal; and further "considering that prior to the receipt by the clerk to the reference of the said letter from Messrs Curror & Cowper, dated 16th March 1882, no intimation was made to me of the deaths of the trustees of Mr Alexander who signed the minute of reference, and that the assumption of Mr Curror and Mr Cowper as trustees was not known to me prior to that date, and was never formally intimated by them, and holding that the said David Curror and Charles Neaves Cowper having, after the deaths of the said Edward Black and Alexander Learmont, attended meetings before me, and conducted the reference to a conclusion (the only matter remaining to be disposed of being the revisal of the award to give formal effect to the adjustment of accounts completed at the meetings of Mr Curror and Mr Hastie), without intimating to me either the deaths of the said Edward Black and Alexander Learmont or their own assumption as trustees, have virtually sisted themselves as parties to the reference, and by their actings before me have adopted the same." The decree then went on to find a balance due by Alexander's trustees to Dymock of £437, 6s. 6d., and ordained Mr Curror and Mr Cowper, now the sole trustees of Alexander, as trustees foresaid, to pay the same.

Thereafter Mr Dymock raised an action against Mr Curror and Mr Cowper as Alexander's trustees to compel them to implement the decree-arbitral. They defended that action, and raised against him the present action for reduction of the minute of reference and decree-arbitral. They averred that after the death of Mr Learmont, the survivor of the trustee who entered into the reference, they had never attended any proceedings before the arbiter in the capacity of parties to the reference, and in fact never were parties to it. Further, they objected to the award as subjecting them in personal liability.

They pleaded—"(2) The said reference having fallen by the death of the said Alexander Learmont and Edward Black, it was incompetent for the referee to proceed further therein, and the said award or decree-arbitral falls to be reduced. (3) The pursuers not having been parties to the reference, any award or decree against them was *ultra vires* of the referee."

The defenders pleaded—"(5) The pursuers having been assumed as trustees of the late Mr Alexander during the lives of Messrs Learmont and Black, the original trustees, the reference remained valid and subsisting, notwithstanding the deaths of Messrs Black and Learmont, and the reduction of the award sought should be refused. (7) In any case, the pursuers adopted the reference, and are barred by their actings as condescended on from insisting in the present action. (8) The pursuers being successors of the said Messrs Learmont and Black, as trustees of the late John Alexander, are bound under the terms of the minute of reference to implement and fulfil the decree-arbitral, and they are not entitled to have the same reduced."

The Lord Ordinary allowed a proof before answer.

"*Opinion.*—By minute of reference dated in August 1873, the defender James Ritchie Dymock, as taking burden on him for the trustees of the late Robert Lockhart Dymock, and for the dissolved firm of Dymock & Paterson, and the individual partners thereof, and their representatives and successors, of the first part, and Alexander Learmont and Edward Black, the sole accepting and acting trustees of the deceased John Alexander, of the second part, agreed to refer to the decision of Edmund Baxter, Esq., Auditor of the Court of Session, as sole referee, the whole cash transactions between the said Robert Lockhart Dymock and Dymock & Paterson on the one part, and the said John Alexander on the other part, during their joint lives, or between their trustees and executors after their death, in order that the said Edmund Baxter might settle and ascertain the true state of accounts between the parties, and also fix and determine the balance due to or by the one party to the other; and also to tax the business accounts which were incurred by the said John Alexander to the firm of Dymock & Paterson, or the individual partners thereof, and the said Robert Lockhart Dymock as an individual, and to include in the decision to be come to by him the results of the taxation of the business accounts, and to embody the same in a decree-arbitral, to be pronounced in the premises, and which decree-arbitral it was declared should be final and binding on both parties.

"The parties further bound and obliged themselves, and their respective heirs, executors, and successors, to implement and fulfil whatever award the referee should issue.

"Mr Baxter by minute dated 2d October 1873 accepted of the reference.

"It further appears that by deed of assumption dated in March 1881 the said Alexander Learmont and Edward Black, as trustees aforesaid, assumed the pursuers David Curror and Charles Neaves Cowper to act as trustees of the said John Alexander, and that they accepted and acted as such.

"It further appears that Mr Black died in July 1881, and Mr Learmont in November of that year.

"The fact of the death of these gentlemen was not communicated at the time either to the defender or to the arbiter.

"Thereafter the reference was proceeded with. Various meetings took place with the arbiter, which appear to have been attended by Mr Curror, who was at the time one of Mr Alexander's trustees, and agent for the trust. A draft of the proposed award, and relative draft state of accounts, was ultimately prepared by the arbiter and handed to the pursuers Messrs Curror & Cowper on 15th March 1882 for revisal. In place, however, of returning the same revised, they for the first time intimated to the defender that Messrs Black and Learmont were dead, and they maintained that the reference had fallen by their death.

"It is not disputed that the pursuers Messrs Curror & Cowper in their capacity of law-agents

had acted for Alexander's trustees throughout the whole of the proceedings, and that after they were themselves appointed trustees, and after the death of Messrs Black and Learmont, Mr Curror attended before the arbiter and took an active part in the proceedings before him. In these circumstances the arbiter appointed the pursuers to sist themselves as parties to the reference. But they having declined to do so, the arbiter proceeded on the 30th May 1882 to issue the decree-arbitral which is now sought to be reduced.

"By this decree-arbitral, the arbiter after certain findings as to the state of the accounts between the parties, finds that a balance of £437, 6s. 6d. is due to the defender, and he ordains the 'said David Curror and Charles Neaves Cowper, now the sole trustees of the said deceased John Alexander, as trustees aforesaid,' to pay the defender the sums of money due and payable to him under the foregoing findings.

"The first ground on which it is sought to set aside this decree-arbitral is that the reference had fallen by the death of Mr Black and Mr Learmont. It is said that they entered into the reference as individuals, and not *qua* trustees and as representing the trust-estate of Mr Alexander. Looking to the nature of the subject-matters referred, viz., the amount due to or by Mr Alexander's trust-estate on an adjustment of accounts between them and the defender, it appears to me that Messrs Black and Learmont entered into the reference in their character of trustees, and meaning to represent and bind in the first instance Mr Alexander's trust-estate. It was that estate alone which was interested in the matter, and it seems to me that it must be presumed that all parties to the reference intended that that estate should be bound by Mr Black and Mr Learmont becoming parties to the reference. That they had power so to contract is not disputed. And no reasons exist—such as existed in the Bank cases—why it should be presumed that they did not do so. If that be so, then I do not think that the reference fell by the death of Mr Black and Mr Learmont. Before that event took place Messrs Curror & Cowper had been assumed as trustees, were vested with the trust-estate, and represented it. I think that if the pursuers had moved that they should be sisted as parties to the reference they would have been entitled to be so sisted. They did not do that, but according to the allegations on record they did what was equivalent. It is alleged that Mr Curror, with the consent of his co-trustee, and necessarily in the full knowledge that they were the only existing trustees, carried on the reference as a still subsisting reference, and it was not until they saw the draft decree-arbitral, and which presumably was against them, that they proposed to repudiate the submission. If the fact as to the proceedings which took place before the arbiter as set forth by him in the decree-arbitral are correct, I should think that there could be little room for doubt that the arbiter was entitled to hold that the pursuers had made themselves parties to the submission, and to call upon them to sist themselves as parties, and failing their doing so to pronounce the findings which he has done.

"It is said, however, by the pursuers that Mr Black and Mr Learmont were parties to the refernce personally and individually, and not *qua* trustees, and that this clearly appears from the fact that they by the minute of reference bound themselves, their heirs, executors, and successors, to implement the award. The fact undoubtedly is that they did so, and I do not think that the clause can be read otherwise than as containing a personal obligation on the parties, their heirs, executors, and successors, to implement the award. I do not think that it can be read as binding the parties only as trustees and their successors in the trust. But although the trustees may have bound themselves personally, and their heirs, executors, and successors, to implement the award, I do not think that it necessarily follows that they were not also bound in their character as trustees and as representing the trust-estate. That this was the view of the pursuers themselves is sufficiently plain, because I do not see how otherwise their conduct after Mr Black and Mr Learmont's death, in going on with the reference as a still subsisting reference, is to be explained.

"In these circumstances I am not prepared *de plano* to reduce the decree-arbitral.

"I think that there must be further inquiry into the facts of the case, more especially as to the proceedings before the arbiter, and I therefore propose before answer to allow the parties a proof of their respective averments."

After taking the proof the Lord Ordinary assoilzied the defenders.

The pursuers reclaimed. Argued for them—The parties bound by this reference were Black and Learmont and their heirs. The trust was in no way bound. The ordinary rule must apply that the death of the referring parties ends the reference—Ersk. iv. 3, 29; *Robertson* v. *Cheyne*, February 6, 1847, 9 D. 599. There was no intimation of the assumption of new trustees—*Maitland*, 1796, M. 641; Bell's Arbitration, 107; *Ewing*, December 19, 1820, F.C. There was no evidence from which it could be inferred that they had sisted themselves by their actings.

Argued for respondent—This was a case of a trust reference; where the reference is to adjust accounts and fix a balance it does not fall by death. The trustees were assumed prior to the death of Black and Learmont. The trust still existed in Curror & Cowper, who were Alexander's trustees. Therefore the rule that death of a party ended the reference did not apply—*Henry* v. *Burns*, January 29, 1835, 13 S. 361; *Barbour*, November 21, 1811, F.C.; Bell on Arbitration, 300. *Orrell*, February 22, 1859, 21 D. 554; *Watmore*, May 17, 1839, 1 D. 743; *Caledonian Railway Co.* v. *Lockart*, 3 Macq. 808. In any view there was adoption of the reference by Curror & Cowper, as Curror frequently attended the meetings before the arbiter, and charged the same against the trust. It was too late to repudiate the reference after seeing that the arbiters' award was unfavourable. It was unnecessary for the new trustees to sist themselves by minute—*Fleming*, July 7, 1827, 5 S. 906.

At advising—

LORD PRESIDENT—This action is a reduction of a decree-arbitral, and it proceeds on the ground that the submission has fallen by the death of one of the parties before the decree-arbitral had been pronounced. The reference is contained in

a minute dated 25th August 1875, the parties to which were on the first part James Ritchie Dymock as factor and taking burden on him for the trustees of the late Robert Lockhart Dymock, solicitor, and also as taking burden on him for the dissolved firm of Dymock & Paterson, solicitors, and on the other part were Alexander Learmont and Edward Black, the sole accepting, surviving, and acting trustees of the deceased John Alexander. It sets out "that the now dissolved firm of Messrs Dymock & Paterson, solicitors-at-law in Edinburgh, of which the deceased Robert Lockhart Dymock before designed, and also the deceased John Paterson, solicitor-at-law, Edinburgh, were the sole partners, and also the said Robert Lockhart Dymock, as an individual, acted for several years as law-agents for the said John Alexander, during which time various business accounts were incurred by the said John Alexander to them, and further that various cash transactions" had taken place between the parties; it is then set out further that "the said accounts are complicated and that it is desirable that the true state of accounts between the said parties should be ascertained," and that it has therefore been agreed to refer the whole cash transactions between the parties to the decision of Mr Baxter, the Auditor of the Court of Session, who is to settle and ascertain the true state of accounts between the parties, and also to fix and determine the balance due to or by the one party to the other. It is thus plain that the matter which by this minute is referred to Mr Baxter is not of the nature of a subsisting litigation, but is rather the settlement of certain accounts already existing between the parties which they both desire to have cleared up. The only other peculiarity in the reference is that Messrs Learmont and Black add this clause—"And the parties hereto bind and oblige themselves, and their respective heirs, executors, and successors, to implement and fulfil whatever award the said referee shall issue."

Now this clause certainly imports a personal obligation against the parties to the reference, and I daresay it was a very judicious clause to insert, but it does not appear to me to alter what is the most prominent feature of this reference—that it is a reference between representative persons—on the one side are the representatives of Mr Robert Lockhart Dymock and of the firm of Dymock & Paterson, and on the other side are the trustees of the deceased John Alexander. It is thus a reference between parties who are not acting on their account or interest, but as the representatives of others.

Now, both Messrs Black and Learmont died before the arbiter had issued his award—Mr Black on the 23d July 1881 and Mr Learmont on the 12th November of the same year. But before their deaths they had by deed of assumption assumed the pursuers Messrs Curror & Cowper as trustees along with themselves under Mr Alexander's trust-disposition, and by the deed of assumption they convey the trust-estate to themselves and the newly assumed trustees. And it only remains to add, in order to complete the narrative of the facts necessary to raise the question now before the Court, that Mr Alexander's trustees were specially authorised to enter into references, and that it was in virtue of a power in the trust-deed that the new trustees were assumed in 1881. The question in this state of matters comes to be, whether the death of the trustees who had entered into the reference in 1873 had the effect of putting an end to the reference, or whether notwithstanding their death before the arbiter had issued his award the reference is still a subsisting reference. I have come to be of opinion—I must say without much hesitation—that the death of the original trustees did not put an end to the reference.

It seems to me that the parties to the reference on the one side were not Messrs Black & Learmont, but Mr Alexander's trustees. I think that we have nothing to do with the personality of the trustees. The party is the trust, and no one else. That the original trustees choose to bind themselves and so add their own personal security appears to me to have nothing to do with the question. The proper party to the reference was Alexander's trust, and the trust has not ceased to exist because the individual trustees who represented the trust in 1873 are now dead. If it were to be held that because the trustees who represented the trust in entering into the reference are now dead, the trust itself must be held to have died, it is very difficult to see how far that doctrine is to be carried. Take the case of a quorum of trustees who have on behalf of the trust entered into a reference. That binds not only the quorum but the remaining trustees, but if one of the trustees who did not act on behalf of the trust were to die, could it be contended that the reference had come to an end? Surely not. But if that result does not follow when it is one of the trustees who have not signed who has died, why should it follow in the event of the death of one of the quorum? It seems to me that the trustees, whether they were part of the quorum or not, or whether they were original or assumed, are all equally bound as trustees, and are equally parties to the reference, which continues to exist although the trustees who actually entered into the reference have died.

This seems to me to be so clear that I do not think it necessary to go into the other questions which were discussed. I am for adhering.

Lord Deas—It has long been settled in the law of Scotland that when there is an agreement to refer a matter in dispute to an arbiter, such a reference does not necessarily fall by the death of one of the referring parties. This was decided authoritatively so long ago as the case of *Nasmyth* v. *The Earl of Selkirk* in 1778, and reported in Morison, p. 627. In that case Nasmyth agreed to sell certain lands to the Earl of Selkirk, and the parties agreed to refer the price to the arbiters, one to be chosen by each. Payments were made to account of the price, but before the arbiters had fixed it Nasmyth died. In the proceedings which followed, Lord Selkirk maintained that there was a concluded bargain, but James Nasmyth, who had adjudged the lands as a creditor of the deceased Robert Nasmyth, argued that there was no concluded sale, and that the lands were carried by decree of adjudication. During the process a price was fixed by the arbiters on a remit from the Court, who thereupon held that the death of one of the referring parties did not end the reference.

Now this case laid down the doctrine which was repeated in the case of *Orrell*, 21 D. 554, to which we were referred in the course of the dis-

cussion, and nothing to the contrary has been decided since.

A clause of this description is quite common in many kinds of contracts. In mineral leases, for example, we often find it introduced, and in that class of contract, of which those between landlord and tenant is an instance, it is very common, when buildings have to be erected, or kept in order, or taken over at a valuation, all to be done at the sight of parties named. It was never contemplated surely that the death of one of the parties would end a reference of that kind.

Now, the question to be determined is, whether such a principle as I have referred to applies to the present case. And the answer to this question depends upon the terms of the clause of reference—[*His Lordship here read the clause quoted above*]. Now, to my mind nothing could better meet the present case than the decisions I have referred to. The terms of the clause of reference favour the application of the principle, as something has to be done for the common interest of the parties, without relation to disputes or differences between them, and clearly no exception can be taken to the qualifications of the arbiter. I can have no possible doubt, then, that a reference such as this does not fall by the death of the party referring. If I am right in what I have said so far, then it appears to me that there is an end of this case without requiring to seek for any further authority. But there is one other point to which your Lordships referred upon which I should like to say a word. Your Lordships remarked that this case was a reference for behoof of the trust, and that as the trust still existed the reference could not fall by the death of the original trustees. It happens that Mr Baxter issued a draft award which was communicated to the parties, and it was only after seeing its terms that the objection was stated that the reference had fallen by death. I can only say that it is rather awkward for the pursuers that the plea was not stated until after the draft award was issued. But a reference by trustees is undoubtedly a reference for the trust, and it exists in the persons of the assumed trustees. I therefore agree with your Lordships on this latter point also, but I prefer to base my judgment upon the grounds which I stated first.

Lord Mure—This is a question of considerable importance but it does not appear to me to be attended with very much difficulty. It is the case of a reference by trustees to a competent referee to fix the balance due to or by a trust estate, and to tax business accounts. While the reference was proceeding the old trustees by deed of assumption elected two new trustees, who were vested with all the rights and liabilities of the old trustees. In these circumstances it seems to me that the new trustees undoubtedly became parties to the reference, and did not require to be brought into it by minute. I am equally clear that the reference did not fall by the death of the original trustees.

Lord Shand—I think there are several reasons for sustaining this decree-arbital, any one of which appears to me to be sufficient. First, it is not the case of parties who have a difference of opinion as to their rights. There is no dispute here; all that is desired is an adjusting of accounts. Now, it is quite settled that when the reference is executorial of a contract, or when it occurs during its continuance, the death of either of the parties referring does not necessarily end the reference. Now there is no question here that the object of the reference is to strike a balance between the parties, and no exception can be taken to the party chosen as referee; therefore I think that the reference would have been a good one even if it had been entered into by the truster and he had died before it was completed. But, in the second place, this is a reference by trustees, and the death of those who entered into the reference will not end it, for the trust subsists by the assumption of new trustees. On that ground alone it is not voided by the deaths of Black and Learmont. But, third, even if any doubt existed as to whether the reference had fallen by the death of the original trustees, there can be no doubt that the question of personal bar comes in against the pursuers of this action. The pursuers need not have sisted themselves as parties to the reference; yet the business accounts show that not only did they take up the trust, but also the reference, both by their attendances and by the active part which they took in the proceedings. It is impossible in that state of matters for them now to turn round and say that they were no parties to the reference, for at any rate they were trustees of the deceased.

With reference to the clause at the end of the minute of reference, by which the parties bind themselves and their respective heirs, executors, and successors to implement and fulfil the award of the referee, that to my mind leaves the reference, as far as the trustees are concerned, unaffected. It is like a bond of caution, or a guarantee to implement, and does not create a personal obligation on the trustees as to any balance which may be found due. It was really a bond that the trustees would make the funds of the trust furthcoming so far as they would go, and the mere existence of that clause could not make the reference personal, but it remained in all respects a trust reference. I am therefore for adhering.

The Court adhered.

Counsel for Pursuers — Mackintosh — Shaw. Agents—Curror & Cowper, S.S.C.

Counsel for Defenders — Guthrie — Dickson. Agents—J. & A. Hastie, S.S.C.

Saturday, July 14.

FIRST DIVISION.

BLAIR, PETITIONER.

Evidence—Foreign—Evidence Required in Foreign Court of Witness residing in Scotland—19 *and* 20 *Vict. c.* 113.

The Act of 1856, "to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals, 19 and 20 Vict. c. 113, provides, sec.