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

have been paid, and it is not here averred that John Cyril Macdougall has paid the measurer's fees to defender. I accordingly sustain defender's first plea-in-law. . . . ."

The pursuer appealed, and argued—The Sheriff-Substitute was wrong, and should have allowed a proof. The claim was not for a rebate on fees but for a commission, and the contract was not so unusual as not to be provable by parole, for the stipulation flowed naturally from the contract of employment—*Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, 14 S.L.R. 672; *Henderson, Tucker, & Company* v. *The United Collieries, Limited*, January 26, 1904, 11 S.L.T. 653. (The Court suggested the alleged contract was illegal.) There was no plea of *pactum illicitum*, and even if there had been it would not have been good. This was not a case of seeking to make a profit or get a commission contrary to the interests of a principal. The fees to be paid to the measurer were the ordinary fees which the principal would have had to pay in any case—compare *Laughland* v. *Millar, Laughland, & Company*, February 19, 1904, 6 F. 413, 41 S.L.R. 325.

Argued for the defender (respondent)—It had been suggested from the Bench that the contract, if there was one, which was denied, was *pactum illicitum* and contrary to public policy. On that ground it was within the powers of the Court to refuse to lend its process to the enforcement of the contract, and though there was no express plea to that effect, the plea of irrelevancy was sufficient. The alleged contract was clearly illegal—*Laughland* v. *Millar, Laughland, & Company, ut supra.* It would have come under the Prevention of Corruption Act 1906 (6 Edw. VII, cap. 34). That clearly proved it was corrupt. To validate such a contract the pursuer must aver that it had been disclosed to the common employer. It could not be enforced at law—*Harrington* v. *The Victoria Graving Dock Company*, 1878, L.R., 3 Q.B.D. 549.

LORD M'LAREN—This action is brought by the assignee of a person who as clerk of works had charge of the erection of certain buildings in Glasgow. This clerk of works, Mr Robert Macdougall, employed John Bremner, the defender, as measurer to make the measurements on which the tradesmen were to be paid, and as a condition of giving him the employment he avers that he stipulated for payment of a commission of ¾ per cent. upon the total amount of the contracts of the tradesmen as ascertained by the measurement. That was a substantial proportion of what Mr Bremner was to get for doing the measuring. The action is brought to enforce payment of this secret commission. The Sheriff-Substitute has dismissed the action on the ground that the contract was an innominate contract of an anomalous and unusual character which could not be proved by parole testimony alone.

I do not think that it is necessary to consider whether the case does fall within the rule on which the Sheriff founds. I am not at all disposed to say that the Sheriff-Substitute's finding is wrong. But it seems to me that there is a clearer and more direct ground of decision, and that is that the stipulation is illegal. It is true that this defence is not specially pleaded. But where the nature of the transaction is disclosed on the face of the proceedings, it is consistent with the known law on this subject that the Court will refuse to give decree in an action to enforce a *pactum illicitum*. There is no doubt that the stipulation which it is here sought to enforce was within the class of obligations contrary to public policy. This is assumed in the Act of Parliament recently passed, because it is impossible otherwise to suppose that the Legislature would have made it punishable to bargain for a secret commission. I am confirmed in proposing to decide the case on the ground I have stated by the case of *Harrington* to which we were referred, and apart from authority I am sure your Lordships would not give the aid of the process of the Court to enforce a bargain which the Legislature has declared to be a crime.

LORD KINNEAR and LORD PEARSON concurred.

The LORD PRESIDENT was absent.

The Court affirmed the interlocutor of the Sheriff-Substitute and dismissed the appeal, finding expenses due to or by neither party.

Counsel for the Pursuer (Appellant)—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defender (Respondent)—Macaulay Smith—Morton. Agent—Norman N. Macpherson, S.S.C.

Thursday, June 27.

FIRST DIVISION.

[Sheriff Court at Dundee.

LANGLANDS & SONS *v.* M'MASTER & COMPANY.

Shipping Law—Carriage—Contract—Cargo—Tally—Liability for Loss of Goods.

A firm of merchants contracted with a firm of shipowners for the carriage of a quantity of damaged jute goods, bought at a sale in one seaport, to another seaport where the merchants had their place of business. The contract of carriage treated the goods, which were piece goods consisting of so many bales and so many odd pieces, by weight only, and included the conveyance to the dock for shipment. At the port of arrival, advice having been sent to the merchants, the goods were either taken direct by their carters or were stored in a shed at the dock alongside the ship, whence the carters took them. Receipts were not given by all the