cause or making avizandum, which is absurd. The clause must be read in the light of existing law and practice, and what, in my opinion, it authorises is this—that extract of a decree, judgment, interlocutor, or order, may be issued within fourteen days, provided that, according to law and practice, the interlocutor or judgment is extractable.

The Court found that the appeal was competent.

Counsel for Appellant — Lees — Craigie. Agent—John B. Young, S.S.C.

Counsel for Respondent—Sym. Agent D. Lister Shand, W.S.

Tuesday, June 21.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

DUTHIE *v.* DUTHIE BROTHERS & COMPANY, AND ANOTHER.

Process — Amendment of Record — Conditions—Acceptance—Court of Session Act, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

If a party who is allowed to amend his record upon certain conditions, puts his amendments on record, he is barred from thereafter objecting to the conditions upon which he has been allowed to amend.

Opinions by Lord Adam and Lord M'Laren, that under the 29th section of the Court of Session Act 1868, the Lord Ordinary has power to attach other conditions to the making of amendments than the mere payment of a sum of expenses.

An action was raised at the instance of Duthie Brothers & Company, shipowners, 6 Crosby Square, London, E.C., part owners and managers of the steam-ship "Telephone" of Aberdeen, against Robert Duthie, as the owner of 5/64th shares in said steamer, for payment of sums amounting to about £500, which the pursuers alleged to be due to them by the defender as his shares of debts incurred in connection with the management of said steamship.

The defender in answer denied liability for the greater part of the sum sued for, and parties were allowed a proof of their averments, the diet being fixed for 18th February 1892.

On 18th February the diet of proof was discharged on the motion of the pursuers, and in respect it was stated that the defender desired to amend his record.

The defender thereafter proposed to make extensive amendments on his defences. In the proposed amendments he denied the pursuers' title to sue as managing owners of the "Telephone" on various grounds, and, *inter alia*, averred that the title which the pursuers had produced under a diligence consisted of three bills of sale of 13/64ths, 14/64ths, and 13/64 shares in said ship, which were granted in favour of James, William, and Alexander Duthie respectively, who were the individual partners of the firm of Duthie Brothers & Company, and conveyed no right or title in said shares to the pursuers Duthie Brothers & Company.

On 16th March the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"The Lord Ordinary having heard parties, opens up the record: Allows the defender to amend the record as proposed at the bar, on condition of the pursuers being entitled to sist the individual partners of the firm of Duthie Brothers & Company as pursuers of the action, and of the defender paying to the pursuers the expenses incurred by them connected with the diet of proof fixed for 18th February last: Allows an account of said expenses to be lodged, and remits the same to the Auditor to tax and report; and appoints the cause to be put to the Adjustment Roll."

The defender did not ask for leave to reclaim against this interlocutor, but put his proposed amendments on record and authenticated them.

A minute was thereafter lodged for James Duthie, William Duthie, and Alexander Duthie, partners of the firm of Duthie Brothers & Company, as such partners, and as individuals, craving the Lord Ordinary to sist them as pursuers.

On 17th May the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary, in respect of minute 90 of process, sists the minuters in terms thereof: Allows the pursuers to answer the defender's amendments, and the same having been done, of new closes the record on the summons and defences, Nos. 1 and 5 of process, and appoints the cause to be put to the Procedure Roll: Grants leave to reclaim."

The defender reclaimed, and argued—The Lord Ordinary had gone beyond the powers vested in him by the 29th section of the Court of Session Act in making the defender's amendment conditional on the pursuers' being entitled to alter the instance of their summons by having the individual partners of their firm sisted. When a pursuer came into Court in one capacity, he could not alter or add to it without the defender's consent—*Hislop* v. *Macritchie's Trustees*, June 23, 1881, 8 R. (H. of L.) 95 (*per* Lord Watson, 106); *Turnbull* v. *Veitch*, July 18, 1889, 16 R. 1079. The defender was not debarred from objecting to this condition by the fact that he had put his amendments on record, for the interlocutor imposing the condition could not be reclaimed against without leave, and the mere omission to ask for leave to reclaim could scarcely be held to exclude him from subsequently bringing the Lord Ordinary's interlocutor under review.

Argued for the pursuers—The defender was barred from now objecting to the conditions on which his amendments were allowed, inasmuch as he had impliedly consented to the conditions by putting his amendments on record. Further, the con-

dition objected to was one which it was perfectly competent for the Lord Ordinary to impose, and was a very reasonable one to impose in the circumstances. It did not involve a change in the character in which the pursuers sued. The aim of the Court in attaching conditions to the right of amendment was to impose such conditions as would place the parties in as nearly as possible the same position as they would have occupied if the matter of the amendment had been originally put on record—*Dobson* v. *Hughson & Company*, February 17, 1858, 20 D. 610; *Keith* v. *Outram & Company*, June 27, 1877, 4 R. 958 (*per* Lord President Inglis, 959); *Morison* v. *Gowans*, November 1, 1873, 1 R. 116. This being a question of procedure, the Court would be slow to interfere with the Lord Ordinary's discretion.

At advising—

LORD PRESIDENT—It is important to observe that on 18th February 1892 the Court was to have proceeded to take the proof under its previous interlocutor. Up to that time the defender's pleas were of a nature which is sufficiently indicated by saying that their first plea was—"The defender not being due or addebted to the pursuers in the sums sued for, is entitled to absolvitor, with expenses," and that there was no challenge of the pursuers' title, and no call made upon them to produce instruments instructing their title. On 18th February the defender informed the Court that he desired to amend his record, and thereupon the diet of proof was discharged. It turned out that the amendments proposed were of the most material description. We have a copy of the original record with the alterations upon it, and a single glance shows that the amendments alter the whole record. When the Lord Ordinary was apprised of the nature of the alterations, he had to consider on what terms they should be allowed, and he prescribed those terms in his interlocutor of 16th March, in which he allows the proposed amendments to be made "on condition of the pursuers being entitled to sist the individual partners of the firm of Duthie Brothers & Company as pursuers of the action, and of the defender paying to the pursuers the expenses incurred by them connected with the diet of proof fixed for 18th February last." When the defender was informed of the conditions on which he was allowed to make his proposed amendment, he had a clear option before him. He could either make the amendments on the conditions imposed, or he could abstain from making them. If he thought the conditions imposed too onerous, he should have asked leave to reclaim against the interlocutor prescribing those terms; but even if that had not been granted, his proper course would have been to go on and take his fate on the existing record, and if need were raise the question of the conditions of amendment as soon as he was able to ask our judgment upon it on a reclaiming-note. Instead of that, however, he has made the amendments on the Lord Ordinary's terms by altering his record and authenticating the alterations, and it is, in my opinion, too late now for him to object to them. It is therefore not necessary to examine these terms on their merits. It is sufficient to say that the defender is disabled from challenging them because he has accepted them.

LORD ADAM—It appears to me that under the 29th section of the Court of Session Act 1868 the power of the Lord Ordinary to fix the conditions upon which amendments shall be allowed is not limited to conditions as to expenses. He can impose other conditions if he thinks it right to do so. I do not, however, think it necessary to consider whether the conditions here imposed by the Lord Ordinary were such as I would have imposed, because I agree in thinking that a party who has been allowed to amend his record on certain conditions, and has thereafter made the amendments, cannot come here to ask us to say that those conditions ought never to have been imposed.

LORD M'LAREN—The power of fixing conditions of amendment given to the Court by the Court of Session Act 1868 is not limited to conditions as to expenses. The Lord Ordinary has a discretionary power of attaining conditions to the amendments he may authorise for the better determination of the points in controversy. When the effect of allowing a defender to make an amendment is to alter the conditions of the controversy to the prejudice of the pursuer, it seems only reasonable that such new conditions should be imposed as will obviate this prejudice, and put parties as nearly as possible in the position in which they would have been, had the matter of the amendment been pleaded at the proper time. The amendment here (which goes to the right and title of the pursuer to recover) was not proposed until after the record was closed and proof allowed, and the effect of allowing the amendment unconditionally would be that the pursuers would have to go on with their action under conditions which they had never contemplated. If they had known at an early date that the objection to the title was to be raised, the pursuers might have either abandoned their action, or have decided what steps they would take to amend their title. This therefore seems a suitable case for imposing a condition other than the award of a small sum of expenses. Whether the conditions which the Lord Ordinary has here proposed are the best possible, it is not necessary to inquire. I was not much impressed by the argument advanced against their reasonableness. Mr Asher said that the conditions must not be unlawful or impossible, but I think no judge would ever think of imposing conditions which were not pertinent to the substance of the action.

I agree with your Lordships that as the defender has made the amendments under the conditions imposed by the Lord Ordinary, it is no longer in his power to reclaim

against the interlocutor authorising him so to amend.

LORD KINNEAR — I am of the same opinion. I think that when a Lord Ordinary intimates that he will only allow an amendment on certain conditions, the party proposing to amend has a clear option before him. He may accept the conditions and alter the record, or he may say that he is not prepared to accept the conditions, and move the Lord Ordinary to allow the amendment without these conditions. The necessary consequence will be that the Lord Ordinary will refuse the motion, and will thus give him a judgment against which he may reclaim, if he desires to bring the question before the Inner House. If he desires to come here at once he will move the Lord Ordinary to grant him leave to reclaim. If leave is not granted the point will remain over until the final decision of the case. But what he cannot do is to alter the record by virtue of an interlocutor giving leave to amend upon conditions, and then reject the conditions upon which leave to amend has been granted.

The Court adhered.

Counsel for Pursuers—C. S. Dickson—Younger. Agents—J. & J. Ross. W.S.

Counsel for Defender — Asher, Q.C.—J. A. Reid. Agents—Morton, Smart, & Macdonald, W.S.

Thursday June 23.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

KNIGHT & COMPANY *v.* STOTT.

Horseracing — Obligation — Principal and Agent—Mandate—Disbursement of Money in Bets—Pactum illicitum—Sponsio ludicra—Relevancy.

Held that commission agents who averred that they had disbursed certain monies at a horserace meeting upon the mandate of the defender, were not barred from suing their alleged principal for recovery of these sums because they had been paid away as bets, and that the pursuers had made their averments sufficiently specific by giving, in each case, the name of the race, of the horse backed, of the amount staked, and of the person with whom the bet was made, even although in half of the cases the name given was merely "a bookmaker."

In September 1891, Knight & Company, commission agents, 109 Argyle Street, Glasgow, brought an action against Captain Stott, Netherwood, Dumfries, for payment of £170, 10s., being the balance still due to them for sums disbursed upon the defender's order as lost bets at the Carlisle horserace meeting of that year.

Upon 3rd December 1891 the Lord Ordinary (WELLWOOD) found the pursuers' averments irrelevant for want of specification, on the ground that they had failed to give with sufficient definiteness the names of the parties with whom the bets were made and the parties to whom they paid the money, and dismissed the action.

The pursuers reclaimed, and at the hearing upon the reclaiming-note moved to be allowed to amend the record. The proposed amended condescendence with relative answers contained, *inter alia*, the following averments—"(Cond. 4) At Carlisle race-course on or about the 30th day of June 1891 and the 1st day of July 1891, the defender employed the pursuers as his agents to make, and if lost to pay, the following bets for him, and the pursuers did accordingly make the following bets and pay for him the following sums, viz.—

	Race.	Horse.	Sums laid.	Odds.	Persons with whom laid.
1.	Corby Stakes,	Bonnie Colleen	£4 0	5 to 4	John Schiller.
2.	Do.	Do.	4 0	5 to 4	A bookmaker.
3.	Cumberland Plate,	Alice	10 0	10 to 5	John Schiller.
4	Do.	Do.	10 0	10 to 5	A bookmaker"

Other eighteen similar entries followed, the person with whom the bet was laid being in every case either "John Schiller" or "a bookmaker." The defender's fourth answer was "Denied." "(Cond. 5) The engagements Nos. 1 to 10 inclusive of the above list were made on 30th June 1891, and Nos. 11 to 22 inclusive were made on the following day. They were made by the authority and instructions and for behoof of the defender, and with his knowledge, consent, and approval. The names and addresses of the bookmakers, other than the said John Schiller, referred to in said list, are not known to the pursuers. It is the custom at race meetings for agents such as the pursuers, acting on such instructions as the defender gave the pursuers, to bet with bookmakers, although their names and addresses are unknown, and to pay in the event of the bet being lost, without the name of the payee being noted. This custom was well known to the defender, and he acquiesced in the pursuers conforming to it on his behalf, and instructed them to make and pay said bets on the footing that said custom would be followed. In each of the instances above referred to, where no name is given, the bet was made with and paid to a bookmaker whose name is unknown to the pursuers, and in doing so and acting they relied on the custom foresaid. The said John Schiller's address is No 85 Buchanan Street, Glasgow." The defender answered—"(5) The alleged customs at race meetings are not known and not admitted; *quoad ultra* denied." "(Cond. 6) With the exception of Nos. 3 and 4 in said list, the sums thus staked by the pursuers, on the defender's instructions and for his behoof, were lost and paid by them on his account. The various sums thus lost were paid by the pursuers to the defender's creditors, or the winners from the defender as his agents, and in accordance with his instructions, shortly after the running of each of the said races. The payments thus made by the pursuers, as agents and for behoof of the defender, after