representatives of the first party and the second party shall be interested in the business equally for profit and loss; but it shall be in the power of the representatives of the first party to withdraw at any time from all connection with the business on giving three months' prior notice in writing to the second party; and in the event of their so withdrawing, the whole property, business, stock-in-trade, and assets shall devolve upon and vest in the second party, who shall pay out the first party's interest therein, as the same shall have been ascertained by the immediately preceding balance, by equal instalments at twelve, eighteen, and twenty-four months from the date of such balance, with interest at 5 per cent per annum on each instalment, and for which instalments the second party shall grant bills." The arrangement between the partners was that Mr Wilson was to contribute two-thirds, and Mr Woodrow one-third of the capital, and that they were to share the profit and loss in these proportions. Interest was first to be allowed at the rate of 7 per cent upon all sums standing at the credit of the partners before the balance of profit and loss was struck. A balance was to be struck every year on 30th June during the subsistence of the copartnery. The amount of Mr Wilson's capital in the business at the time of his death was £3333, 13s. 4d., on which interest was due by the copartnery at the rate of 7 per cent.

The business having hitherto been prosperous the trustees, believing that it was for the advantage of the beneficiaries under the settlement that they should remain connected with it, resolved to hold, for a time at least, an interest therein, under the ninth article of the contract of copartnership above quoted. The business, under the same firm of H. Wilson & Company, engravers, Glasgow, has accordingly, since the death of the said Hugh Wilson, been carried on by the said Alexander Woodrow, for behoof of himself and the representatives of the said Hugh Wilson. The profits accrued for the year ended 30th June 1870, being the only financial year completed since Mr Wilson's death, amount to the sum of £3671, 5s. 7d. (exclusive of the said 7 per cent interest), of which the sum of £1835, 12s. 9½d. belongs to the estate and representatives of Mr Wilson. The share of profits falling to the estate is greatly in excess of any return which could be derived from the capital by investing it in any other way sanctioned by the settlement. The profits and 7 per cent. interest which accrued to the late Mr Wilson as at 30th June 1869, being the first balance after his death, have been treated as capital. With regard to the profits and 7 per cent. interest accruing to Mr Wilson's trust-estate subsequent to the said 30th June 1869, the liferentrices claim that the same shall be wholly dealt with and paid to them as income falling under their rights of liferent. On the other hand, it is contended, on behalf of the fiars, that the right of the liferentrices in the capital embarked in the business is limited to interest at the legal rate of 5 per cent thereon, or, at all events, to the said 7 per cent. interest, and that the profits should be dealt with as capital, only the interest thereof, upon investment in the usual securities, belonging to the liferentrices.

The questions on which the opinion of the Court was requested, were:—

"Do the business profits and 7 per cent. interest accruing since 30th June 1869 to Mr Wilson's trust-estate form part of the income or liferent of the said estate divisible amongst the liferentrices?

or,

"Does any portion thereof—and if so, what portion—form part of the capital or fee of the estate, and fall to be treated as such?"

SOLICITOR-GENERAL and INNES for the trustees and liferentrices, the parties of the first and second part.

WATSON and R. V. CAMPBELL for the fiars, the parties of the third part.

Reference was made to *Weddel*, January 21, 1812, F. C.; *Cochrane* v. *Black*, February 1, 1855, 17 D. 322; and *Laird* v. *Laird*, June 26, 1855, 17 D. 984.

The Court held that the question was to be determined according to the testator's intention, as evidenced by the terms of the trust-deed and deed of copartnery, and that his meaning clearly was, that the profits and interest should fall to the liferentrices.

Agents for the First and Second Parties—Maconochie & Hare, W.S.

Agent for the Third Parties—T. J. Gordon, W.S.

Friday, March 17.

MACKAY *v.* MONRO.

Proof—Oath on Reference—Intrinsic Quality. Where two parties, who were related to one another, had been in the habit of accommodating each other with advances to a small extent as occasion required, but without taking any acknowledgments or documents of debt, and where they were accustomed to have periodical settlements when the balance due was paid over by the debtor,—on the death of one of them his executor sued the other for the amount of a specific one of these advances. The constitution but not the resting owing was referred to his oath. In his deposition he admitted the constitution, but qualified it with the statement that the debt was not resting owing, he having subsequently made an advance, in the ordinary course of transactions between the parties, of a larger amount than the sum sued for, and they having twice, subsequently to this last advance, had a settlement of accounts in their ordinary way. *Held*, that the reference was truly as to the resting owing, notwithstanding the terms of the minute; and that the qualification in the deposition was intrinsic, it not being a mere statement of a counter-claim, but a statement and explanation of a settlement of accounts, according to the natural way, looking to the cause of dealing of the parties, and that the oath was therefore negative of the reference.

This was an appeal from the Sheriff-court of Inverness in an action in which Donald Mackay, as executor of the deceased John Mackay, sued Duncan Munro for the sum of £30, "being the amount of cash lent by the deceased John Mackay to the defender on or about the 18th day of February 1865."

The defender's minute of defence was as follows—"The defender stated his grounds of defence to be a denial of resting-owing of the sum said to have been lent. He admits having received in loan the £30 from the deceased, but repaid the money to him before his death."

The Sheriff-Substitute (FRASER) allowed the

pursuer "a proof, *scripto vel juramento*, of his allegations as to the money said to have been lent," and to the defender a conjunct probation. In this proof the defender was examined on oath, and certain documents were produced. The Sheriff-Substitute found that the proof *scripto* had entirely failed; and that the proof *juramento* had also failed, "the defender's admission of the loan in his deposition being neutralised by the qualification that the debt was extinguished by subsequent cash transactions between him and the deceased, and that a settlement of accounts between them had taken place a few months before the deceased's death, when a balance of a few shillings was found due by the latter." He accordingly assoilzied the defender.

Upon appeal, the Sheriff (IVORY) recalled this interlocutor, and allowed "the pursuer, if so advised, to put in a minute of reference to the defender's oath." In his note to this interlocutor the Sheriff added—"It appears to the Sheriff that it was quite incompetent to examine the defender as a witness in regard to the loan in the way that has been done. The loan could only be proved by the defender's writ or by his oath on reference. The proper course was to have allowed the pursuer a proof by writ in regard to the loan, and if he failed in proving it by writ, he should then have been allowed an opportunity of referring the matter to the defender's oath. The pursuer's examination of the defender as a witness, however, raises the question whether he is not now precluded by the Act 16 Vict., cap. 20, sec. 5, from referring the matter, in regard to the loan, to the defender's oath. This question is one of considerable difficulty. The Act provides (sec. 5) 'that it shall not be competent to any party, who has called and examined the opposite party as a witness, thereafter to refer the cause, or any part of it, to his oath.' In the present case the defender was examined as a witness in regard to the loan. But he was not, and could not be, competently examined as a witness in regard to it. The whole proceeding was irregular and inept. The Sheriff is inclined to think that the prohibition in the Act only applies to a matter as to which the defender could competently be examined as a witness; and that, as in the present case the examination of the defender in regard to the loan was quite incompetent, the pursuer's right of reference was not affected thereby. The Sheriff has therefore, though with considerable hesitation, allowed the pursuer a reference to the defender's oath."

Accordingly the following minute of reference was thereafter put in :—

"*Portree, 26th February* 1870.

"Donald Mackay, above designed, refers to the oath of Duncan Munro, also above designed, the constitution of the loan of £30 sterling sued for.

"*In respect whereof, &c.*

"DONALD MACKAY."

The defender's deposition on the reference, taken upon April 15th, was as follows:—"In February 1865 I received a loan from the pursuer's brother, the now deceased John Mackay, of £30 sterling. It was transmitted to me by a letter of credit on the National Bank at Portree. That sum of money is not now owing by me, as I paid it to the deceased John Mackay. I paid it to him in cash. I made the payment at Kyleakin, between the 20th and 22d of August 1865. The sum which I so paid him amounted to £45 sterling, which was my own money. It was not paid specifically as £30 sterling, in extinction of his loan to me above-mentioned, and the balance as a loan by me to him, but merely as a payment or advance to him of the same character as payments or advances which he and I were in the habit of making to one another, and for which we were in the habit of coming to a settlement from time to time; and in point of fact, I had two settlements with the deceased subsequent to the transaction above specified, one of which settlements was made in Glasgow, and the other of which took place at Kyleakin, shortly before John Mackay's death, and at both of them the balance was in my favour. Both of the sums of £30 and £45 above-mentioned were taken into account in our settlement at Glasgow."

The question was, whether this deposition was negative of the reference or not. The Sheriff-Substitute held that the qualification contained in it was intrinsic, and so that the deposition was negative of the reference. This interlocutor the Sheriff reversed on appeal, finding that the pursuer had proved by the defender's oath the loan of £30 libelled; and that the defender had failed to prove by competent evidence his defence that he repaid the said sum to the pursuer. In his note to this interlocutor the Sheriff said—"All that the pursuer referred to the defender's oath, by the minute of reference No. 12 of process, was the constitution of the loan of £30 sued for. This, it is thought, has been sufficiently established by the defender's oath. This being the case, the *onus* of proving the defence of repayment lies on the defender. The defender cannot be allowed to prove this by his own oath, more particularly when the minute of reference referred to his oath, the constitution only, and not the resting-owing of the loan. He has failed to prove it by the writ of the late John Mackay, and there can be no competent reference to the oath of the pursuer as John Mackay's executor, except to the extent of affecting his own interest in the executry-estate.—Ersk. 4, 2, 10; Dickson on Evidence, sec. 1587. It is said that the defender's allegation of payment is an intrinsic quality of the oath. It might have been so if the resting-owing as well as the constitution of the loan had been referred to the defender's oath. But where, as in the present case, the constitution only was the subject of the reference, it appears to the Sheriff that the allegation of payment is clearly extrinsic."

Against this interlocutor the defender appealed to the First Division of the Court of Session.

MACDONALD and RHIND for him.

RUTHERFORD for the respondent.

At advising—

LORD PRESIDENT—This is an action for payment of a loan of £30. The defence is an admission of the loan, but an allegation of repayment. There has been a good deal of miscarriage in the conduct of this case in the Court below, but the question now comes to a narrow point, the meaning of the defender's oath. By the minute of reference it would appear that the only matter referred to the oath of the defender was the constitution of the loan. This was a mistake, for the constitution was not denied; the only point was whether the debt was resting-owing. The Sheriff has taken a view of the reference in which I cannot concur. Accordingly I must read the reference as referring to the oath of the defender whether the loan was resting-owing, and the only question is whether the deposition is affirmative or negative of the

resting-owing. The defender begins his explanation in an awkward manner—(*Reads deposition*)—but that is not his fault, for the deponent has to follow the order of the questions put to him. The fair way to deal with the deposition is to take it as a whole, and examine its import. The defender states distinctly that he and the deceased were on very friendly terms, and in the habit of making small cash advances to one another. These small loans were frequent, and as they did not exactly balance, it became necessary occasionally to adjust accounts. This loan of £30 was one of these transactions. Subsequently, in August of the same year, the defender made a similar advance of £45 to Mackay. Having explained the mode of dealing, the defender goes on to say that there were two settlements after the date of this last loan, one at Glasgow and the other at Kyleakin, and that at the settlement in Glasgow the sums of £30 and £45 were both taken into account, and the balance struck in his (the defender's) favour. The question then comes to be, Is that oath negative of the reference? That raises the question whether the facts inferring extinction of the loan are intrinsic or extrinsic, which is always a nice question. Now, while a mere statement of a counterclaim is extrinsic, a statement and explanation of a settlement of accounts, in which the loan was taken into account and the balance struck, is intrinsic. I am of opinion that the deposition is of the latter class. The loan is stated to have been extinguished in the natural way, looking to the course of dealing of the parties. The deposition is therefore negative of the reference. And it would be strange if it were not so. Assuming the defender's statement to be true, it would be hard if any legal rule prevented us giving effect to it. These two persons were in the habit of accommodating one another with loans—a perfectly intelligible course of dealing. A number of such transactions passed between them. John Mackay dies, and his executor having accidentally some knowledge of one of these loans, pounces on it, and says to the defender, "You must prove that you repaid this." If we were obliged to hold otherwise than I propose, the most manifest injustice might ensue. The defender, who might really have a large balance in his favour, might be called upon to pay this solitary advance, the whole other dealings of the parties being passed by, and consequently would suffer serious injustice. But as I am of opinion that the qualification is intrinsic, and therefore the oath negative of the reference, this misfortune will not occur.

Lord Deas—This is a most perplexing case, but the difficulties chiefly arise out of the way in which it has been managed. If it related to a larger sum, and a re-examination were possible, I would be disposed to order one upon properly adjusted interrogatories; but the expense would be too considerable; we must therefore just construe the oath as best we can. Now, looking at the substance of the oath, I can have no doubt that there is nothing in the law of intrinsic and extrinsic which can prevent our holding the deposition as negative of the reference. The whole deponed to by the defender is of the nature of one and the same transaction. The counter advance which he avers, and the settlements between the parties, are not of the nature of subsequent transactions, but parts of the same transaction or rather course of dealing, and it is settled law that to make a qualification intrinsic it is only necessary that the extinction averred must be in the natural way (that is, looking to the course of dealing of the parties), or must be part of the same transaction.

Lord Ardmillan concurred.

Lord Kinloch—I am of opinion that this oath is negative of the reference. My reason is that, whilst the defender admits receiving £30 from the deceased John Mackay, he depones to having repaid it by statements which I think intrinsic. If, indeed, he had merely said that he on his side had advanced Mackay £45, leaving the debt to be extinguished by the legal force of compensation, I think this would have been insufficient. But he says that, after paying this £45, he and Mackay had a settlement of accounts at Glasgow, as was their practice from time to time, and that at this settlement the £45 were put against the £30, and a balance brought out in his (the deponent's) favour. I am of opinion that this is equivalent to deponing that the sum of £30 was paid in cash to the creditor. The mode of settlement was, in the circumstances, a natural one. There is nothing suspicious in the oath; and I think it legally clears the defender of responsibility for this sum.

Agents for the Appellant—Menzies & Cameron, S.S.C.

Agents for the Respondent—Mackenzie, Innes, & Logan, W.S.

Wednesday, March 15.

SECOND DIVISION.

SPECIAL CASE—GLEN AND CUNNINGHAM.

Legacy—Revocation—Codicil—Instruction to Agent. A memorandum in the following terms was found in the repositories of a deceased lady:—"*Mem.*, 6th December 1867.—To let Mr Tod know that I wish (the bequest and) the name of Cunningham to be erased from my settlement; and I do hereby desire it to be done."—*Held* that this did not constitute a valid revocation of the legacy in question.

This was a Special Case presented in the following circumstances:— Miss Mary Murray died on 21st April 1868, leaving a trust-disposition and settlement conveying her whole estate to certain trustees. The said trust-disposition and settlement contained directions to the said trustees and executors for the payment of various legacies at the first term of Whitsunday or Martinmas happening six months after the death of the truster's sister, Miss Ann Murray, and *inter alia*, "to the three daughters of the late Mrs Archibald or Cunningham, at Newport, equally, or to the survivors or survivor of them, £150 sterling as a small remembrance, and that free of legacy duty." The deed also contained the following clause:—"And I reserve not only my liferent right and enjoyment of the whole premises, but also full power and liberty to myself, at any time of my life, and even on deathbed, to give any additional instructions relative to the disposal of my estate, and to alter, innovate, or revoke these presents in whole or in part as I shall think proper." There was found in Miss Mary Murray's repositories in her dwelling house, after her death, a holograph memorandum in the following terms:—"*Mem.*, 6th December 1867.—