ing to £121, 3s. 9d., and of a summary warrant threatened to be obtained for enforcing payment of these assessments. He also craved interdict against the respondent's levying or collecting the assessments. In February 1877 the Lord Ordinary on the Bills passed the note; and in June thereafter the complainer raised an action of declarator and interdict, based on the same allegations as those on which he founded the petition for interdict and suspension.

The circumstances which gave rise to these proceedings were, *inter alia*, as follows:—By the Banffshire Roads Act 1866, the Road Trustees were directed to impose a certain rate of assessment at their annual general meeting at Michaelmas of each year on all lands and heritages within the county. By section 72 of the Act, all assessments under the authority of the said Act were to be deemed and taken to be for the year from the 26th day of May immediately preceding to the 26th day of May subsequent to the date of imposing the same, and "shall be payable at such date as may be fixed by the trustees." The collector was directed, under sections 73 and 74, to make up assessment rolls and to give notice to the ratepayers, distinguishing the assessments for maintenance of roads from that for reducing debt (section 75). The assessments were to be levied from the proprietors, with relief as to the half of the maintenance assessment against their tenants (section 70). Further, by section 79, if such assessments were not paid within one month after the date of payment fixed by the trustees, interest at 5 per cent. per annum was chargeable until payment.

Mr Steuart received notices requiring him to make payment of the various assessments on his lands, amounting to £121, 3s. 9d. They were dated 20th November 1876, and the time of payment was stated to be 1st December 1876. No place of payment was specified. The following explanation was added:—"These assessments are all declared by the Commissioners of Supply and Road Trustees to be due and payable on the 1st December next, and as the full amount to be collected has to be disbursed 'twixt that date and the 20th, the collector hopes that as in former years prompt payment will be made."

It appeared, however, that while 55 landed proprietors, whose assessments amounted to £4677, received notice in these terms, there was a body of feuars and others in the various villages in the county, numbering 3450 individuals, who paid assessments varying from a few pence to four or five shillings in amount, the whole sum leviable from them being £823. These feuars received notices intimating that their assessments had been imposed and declared payable on 1st December, but that collection thereof would be made at a specified place on a specified day in March. If the parties called, however, these assessments might be paid at the collector's office in Banff at any previous date.

The explanation given by the collector on record was as follows:—"It would create great inconvenience to require parties throughout the whole county to pay the small sums of assessments due for house property at the collector's office in Banff. The landed proprietors pay six-sevenths of the whole assessment. With regard to the remaining one-seventh part, payable by house property, the collector makes collections at various convenient places throughout the county, and as the state of the weather during the first months of the year is so uncertain and usually so severe as to make these collections during said months inconvenient and often impracticable, the collector has usually postponed these collections until March. In thus acting, the collector has simply tried to meet the public convenience, and facilitate an easy collection of the money. This practice has been well known to the landed proprietors and others in the county, and instead of being objected to, it has been universally approved. The practice in no way affects the imposition of the assessment, and is a mere incident of the collector's system of collection."

The complainer presented the note on the ground that the collector's proceedings were wrongful and invalid, in respect that while the statute enjoined that the assessments should be imposed at one equal rate, he deferred his demand in the case of these feuars till March. He also failed to require from them payment of interest on their assessments where thus overdue, and so caused those who paid in December a loss corresponding to the amount of relief to which they would severally have been entitled if interest had been demanded. The conclusions of the action of declarator and interdict were of a similar nature.

The Lord Ordinary repelled the reasons of suspension and refused the interdict, and also dismissed the action of declarator, sustaining a plea that the pursuer's averments were not relevant or sufficient to support the conclusions of the summons.

The pursuer reclaimed, and the Court adhered, on the ground that the assessment was equally laid on, and that it was no violation of the provisions of the statute to dispense with the collection of sums of interest so infinitesmal that they could not be expressed by any current coin, where the purpose of postponing collection was to consult the convenience of the public.

Counsel for the Complainer and Pursuer (Reclaimer)—Guthrie Smith—Vary Campbell. Agents—Maitland & Lyon, W.S.

Counsel for the Respondent and Defender (Respondent)—Balfour—Lorimer. Agents—H. & A. Inglis, W.S.

Wednesday, November 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

COOPER *v.* MARSHALL.

Proof—Reference to Oath—Where Account prescribed and Compensation pleaded—Intrinsic or Extrinsic to the Reference?

A prescribed account, consisting of a number of items, payment of which was sued for, was referred to the oath of the defender. He had pleaded counter claims in compensation, and in his examination said that he "con-

sidered the one account squared the other," and that he did not "owe the pursuer anything." While the case was under appeal he died.—*Held* that, there not being material to show whether the statement as to the counter claims was intrinsic or extrinsic, it would have been proper to have a re-examination, but that that being now impossible, the oath must be held to be negative of the reference, and the defender assoilzied.

Opinion (*per* Lord Deas) that in a reference to oath the plea of compensation, where there was no proof of an agreement between parties to hold the transactions as extinguishing one another, was extrinsic.

This was an action raised in the Sheriff Court of Lanarkshire for the sum of £88, being the amount of an account for coals and dross said to have been furnished to the defender John Marshall by the pursuer Robert Grier Cooper. The account consisted of 210 items, the first of date May 25, 1853, the last of date May 13, 1865. The action for payment was raised on December 26, 1876, when the defender was eighty-one years of age, and so infirm as to be unable to leave his bed.

The defender stated—"(3) The defender admits having received from the pursuer various quantities of coals, but they have all been settled for. The late Mr Robert Hamilton acted at the time the coals in question were supplied as pursuer's manager, and also as factor to the defender, and when Mr Hamilton settled with the defender for the rents and feu-duties uplifted by him he at various times made deductions for coals supplied by the pursuer. (4) These deductions, along with contra account due to the defender, the defender believed settled all transactions between them many years ago." He pleaded—"(1) The account sued for being prescribed, can only be proved by the defender's writ or oath. (2) The defender having paid or compensated the pursuer for the goods sued for, he is entitled to absolvitor with expenses."

A proof was allowed by reference to the defender's oath. It was taken by commission, when the defender, *inter alia*, deponed as follows—"I am eighty-one years of age. I have known the pursuer for upwards of twenty years. He was a coalmaster at Shaws and Raploch. When I had a limework at Stonehouse I got dross from him, but I am not sure about getting coal. I also got dross for a brickwork I had at Machan, and sometimes coal. All the household coal came from pursuer's colliery. I never to my knowledge got any account from the pursuer, unless it was when the pursuer got wood and stones from me, and I considered the accounts were balanced. I never had any settlement with Mr Cooper that I remember of. I had no objections to the account sued for. I don't know how we never had a settlement. I do not remember whether I did or did not render an account to the pursuer. Mr Cooper was owing me above £30 for wood, and I supplied stones and bricks. . . . The account for stones and bricks referred to would amount to between £20 and £30, but I kept no books, except what the men at the quarry and brick work kept—that is, they kept a note of what was sent out. I cannot tell why accounts were never rendered between us. I cannot tell why I did not render an account to the pursuer, if it was not that I considered the balance due me so small that I did not interfere with them. I paid some taxes, but I cannot say whether for the pursuer or his stepfather; but I think that was the last transaction we had. I never paid the pursuer any money, as I considered the one account squared the other, and I do not owe the pursuer anything. I always considered he owed me."

The Sheriff-Substitute (Birnie) found the oath negative of the reference, and assoilzied the defender, adding this note:—

"*Note.*—The account sued for commenced in May 1853 and ended in May 1865, eleven years and seven months before the petition was served. No reason is proved for this delay, nor is it proved that the account in its present shape was ever asked for from the defender. The defender admits receiving dross and coals from the pursuer, but depones that accounts were balanced by wood, bricks, stones, and taxes supplied to or paid for the pursuer. That statement is intrinsic. (Dickson on Ev., secs. 1641–1646.) The details of the wood, &c., are unsatisfactory, the defender deponing that the pursuer was due him above £30 for wood, and between £20 and £30 for stones and bricks, and not mentioning the sum due for taxes; but he is eighty-one years of age, and cannot be expected to have a precise recollection of details, and he has no books. There is no reason to doubt his belief that he 'considered the one account squared the other,' and does not 'owe the pursuer anything.' The petitioner urged that a re-examination should be allowed. That in certain circumstances is competent. (Dickson's Evid., *supra*, sec. 1619.) But there is no reason to suppose that the defender can tell more than he has done."

The pursuer appealed to the Court of Session.

Argued for him—The reference by the Sheriff to Dickson on Evidence did not support his view. On the contrary, as there was no allegation of any agreement on the part of the pursuer to hold the claim of the defender as compensating his own, it was a direct authority to the contrary—Sec. 1646, *ad fin.* See also Erskine, iv. 2, 11, 13; 1 Bell's Comm. 351 (M'Laren's ed.), 333–4, (5th ed.), and cases quoted in More's Notes to Stair, 418; *Hepburn* v. *Hepburn*, Hume 417. To allow the defender to prove his counter claim in this way was to allow him to prove his own debt by his own oath—*Learmonth* v. *Russell*, M. 13,201.

Argued for the defender—Where it was a course of transactions which was in question, the principle of *Hepburn* and the other cases did not apply. Besides, the circumstances of the case should be looked at, and if there was any doubt as to what the defender's oath imported, the presumption was against the pursuer, who must suffer for his neglect.

At advising—

Lord Deas—This is an action for payment of a prescribed account, and that is not an unimportant consideration, for there is no room for the argument sometimes maintained, when the account is not prescribed, that there is less burden on the pursuer to prove his account by the oath of his adversary. Here there is no doubt that the pursuer must prove both the constitution and the subsistence of his debt by the defender's oath, and the question is whether he has done so? That,

again, turns upon the question whether certain statements made in the reference to oath by the defender with reference to certain counter claims are extrinsic or intrinsic?

The exposition of the law as given by the Sheriff-Substitute is not, I think, sound. I have no doubt that the statements in the reference are extrinsic. I think that in his reference to Dickson on Evidence the Sheriff-Substitute has mistaken the author's meaning. He refers to section 1646. It must be admitted that the law laid down there is not so clearly expressed as is usual in that authority. We find—"If the discharge of the debt is intrinsic to the reference (*e.g.*, where prescription has run on it), then it is no matter whether the extinction was by a money payment, by acceptance of goods in discharge of the debt, by agreeing to hold it compensated by a counter claim, or by a voluntary cancellation; for all these equally import discharge. On the other hand," the author proceeds, "if the discharge of the debt by one of these modes is extrinsic, it is thought that discharge by any other of them is equally so." If you stop there, that lends some countenance to the view the Sheriff-Substitute has taken; but when you go on it becomes quite clear what the author means—"The real distinction lies between a discharge by agreeing to hold the debt compensated, or accepting goods in payment of it, on the one hand, and simple set-off or delivery of goods as payment, on the other—statements of the latter kind being extrinsic to an oath of resting-owing." What he means, therefore, is, that if the oath bears an agreement on the part of the creditor to accept payment or delivery of goods as compensation of his debt, that is intrinsic; but if it is merely a set-off by a claim on the part of the debtor without any such agreement, that is extrinsic.

Now, it is not said that the creditor here ever agreed to accept payment by receiving goods or in any other way. It is only said that the debtor understood that there was compensation, and taking that view he believed there was nothing due by him. If that were all, we should have to hold that the oath was not negative of the reference.

But the question is, Whether in the circumstances the oath is or is not satisfactory in bringing out the real state of the case which was referred? It appears that a re-examination was urged. It makes no difference whether that was by the petitioner or the defender, for whoever did so it shows that the oath was not considered satisfactory. In that view we are entitled and bound to look at the circumstances of the case and see if there should have been a re-examination.

Now, the circumstances are very peculiar. The account ends in May 1865, eleven years and a-half before the action is brought. It begins in 1853, twelve years before the date of the last item. It consists of a great number of small items. All that is important in considering whether there should have been a re-examination to clear up the question of an agreement between the parties to hold the one set of charges as compensating the other. Then the action was brought when the debtor was eighty-one years of age, and confined to bed, and had to be examined on commission. Taking all these circumstances together, I think there should have been many more questions put, and the burden of putting them was on the pursuer, who was, as I have noticed, claiming for a prescribed account. He could have said whether there was an agreement to set-off the one account against the other. If this case had been brought before us while the old man still lived, we would certainly have been for ordering a new examination. The party who delayed so long to bring his action must bear the burden of his fault in not coming forward sooner, and we have no course therefore but to hold the oath negative of the reference.

Lord Mure, Lord Shand, and the Lord President concurred, on the general ground that the pursuer had failed to prove resting-owing, there being no materials in the oath to enable the Court to say whether the statements as to compensation were extrinsic or intrinsic, a question that is always a difficult one; and that he must bear the penalty in consequence of his failure to make that clear.

The Court adhered in the result.

Counsel for Pursuer (Appellant)—Mackintosh. Agent—Alex. Morison, S.S.C.

Counsel for Defender (Respondent)—Lord Advocate (Watson) — Gebbie. Agent — Alex. Wyllie, W.S.

Thursday, November 29.

FIRST DIVISION.

THE FERGUSON BEQUEST FUND, PETITIONERS.

Trust—Powers of Trustees—Possession—Church.

A truster directed his trustees to make certain payments for the advancement of education and missionary work to a certain denomination of the Church, which afterwards split up into two parties, one of which, the majority, continued to be treated by the trustees as representing the original body. This party having subsequently united with another denomination, and adopted their designation, the other party, the minority, raised an action of declarator of their right to be treated as representative of the original Church.—*Held* that the trustees were entitled by the terms of an Act of Parliament, whereby they were incorporated, to apply to the Court by petition for directions as to their conduct *pendente lite*, and that the Court would, as in the regulation of all questions of interim possession, be guided by the maxim *uti possidetis*.

Mr John Ferguson of Cairnbrock, who died on 8th January 1856, left a trust-disposition and settlement, dated 13th May 1853, and a codicil or deed of instructions, dated 22d September 1855. By the codicil the testator, *inter alia*, directed his trustees as follows:—"And lastly, to hold, retain, set apart, and invest as after written, the rest, residue, remainder, and reversion of my whole subjects, property, means, assets, estates, funds, debts, effects, and sums of