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

money, heritable and moveable, real and personal, as a permanent fund, to be called The Ferguson Bequest Fund, and to pay, apply, and appropriate the interest and other annual income, profits, and produce thereof, in and towards the maintenance and promotion of religious ordinances and education and missionary operations," in certain counties in Scotland, "and thereafter, if my said trustees in Great Britain shall think fit, in any other counties in Scotland; and that by means of payments for the erection or support of churches or schools (other than and excepting parish churches and parish schools) belonging to or in connection with *quoad sacra* churches belonging to the Established Church of Scotland, and belonging to or in connection with the Free Church, the United Presbyterian Church, the Reformed Presbyterian Church, and the Congregational or Independent Church, all in Scotland, or any or either of them, or in supplement of funds collected for these purposes, or in supplement of the stipends or salaries of the ministers of the said *quoad sacra* and other four churches; and by payments of salaries or in supplement of the salaries of religious missionaries, and of teachers of schools of or in connection with the said *quoad sacra* churches and the said Free Church, United Presbyterian Church, Reformed Presbyterian Church, and Congregational or Independent Church; and by payments for forming and maintaining, or in aid of funds raised for forming and maintaining, libraries for the use of the general public—such missionaries, schools, and libraries being under the superintendence or management of members in full communion with one or other of the said five churches: Declaring that the application and appropriation of the trust-funds shall be entirely at the option and discretion of the quorum of my said trustees as to the proportions thereof to be applied to the said several objects."

The trustees administered the fund according to the directions of the truster until the year 1869, when they applied to Parliament with the view of obtaining an Act for their incorporation, and for enlarging their powers and other purposes. The bill was remitted to two Judges of the Court of Session, before whom all parties having interest were called to appear by special advertisement in the usual form. No opposition was made to the bill, and after a report by the Judges it was passed into an Act. The truster in his deed had declared it to be his wish "that the trustees for the execution and management of the permanent trust hereby created shall be thirteen in number, and shall consist of members of the said five churches, in the following proportions, viz.—three members of the Established Church, four members of the Free Church, four members of the United Presbyterian Church, one member of the Reformed Presbyterian Church, and one member of the Congregational or Independent Church, all in Scotland;" and by the Act the persons therein named, "together with the persons to be from time to time elected or assumed as herein and in the trust-deeds provided in the room of any trustee or trustees ceasing to act, so as to make up the number of the trustees to thirteen, in the proportions of church membership herein and in the trust-deeds specified," were declared to be incorporated under the title of the Ferguson Bequest Fund.

In the year 1863 a difference had arisen among the members of the Reformed Presbyterian Church as to discipline, and a separation took place in the body so styling themselves. A minority, consisting of four ministers and some elders, then withdrew from the majority, and after that date continued as a distinct and separate church. They assumed the name of the Reformed Presbyterian Church of Scotland. In 1865 the minority had presented a memorial to the trustees claiming to be the Reformed Presbyterian Church, and as such entitled to participate in the management and benefits of the fund. But the trustees continued to recognise the majority as the Reformed Presbyterian Church, and the trust was administered on that footing. No further action was taken by the minority until the year 1876. When in that year the majority had united themselves with the Free Church of Scotland, the minority, after presenting a memorial to the trustees, stating that the difficulties formerly in the way of their being recognised as the Reformed Presbyterian Church had been removed, and they were now entitled to participate in the fund, further raised an action of declarator concluding "that they should be found and declared to be the Reformed Presbyterian Church of Scotland to the exclusion of the majority of 1863, and those who have since adhered to them, and that as such they alone are entitled to participate in the benefits provided in the said codicil to objects connected with the Reformed Presbyterian Church, and that they are also entitled to have one of their own body elected as a trustee on the 'Ferguson Bequest Fund.'" The action further involved the removal of the trustee, who had represented the party who had now joined the Free Church. This action was raised on 12th June 1877.

Defences were lodged both by the trustees of the fund and by the majority of the Reformed Presbyterian Church, who were also called as defenders.

The trustees were at this time considering what they should do in the circumstances narrated, and since the union with the Free Church they had made no "grants to objects connected with the Reformed Presbyterian Church, except upon applications lodged with them prior to the date of the said union." They accordingly, on 15th October 1877, presented a petition to the Court for directions—(1) Whether it was their duty to recognise the parties representing the minority of the Reformed Presbyterian Synod of 1863, or the congregations of the Reformed Presbyterian Church which united with the Free Church in 1876, or either of them, as constituting the Reformed Presbyterian Church within the meaning of the codicil of the late John Ferguson and of the "Ferguson Bequest Fund Act 1869? (2) Whether they were in the meantime entitled, in the exercise of the discretion conferred upon them by the codicil and Act aforesaid, to make grants to churches, schools, libraries, ministers, missionaries, or teachers connected with both or either of the parties aforesaid? (3) Whether the trustee who has hitherto acted was entitled to continue to act as a trustee on the "Ferguson Bequest Fund,' or whether they were bound to assume a trustee who was in full communion with the body representing the minority of 1863?

The 18th section of the Act of 1860, on which they founded, was as follows;—"In the event of any question or difficulty arising as to the construction of the trust-deeds or of this Act, or as to the proper operation and administration of the trust, or in consequence of the lapsing or failure of any of the purposes of the trust, or in consequence of any other special fact or occurrence, the trustees may apply to the Court for direction, by petition disclosing the circumstances material for the consideration of the Court, who thereupon shall order such intimation or service as they shall think fit; and shall have full power and discretion to give such direction as they shall consider just and best for the ends and uses of the trust; and the trustees acting on such direction shall be held to have discharged their duty as trustees, and to be relieved of all responsibility in the subject-matter of the said application; and the expense of such application, and of all proceedings connected therewith, shall be defrayed out of the fund."

The petition was served upon, and answers were lodged for, the bodies representing respectively the majority and minority in the division that had taken place in 1863 in the Reformed Presbyterian Church.

The petitioners and the majority, who were represented by separate counsel, argued that it was quite within the competency of the Court under this section to deal with the circumstances that had arisen. They had no wish to raise now the question raised in the declarator, or to prejudice its decision, but merely asked for temporary directions. The majority were entitled to hold the position they had held since 1863. They had enjoyed the benefits of the fund since that date without any objection; they had been represented without any objection in the trust; no opposition had been offered to the Act of Parliament—and of all these things the minority must have been aware.

The minority argued—It was inexpedient to determine the rights of parties in this petition. Besides, the clause of the Act referred to did not warrant the application; declarator was the only method of trying the rights of parties. If the Court was to give judgment in this petition, it should be remembered that the minority had protested in 1863 and memorialised the trustees. Then, even if the majority were right in their contention that they constituted the Reformed Presbyterian Church up to 1876, they had by their union with the Free Church in that year merged themselves in it.

The Court held that they were empowered by the 18th section of the Act of Parliament to give the trustees directions as to the difficulties that had arisen, and that the principle by which they must be guided was, as in all cases involving the question of interim possession, *uti possidetis*. They therefore directed the trustees to pay as they had been in use to pay, and to continue as trustee a member of that body which they had been in use to hold to be the Reformed Presbyterian Church.

Counsel for Petitioners—Lord Advocate (Watson)—Jameson. Agent—J. Carment, S.S.C.

Counsel for Majority—Balfour—Innes. Agent—John Galletly, S.S.C.

Counsel for Minority—Pearson. Agent—A. Kirk Mackie, S.S.C.

Friday, November 30.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CLARK *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Culpa—*Railway—Fencing of Bridges.*

An engine-driver employed in driving his engine on a line over which the railway company whose servant he was had running powers, when stopped by the signals outside a station, left his engine for the purpose of proceeding to the signal-box to get information about the working of the line. There was a pilot-man with him on the engine to assist, as he had had no experience himself on that part of the line. In returning from the signal-box he fell over a bridge which was not protected by a parapet, or by wing-walls at the ends, and which was not lighted, and death resulted from the injuries. In an action of damages for loss thereby sustained, brought against the railway company on whose line the accident occurred—*held* that the Company not liable, because, in the circumstances as proved—(1) there was no obligation upon them to have the bridge fenced; and (2) there had been an unusual risk incurred, and no proper precautions taken to avoid accident by the deceased.

This action was raised by the widow of Thomas Clark, an engine-driver in the employment of the Glasgow and South-Western Railway, against the Caledonian Railway Company, for reparation in respect of the loss incurred by her through the death of her husband upon that line.

The Glasgow and South-Western Railway Company had running powers over the defender's line between Carlisle and Gretna Junction. The deceased had, in the year 1871, been employed for some time on that part of the line, but for some years afterwards had not been employed there. On the 5th of February 1877 he was appointed driver of a fish-train between Carlisle and Ayr, which passed Gretna Junction, and proceeded on the up journey as far as Carlisle. The return journey was made at night, and Clark being inexperienced in that part of the line, another engine-driver, named Grierson, was sent on the engine with him to teach him the signals and generally to pilot the train. They reached Gretna Junction about 3.25 A.M. on the 6th February, the night being very dark. As the red danger-signal was against the train, it was then drawn up. Clark thereupon remarked to Grierson that on the up journey on the previous day he had not had an opportunity of observing the junction signals, and said he was going to examine them, they having been altered a few days previously. He accordingly started northwards along the line, but without a lamp, Grierson having declined to allow him to take the only lamp there was, as it was required for the engine. After safely reaching the signal-box, and making the inquiries he wished, he started to return to his engine. On his way back he was killed in the manner explained in the following findings of the Sheriff-Substitute (ERSKINE MURRAY):—"Finds (13) that between the station buildings and the pointsman's box the main line of the defenders, the Caledonian Rail-