10th July 1855 (17 D. 1081). The following authorities were cited on the other side:—More's Notes, p. 418; Dickson on Evidence, p. 970; Brown *v.* Mitchell (M. 13,202); Walker *v.* Clerk (M. 13,230); Grant (M. 13,221); Forrester (M. 13,215); Law *v.* Johnston, 9th December 1843 (6 D. 201); Hamilton (21 D. 51). The Court adhered to the Lord Ordinary's interlocutor.

The LORD PRESIDENT said—In regard to this claim of £181 no proof has been led and no documentary evidence has been produced by the defender. But he has referred to the oath of the pursuer, "the averments of the defender touching" the said debt. The reference made is in regard to the lending of the money, and of the loan being due at the date of the deceased's death. The question is not whether the qualification of the pursuer's oath is credible, but whether, assuming it to be true, we are entitled to listen to it. That rests upon the doctrine of intrinsic and extrinsic qualities of an oath. This doctrine arose in a great many cases formerly, but it now seems to be very much narrowed to this: All questions having reference to the discharge or settlement of a claim are intrinsic. On the other hand, counter claims of compensation requiring constitution are extrinsic. The question is whether this case belongs to the one class or the other. All the evidence we have on the matter is to be found in the pursuer's oath. I look upon it as the history of the transaction. There can be no doubt that if his disposition had been that he had repaid the money, there would have been an end of the question. If he had got back the I O U and produced it that would have been an end of the question also. If, again, the I O U had been found in the repositories of the deceased there probably would have been no reference to oath. But suppose he had said, I got back the I O U, and did not preserve it, it is difficult to say that that would be extrinsic, What is here said is that he asked back the I O U, and that the deceased said he would destroy it or bring it to him. Is that not a part of the transaction and a termination of the whole matter? It is a mode of discharging the debt, and, when I consider the relation of the parties and the whole transaction, it seems to me a not unnatural one.

Lord CURRIEHILL concurred.

Lord DEAS also concurred. He agreed that this was a reference both of the constitution and subsistence of the debt, but that did not solve the question. Two things are intrinsic in an oath—1st, whatever relates to the original transaction; and 2d, whatever relates to the extinction of the obligation in the natural manner—that is, by payment. If there had been here no document granted, and the party had admitted the borrowing, but alleged that there had been a subsequent gift made to him of the amount borrowed, I don't think that allegation would be intrinsic. I don't understand that we are now deciding that; but I think the reference, as made, fairly involves all about the granting of the I O U, and what has become of it; and if that is involved in it, this case becomes a very special one, and we must hold the qualification to be intrinsic.

Lord ARDMILLAN concurred.

SECOND DIVISION.

FINLAY'S TRUSTEES *v.* ALEXANDER AND OTHERS.

Assignation—Intimation. No formality is required in intimating an assignation, and an assignation held to have been duly intimated to a party in respect she accepted and acted as a trustee, to which office she was nominated by the deed containing the assignation.

Counsel for Finlay's Trustees—Mr Gordon, Mr Gifford, and Mr Arthur. Agents—Messrs R. & R. H. Arthur, S.S.C.

Counsel for Mr Miller—The Lord Advocate and Mr Pyper. Agents—Messrs Gibson & Tait, W.S.

Counsel for Mrs Alexander's Trustee—The Solicitor-General and Mr Shand. Agents—Messrs Webster & Sprott, W.S.

Counsel for other parties—Mr Lamond.

This is a question between Mr John Miller, accountant in Glasgow, trustee on the sequestrated estate of John Finlay, Printseller, and carver and gilder in Glasgow, and the accepting and surviving trustees nominated in the marriage contract between Mr Finlay and his wife, who is a daughter of the late Mr Alexander, proprietor of Dunlop Street Theatre, Glasgow. This contract of marriage, which was postnuptial, conveys to the trustees therein named every debt due to Mrs Finlay, and in particular "all right, title, and interest which she or the said John Finlay, her husband, now has or may hereafter have in the succession or estates, heritable or moveable, of her father the said deceased John Henry Alexander." Mr Alexander, two days before his death, and on 13th December 1851, executed a last will and testament by a notary-public, in presence of two instrumentary witnesses, and by that deed he appointed his widow, Mrs Alexander, to be his sole executrix and universal legatory. Two months before Mr Alexander's death, and on the 28th February 1852, Mr and Mrs Finlay, having been previously married in 1845, entered into the post-nuptial contract which contains the assignation above quoted. Immediately after the execution of the contract, and on the 29th February 1852, the trustees nominated accepted of the trust by a minute endorsed on the deed in the following terms—"We, the trustees within named and designed, do hereby accept of the office of trustees." (Here follow the signatures, among which is that of Mrs Alexander, the executrix of her husband.) In July 1852 the Theatre-Royal in Dunlop Street was let to Mr Glover by Mrs Alexander, the liferentrix, and in the lease the trustees under Mr and Mrs Finlay's marriage contract were made parties. The contract was recorded in the Books of Council and Session on the 7th of December 1857. The question between the parties in these circumstances is, whether the assignation in the marriage contract was effectually intimated to Mrs Alexander. The Lord Ordinary (Kinloch) found that it was, holding that the minute endorsed on the deed was an acknowledgment of intimation. To-day the Court adhered.

The LORD JUSTICE-CLERK said—As this question is presented to us by the note of the Lord Ordinary, it appears to me very simple and unencumbered by specialties. Although we have had a good deal of reference to the affairs of the late Mr Alexander, I do not see that we get any benefit from it. The real question at issue is the subject of the last finding of the Lord Ordinary, whether the assignation contained in the post-nuptial contract was effectually intimated to Mrs Alexander as the executrix of her husband. It is necessary to look at the terms of the assignation, not because I should be disposed to say that an assignation couched in ambiguous terms cannot be effectually intimated, but I look to its terms for the purpose of seeing (1) whether Mrs Alexander was the proper person to receive the intimation as debtor; and (2) how it ought to be made. The assignation which Mrs Finlay and her husband, not only with his consent, but he being cedent, made, was of all right, title, and interest which she had in the succession or estate of her father. There is no doubt whatever that so far as this is a claim against the moveable estate of the lady's father it is a claim against Mrs Alexander as his executrix. I can understand that there might be doubts as to the precise nature of the claim. I can understand that there might even be doubts as to whether it existed at all; but such as it is, it is a claim against Mrs Alexander as executrix of her husband; and I don't understand that there is any difficulty in intimating the assignation to her. It is said that the parties made no intimation because they had not a claim of legitim. But if they had not a claim of legitim they had nothing. Mr Alexander left a testament

in which he appointed his wife his executrix and universal legatory. Now this might be misunderstood. It might be thought that everything was given to the widow, and in that case there would be no claim. But, as rightly understood, it is a testament not interfering with the legitim. The claim of the spouses was good, and that was the claim assigned in the post-nuptial contract. Mrs Alexander, I think, was the proper debtor; and the question is whether the assignation was properly intimated to her. It was not intimated by notarial instrument, but that is not surprising for two reasons—(1) because that form of intimation is uncommon; and (2) because the parties to the assignation were in immediate personal contact with Mrs Alexander—she being one of the trustees to whom the assignation by the spouses was made. It is not contended that, being one of the trust assignees, the assignation did not require to be intimated to her. Her being so was not equivalent to intimation. But what follows? She and the other trustees, by a writing on the back of the postnuptial contract, and prior to the 7th of December 1857, intimated their acceptance of the office, and on that they proceeded to discharge their duties; and in particular, in reference to the lease of the theatre, Mrs Alexander concurs in granting that lease; and why? One reason was because she was the executrix of her husband, and another reason was because she was one of the trust assignees. She had nothing to do with the heritable estate of Mr Alexander. She had with the personal estate; and it is a fair inference that, representing the moveable estate as executrix, and also acting under her fiduciary character as a trust assignee she concurred in granting that deed. It is therefore quite impossible to say that the assignation was not intimated. No doubt, if anything technical were required in intimation, difficulties might be raised, because the intimation is not direct. But there is nothing technical in the law of intimation, and there is nothing more satisfactory as an equipollent to notarial intimation than evidence that the assignation was known to the party to whom intimation ought to be made, and we have that here in what Mrs Alexander did.

The other Judges concurred.

Friday, Jan. 19.

FIRST DIVISION.

DUNCAN AND CO. *v.* LUMSDEN.

Expenses — Tender. Circumstances in which an averment of a legal tender held not proved.

Counsel for Pursuers—Mr Clark and Mr J. G. Smith. Agents—Messrs Murdoch, Boyd, & Henderson, W.S.

Counsel for Defender—Mr Patton and Mr Grant. Agent—Mr James Barton, S.S.C.

In this action James Duncan & Company, merchants, Leith, sued James Lumsden, builder, Cumin Place, Grange, Edinburgh, for £70 as the balance of the price of a quantity of timber sold to him in December 1863. The summons was signeted on 29th June, and given in for calling on 11th July 1864. The defence was that the sum sued for and expenses had been tendered before the summons was given in for calling. This was denied by the pursuers, and the Lord Ordinary decerned for the principal sum sued for, and allowed to the defender a proof of the questions of fact contained in his 5th and 6th statements on record, and to the pursuers a conjunct probation.

These statements were as follows:—"5. The defender, on the forenoon of 11th July last, called on the pursuers' agents, Messrs Murdoch, Boyd, & Henderson, and tendered payment of the amount due under said summons, with expenses, as the same should be taxed; but the tender was declined. The defender then waited on his agent, Mr James Barton, who wrote to the pursuers' agents in the following terms:—'Edinburgh, 11th July 1864. Gentlemen,—My client, Mr Lumsden, informs me that he called upon you this forenoon, and tendered you payment of the amount concluded for in a summons at the instance of your clients, Duncan & Company, against him, with expenses, as these should be taxed by the auditor, but that you refused the offer, and claimed certain other expenses, being those for an inhibition upon the summons, to which your clients are not entitled, and the use of which was most oppressive, as your clients are perfectly well aware that Mr Lumsden is a responsible man. Mr Lumsden will be prepared to pay the principal sum and interest here to-morrow at twelve o'clock noon, and the expenses of the summons will also then be paid, if taxation is found to be unnecessary. Of course my client will not be liable for any expenses incurred after his tender to you this forenoon.' The agents for the pursuers replied to the defender's agent as follows:—'120 Constitution Street, Leith, Edinburgh, 12th July 1864.—Duncan & Co. *v.* Lumsden. Dear Sir,—We have your letter of yesterday. It was not easy to ascertain what Mr Lumsden meant to do when he called for us yesterday, but apparently his proposal was to pay principal and interest alone. He distinctly said he would not pay any judicial expenses. We recommended him to go to his agent and make us a tender in the proper way if he wished to settle the case. He was informed that the case was lodged for calling before he came. It will not be convenient for us to send for payment today, but our clients are quite willing to receive payment of principal and interest, if that is not to be disputed, and to take a remit to the auditor to ascertain the amount of the expenses. It is quite evident that you have not been made aware of the circumstances of the case, else you would not hold the opinion that our clients' proceedings have been oppressive. Your client has intentionally, we believe, given our clients a great deal of unnecessary trouble in the matter; and you cannot be surprised at their resorting to any proceedings that appeared likely to secure their debt, when your client himself hinted that they would not get 20s. per pound of their debt. As we presume any charge for this correspondence will be objected to as extrajudicial, we decline to correspond farther on the subject.' To this letter the defender's agent made the following reply:—'Edinburgh, 7 St Andrew Square, 13th July 1864.—Duncan & Co. *v.* Lumsden. Dear Sirs,—I am in receipt of your letter of yesterday's date. Mr Lumsden told me that he distinctly tendered to you payment of the principal and interest claimed by your clients, along with the expenses of the summons, the only thing he refused to pay being the expenses of inhibition, until it was ascertained that these expenses were due by him; and my letter of Monday repeating his offer could leave no doubt as to his meaning. He called here yesterday at twelve o'clock with the money, but as you failed to attend to receive payment, he of course will dispute any claim for expenses after the date of his tender, and also interest on the principal beyond bank rates. If you will send me a state of the debt along with your account, the latter may be adjusted without sending it to the auditor, as you propose; and until I see it, I do not ask it to be taxed. There need be no difficulty in coming to a settlement at once. Mr Lumsden denies that he has intentionally or otherwise caused your clients trouble. He considers he has good reason to resist the present claim; but being averse to enter into litigation, he prefers paying the amount claimed and being rid of your clients."

"6. Notwithstanding the tender made by the defender and his agent of the amount due under said summons, with expenses, the pursuers proceeded with said summons, and lodged the same for calling, and the same was called accordingly."

The questions were tried before the Lord Ordi-