whole conduct of this matter was left to the Messrs Miller with the full confidence that they would do what was right, and that they had power to do what they thought proper. That being so, and the Messrs Miller having thought fit to use the mandate and the confirmation for the purpose of registration, it appears to me that the petitioners, at this distance of time, and after the rights of third parties—creditors as well as shareholders—have become involved, cannot succeed in their present application. I am confirmed in the view that the management of the executry estate was left in the hands of Messrs Miller with full powers by what occurred in regard to the other stocks. Messrs Miller had put the trustees' names on the register in regard to them, and when a new allocation of stock took place, it was accepted by the trustees in their own names, and they were consequently put on the register. In the whole circumstances of the case I think this petition must be refused.

The Court refused the petition with expenses.

Counsel for Petitioners--Dean of Faculty (Fraser) —Pearson. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondents—Kinnear—Balfour—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Friday, July 18.

FIRST DIVISION.

[Lord Craighill, Ordinary.

COWBROUGH *v.* ROBERTSON.

Proof—Reference to Oath—Intrinsic and Extrinsic—Where Debtor deponed that Creditor granted Discharge for a Consideration which was not Part of Original Contract.

The defender in a reference to oath regarding the balance alleged to be due by him on certain accounts incurred during the years 1848 to 1854, in his deposition admitted the constitution of the debt, but stated that the pursuer had agreed to grant him his discharge upon receiving an assignation to certain debts —a consideration which did not form part of the original contract—and that the debts were so assigned and the discharge granted. *Held* (*dub.* Lord President Inglis) that there was no proof that the debt was resting-owing, and that therefore the deposition was negative of the reference.

Examination (*per* Lord Deas) of the authorities upon the question what is intrinsic and what is extrinsic of a reference to oath.

James Cowbrough & Coy., and James Cowbrough the only partner of that firm, who formerly carried on business as grocers in Stirling, sued Robert Robertson, the defender, at one time a hawker there, but at the date of the action resident in America, for the sum of £63, 18s. 4½d., with interest thereon, being the balance said to be due by the defender to the pursuer for goods sold and delivered conform to a series of pass-books commencing 23d October 1848 and ending 13th July 1854. The defender pleaded the Statute 1579, c. 83, and the matter was referred to his oath. The substance of his deposition will be found in the opinion of Lord Deas *infra*.

The Lord Ordinary (Craighill) found the deposition affirmative of the reference, and repelled the defences, adding this note—

"*Note.*—There are two questions which were the subjects of argument. The first was, whether the deposition was affirmative or negative of the reference? and the second was, assuming that the deposition is negative, whether the transactions by which the debt sued for was said to be discharged were intrinsic or extrinsic of the reference. The latter comes to be comparatively immaterial, inasmuch as the Lord Ordinary is of opinion that the deposition is affirmative. But had it been necessary to decide this point, the Lord Ordinary would have acted upon the view that the transactions referred to were intrinsic and not extrinsic of the reference in a case like the present. Two things have here to be established—the constitution and also the subsistence of the debt. The burden of both is upon the pursuer; and if the defender depones that in any way the debt sued for has been discharged, the Lord Ordinary is of opinion that this statement is admissible, and must be accepted.

"The question whether the deposition of the defender is affirmative or negative is a matter of some delicacy. The defender has again and again deponed that the debt sued for was discharged. If the words he uses must be taken as he gave them, the deposition must be regarded as negative; but if the Court is entitled or is bound to review all which the deposition contains, and to determine whether the defender's statement that the debt was discharged is well or ill founded upon the facts disclosed in the deposition (which is the view of the matter upon which the Lord Ordinary has proceeded), the defender's deposition, he thinks, must be taken to be affirmative. In the first place, the defender depones that the debt sued for was not paid or discharged except in one or other of the ways which he has explained. This necessarily introduces the question, whether the ways in which, as he says, the debt was discharged, are, when taken together, such as lead to or warrant the conclusion that the things sworn to by the defender really were such as are represented? If this is not an admissible inquiry, the defender's deposition must be taken to be negative, because he has repeatedly deponed that his debt had at different times and in different ways been discharged; but if, on the contrary, the inquiry is admissible, the result, as the Lord Ordinary thinks, must be that the deposition is affirmative.

"What is first said by the defender is, that there was an agreement between the pursuers and him, by which he gave, and they accepted of, the debts which were due to him as satisfaction of the debt which was due by him to the pursuers. The defender swears that there was an agreement to this effect, but nevertheless he proceeds afterwards to explain that the pursuers acted towards him, and that he treated the pursuers, as if no such agreement had been concluded. What is referred to is, that they demanded, and he paid, a sum of £20, on the condition that this payment should be accepted as in full satisfaction.

"The Lord Ordinary thinks that the last of these statements is irreconcileable with the first. There could hardly have been such an agreement

as is first alleged if what is said with reference to the payment of the £20 is true.

"Again, with regard to the discharge which the defender says was to result from this payment of £20, how can that be taken to be proved when the defender proceeds to state that furniture belonging to him was afterwards delivered to the pursuers that it might be disposed of, and the proceeds, as the Lord Ordinary reads the deposition, credited to the defender? Had the debt of the pursuer been discharged by the transaction relative to the defender's accounts, there could have been, and there would have been, no such payment as that of the £20; and had the condition that this payment was to be taken as payment in full of what was due to the pursuers really formed part of an agreement, the furniture would not have been sent to the pursuers, because there was nothing to which its proceeds could have been applied. The result of all consequently is, that the statements in the deposition are inconsistent with the payment or the discharge of his debt to the pursuers.

"The Lord Ordinary has only to add that the constitution of the debt sued for was not seriously disputed at the debate. The controversy between the parties was confined almost entirely to whether resting-owing was made out by the deposition of the defender."

The defender reclaimed, and argued—The Lord Ordinary's ground of judgment was untenable—[The Court stopped the reclaimer on this point]. In reply to the respondent's argument, there were other cases which showed that the distinction founded on by him was not sound in law. It was enough if the deposition bore that the creditor had agreed to grant the discharge, no matter when or for what consideration, and that the consideration had actually been given—*Hepburn* v. *Hepburn*, Dec. 4, 1806, Hume's Decisions, 417; *Alcock* v. *Easson*, Dec. 20, 1842, 5 D. 386; *Johnstone* v. *Law*, Dec. 9, 1843, 6 D, 201; *Cooper* v. *Marshall*, Nov. 28, 1877, 5 R. 258.

Argued for the respondent—Where the debtor did not depone that the debt had been discharged by a money payment there was this distinction on the authorities—If he stated that it was part of the original contract that the debt might be discharged in some other way than by money, then a statement by him that it had been so discharged was intrinsic of the reference; but if he stated that the debt was discharged for a consideration which had not been agreed to at the time the contract was entered into, his statement was extrinsic. The present case fell within the second of these clauses, and the deposition was consequently affirmative of the reference. [The Lord President referred to Tait on Evidence, 252].

Authorities—*Gordon* v. *Cusigne*, Jan. 3, 1674, M. 13,234; *Wyllie*, Nov. 14, 1765, 5 Br. Sup. 913; *Brown* v. *M'Intyre*, June 26, 1828, 6 S. 1022; *Napier* v. *Graham*, June 24, 1829, 1 Deas and Anderson, 218; *Stuart* v. *Robertson*, Nov. 13, 1852, 15 D. 12; *Balfour* v. *Simpson*, May 16, 1873, 11 Macph. 604; *Thomson* v. *Duncan*, July 10, 1855, 17 D. 1081; Kames' Elucidations, 160; Bell's Comm. i. 334 (351).

At advising—

Lord Deas—The summons in this case concludes for "£63, 18s. 4½d. stg., being the balance arising on account-current between the parties, commencing the 23d day of October 1848 and terminating the 13th day of July 1854, together with the sum of £75, 11s. 3d. stg., being the interest thereon at the rate of 5 per centum per annum to the present date, and with interest on said sums at said rate till payment." The date of the summons is 4th December 1877—twenty-three years and a-half after the date of the last article in the account.

The account-current itself extends backwards over a period of about five years and nine months. The items of charge are for grocery and other shop goods obtained from the pursuers, who then carried on business in Stirling, and the items of credit are for cash payments and various kinds of goods, including tea and coffee—the defender having been then a tea-dealer and hawker in that neighbourhood. It admitted of no dispute that the alleged debt fell under the Statute 1579, c. 83, and consequently the Lord Ordinary found, on 6th February 1878, that "more than three years have elapsed since the account was closed, and that resting-owing can only be proved by the writ or oath of the defender, and upon the pursuer's motion allows him to put in a minute of reference to the oath of the defender."

A reference to oath was accordingly lodged and sustained, and commission granted to the town-clerk of Platville, in the United States of America, where the defender was then and still is resident, to take the oath; and the defender was examined before the commissioner at most unusual length on five successive days. The deposition occupies 16 printed pages, but the substance of it may be shortly stated thus:—The defender deponed that during the currency of the account he carried on business as a provision dealer and hawker, first at Cambusbarron, and afterwards at Alva, both within a few miles of the pursuer's place of business in Stirling; that in July 1854, when the account-current terminates, the deponent was due the pursuer a balance, which he thinks would be about £70; that just about that time the deponent received a letter from his son John in America inviting him to join him; that he took the letter to the pursuer James Cowbrough, who read it, and said it was good encouragement for the deponent to go; that in about a week afterwards, when in the pursuer's shop, the pursuer Mr Cowbrough asked him what he was thinking about going to America, to which the deponent answered that he was not going till he could pay all his debts in Scotland. The deposition then bears—"I said to him—If you will take the accounts that I have against my debtors for the debt that I owe you—and they will bring you about 28s. in the pound—I will go to America if I am spared. When I told him this he stepped back and forward behind the counter for a short time and then he said to me—'I will take the accounts for the debt.' I considered the matter fairly settled then. It took me sometime to write out the accounts and get my debtors to sign them"—That the above was all that was said until the deponent had made all his arrangements for leaving; that it took the deponent about three or four weeks to get the accounts written out and signed. Being asked—"What did you do with these accounts after you had them written out and signed?" he answers—"I gave them to James Cowbrough, every one of them. (Q) When did you deliver them to James Cow-

brough?—(A) I cannot exactly tell, but I gave them to him as soon as I got them ready, every one. I went personally and gave them to him in his shop. (Q) What, if anything, was said at the time you gave him these accounts?—(A) Nothing that I remember of. He accepted the accounts, and if anything was said I do not remember it. (Q) Was there anything other or further said between yourself and Mr Cowbrough concerning these accounts that you have not already stated?—(A) No, nothing. I do not know that anything was ever said about the accounts after he accepted them—not that I remember of. (Q)—Defender being shown exhibits Nos. 17 to 61 inclusive of process—Do you recognise these accounts as the ones you delivered to Cowbrough as you have stated?—(A) Yes sir, I do. I could not deny it, my signature is at the bottom of each of them except No. 26, and they are correct, every one of them—not a single farthing wrong. They are all in my handwriting. (Q) Do you remember the sum-total of all these accounts?—(A) No, but I do know that they amounted to about 28s. in the pound of what I owed Cowbrough as before stated. (Q) When did you first acquaint Mr Cowbrough as to who your debtors were?—(A) When I gave him the accounts. The accounts told him who they were." The deposition further bears that the eight-day clock and other articles specified in the account libelled on, and credited to him as of the value of £9,19s. 9d. before bringing out the balance of £63, 18s. 4½d., were delivered by him to Mr Cowbrough a short time before leaving for America, but whether before or after delivery of the accounts he cannot tell. He further says that as he was quitting business Mr Cowbrough got possession at the same time of his stock-in-trade, but he does not know what was its value.

What I have now narrated and quoted from the oath sufficiently raises the question whether the alleged making-over and acceptance of the shop accounts due to the deponent in satisfaction of the balance sued for is intrinsic of the reference, and consequently may be held to negative resting-owing.

A separate and distinct question, but of a similar kind, arises upon that part of the oath which immediately follows, and which commences by an interrogatory on the part of the pursuer, thus—"(Q) Do you remember of paying Mr Cowbrough any sum of money just before you left Scotland for America, and if so, how much and for what purpose?—(A) Yes sir, I paid him £20. I thought everything was amicably settled between us until three or four days before I left Scotland. He knew the very day that I was to leave for America, for one of his clerks met me on the street and asked me when I was to leave for America, and I told him. Then on the Saturday or Monday following—I do not know which—he sent me a little letter or note claiming the full amount I owed him before his acceptance of the accounts, and receiving this letter put me into great trouble of mind. I went immediately to Stirling, and went to see a lawyer. His name was Davidson, I think; his office was near the pursuer's shop. The lawyer called in Mr Cowbrough; when he came the lawyer and he talked it over. I was present and heard their conversation. Cowbrough demanded the full amount of his account against me before he accepted my accounts. I could not pay it. He then threatened to put me in jail. I said to him—If you are to put me in jail you need not send for an officer; I will go myself. I did not like to be seen going up the streets of Stirling led by an officer. The lawyer said to Cowbrough—I never saw this man till to-day, but I have found him to be one of the honestest men I ever saw. Cowbrough said—We have always found him so. The lawyer said to him—If that's the case you ought not to be hard on him. Cowbrough said in reply to the lawyer—If he will give me £20 I will clear him. Then I made no delay, but went back to Stirling that same afternoon and paid him the £20 over his own counter, every cent of it." I need not read the lengthy, persevering, and fruitless examination by the pursuer's American lawyer which occupies the ten following printed pages, and which elicited no contradiction whatever to either of the portions of the oath which I have already read. Amongst other questions the deponent was asked why, if everything was settled by delivery of the accounts, he paid so large a sum of money on demand? He answered—"Because, sir, I was in a fix. I had no place to apply to to get justice. (Q) How were you in a fix if you did not owe the pursuer anything?—(A) I considered I owed him nothing; but I was in a fix either to pay £20 or go to jail." "I had paid 24 guineas for passage to America for myself and family, 6 guineas for each person, and I must pay him the £20 or lose my passage. I had no chance to defend myself, as the vessel would sail before the Sheriff Court would sit." In answer to a subsequent question by his own agent—"Do you owe the pursuer anything?" his answer is—"Not a farthing, but he owes me." He further explains that when he left Scotland in 1854 he was about 65 years of age, and that at the date of his deposition he was "89 years going in 90." He also specifies his different residences after he went to America, and that for the last 10 years he had lived in Platville, where he was examined. He expresses his belief that the pursuer could have had no difficulty all along in obtaining his address, or that of his son John, who had been a watchmaker and jeweller in Grant County for 24 years, or the address of his son-in-law Charles Robertson, also in America, who had left Scotland along with him and lived in the same places with himself for many years, and whose father and mother continued to live at St Ninians, one mile from Stirling,—that the deponent left a son, Robert, in Stirling, who died there only about two years ago; a sister married to James Colville in Stirling, "both still living there," and other relatives, whom he names, in Bannockburn and the neighbourhood, all or most of them personally known to the pursuer, and any one of whom could have told the pursuer where he the deponent was residing.

I have thus taken the trouble carefully to analyse and condense this oppressively voluminous oath, both because it is necessary for the decision of the case to see precisely what is deponed to, and likewise because of the great general importance of the question involved as to the operation of the Statute 1579, c. 83.

The Lord Ordinary rightly holds the burden to lie on the pursuer of proving by the oath both the constitution and the subsistence of the debt, and indeed he goes the full length of saying that "if the defender depones that in any way the

debt sued for has been discharged, the Lord Ordinary is of opinion that this statement is admissible and must be accepted." The Lord Ordinary therefore would obviously have held the oath negative of the reference in respect of the first settlement deponed to had that settlement stood alone, but he thinks the deponent's credibility as to that settlement is shaken or rather destroyed by what he says as to the second settlement, which, in the Lord Ordinary's opinion, is irreconcileable with what he had deponed to as to the first settlement.

Now, I can see nothing irreconcileable in what is said as to the two settlements. The necessity for the second settlement arose, according to the deponent's narrative, in consequence of the pursuer's attempt to withdraw from and repudiate the first settlement in the critical position in which the deponent then stood, with his business abandoned, his passage-money for America paid, and his ship about to sail. His narrative is throughout extremely natural and truthlike, and if I had to form an opinion on that point I should not be prepared to say that I did not believe him. But the question in such cases is not what we believe, but *quid juratum est?* And accordingly I do not think that the ground on which the Lord Ordinary puts the case was attempted to be supported at the bar.

But what the pursuer mainly, if not wholly, came to rely upon was an alleged distinction (not recognised by the Lord Ordinary) between what a debtor depones had been stipulated at the time of the constitution of the debt and what he depones to as having taken place afterwards, the former being admittedly intrinsic, but the latter being, it was contended, always extrinsic, unless the qualification amounts to payment of the debt in money. This rule, it was maintained, is of universal application, so that although the debtor should depone that the creditor had expressly agreed to accept some other mode of satisfaction and extinction, proposed to him subsequent to the contraction of the debt, and to hold the debt thereby discharged and extinguished, this qualification will still be extrinsic, although it was by the oath alone that the constitution of the debt was established.

The counter proposition admits that where some other mode of extinction than by payment in money is sworn to have been stipulated for at the contraction of the debt, and afterwards acted on by the debtor, the qualification will be intrinsic. But it further affirmed that if the debtor depones that another mode of extinction than payment in money was *ex post facto* distinctly agreed to and accepted by the creditor, that qualification, although not stipulated for when the debt was contracted, will be equally intrinsic as if it had been so. It is upon this last point that the whole legal controversy in the present case turns. The two branches of what I have here called the counter proposition involve my own opinion of the law applicable to the Statute of 1579 so far as it is necessary here to be considered.

In support of the pursuer's proposition one judgment, and one only, was cited, and I know of no other which even in appearance supports it. I refer to the judgment in *Gordon* v. *Cusigne*, January 3, 1674, M. 13,234. There are said to have been occasional *dicta* in favour of the proposition, but the only judicial *dicta* we were referred to consisted of certain passages in the opinions delivered in *Thomson* v. *Duncan*, July 10, 1855, 17 D. 1081. But these when carefully examined will be found to resolve into some expressions contained in the opinion of Lord Murray, who said he thought the alleged agreement, some years after the debt had been contracted, to set the board of the creditor and his family against the debt was "like setting the cow against payment of the horse" and extrinsic. His Lordship, however, stated at the same time that he entertained grave doubts of the soundness of the opinion he had arrived at. None of the other Judges went upon that ground. The Lord Justice-Clerk (Hope) held that all that was deponed to as having passed, both at the contraction of the debt and afterwards, amounted to mere loose conversation, which could not affect the mode of payment or extinction of the debt, and that was substantially the view I had taken as Lord Ordinary. Lords Wood and Cowan thought the fact of a stipulation at the time of contracting the debt for deduction of the son's board, clothing, and school-fees was deponed to explicitly enough, and was consequently intrinsic, and in this, if it be assumed that they were right about the fact, I should not doubt that they were right about the law. And as to the second part of the counter claim, viz., for the board of the pursuer and his family, it is plain that Lords Wood and Cowan did not, any more than the Lord Justice-Clerk, consider what was deponed to sufficiently explicit to amount to an agreement to deduct it from the debt, otherwise they would not have reserved their opinions upon its intrinsic or extrinsic nature, but would have decided the point one way or other, although as it arose in a suit for a loan of £500, and for which a writing (although informal) had been granted, it was not an appropriate case for discussing the Act of 1579, which did not relate to it at all. The material thing, however, is to see that upon any question of that kind, which alone we have here to do with, Lord Wood and Lord Cowan both reserved their opinions.

Lord Wood observed—"It is to be kept in view that the constitution of the loan, as well as its subsistence, is referred to the reclaimer's oath. Both stood upon the oath, and therefore when the respondent appeals to it as establishing the constitution of the debt it is clear that he may not be entitled in every instance to separate the admission of the debt from the statements in the oath with which it is accompanied, and to throw the latter aside as of no avail to the debtor." His Lordship then expresses his opinion in favour of the intrinsic nature of the first part of the claim, which had been stipulated for when the loan was contracted; and then he says—"Not only so, but I am not at all prepared to say that similar statements may not be entitled to the same effect, although they refer to an agreement entered into subsequent to the contraction of the debt, if they are clear and explicit, and of that business character which gives them the form of a definite transaction which might properly take place in reference to the debt admitted to have been then due."

In like manner Lord Cowan said—"I do not say that the view stated by Lord Mackenzie in *Mitchell* v. *Ferner*, quoted from the bar, may not be well founded in certain cases where parties have

come together and settled that the matter is to be dealt with on a certain footing. I say nothing about that, but we have no such state of matters to deal with here."

It must be admitted that Lord Cowan had misapprehended the case of *Mitchell* v. *Ferner* if he thought it was a case of reference to oath. It was a case of judicial admissions, which must always be taken by the other party, if at all, with all their qualifications. Neither the admissions nor their qualifications have the mutually binding nature of an oath of reference. It is plain enough, however, that what Lord Cowan had in his mind was an oath of reference, so that the misapprehension is of no materiality to the present question.

In the case of *Gordon* v. *Cusigne*, which I now return to, the subject of the reference to oath was the price of a horse, which the deponent admitted he had purchased for £24 Scots, but he deponed that he had delivered to the seller a cow, which had been accepted for the price of the horse, and it is said to have been found that if this had been part of the original bargain, or if it had been payment of money *ex post facto*, the qualification would have been intrinsic, "but being the acceptance *ex post facto* of the cow for the same price it was no competent quality, but behoved to be proved."

But it is important to notice that the report in Morrison's Dictionary is a mere short excerpt by the compiler from the report itself by Lord Kames in the Folio Dictionary, vol. ii., p. 299, where his Lordship says—"Here the defence, being satisfaction and extinction, was plainly an intrinsic exception, eliding the prescription of resting-owing, but the ground of the decision has been that the exception ought to have been proponed at litiscontestation, and a relevancy sustained upon it, if which had been it is scarcely to be doubted but the defender would have been allowed the benefit of his own oath to prove his exception."

The observations by the late Mr Tait (who was long Sheriff-Substitute of Edinburgh) in his Treatise upon Evidence, upon this case of *Gordon*, are entitled to respect, but when he gives it as a reason favourable to his own view of the case that the reference by Lord Kames to the rule about protesting at litiscontestation for a qualified oath does not apply to modern practice, I fail to see the relevancy of the remark. That rule, as Lord Kames states in his Elucidations (art. 25), had been enacted by the Act of Sederunt, 7th December 1613, which was in force then, and it does not affect the way in which Lord Kames accounts for the judgment that the Act of Sederunt had ceased to be in force in the time of Mr Tait. It seems probable that Lord Kames refers to this same case of *Gordon* when he says, in the same article of his Elucidations, that extinction of a debt by delivery of goods had not been sustained, "for what good reason I have not discovered."

It is further to be observed that the debt sued for in *Gordon's* case did not fall under the Act 1579, c. 83, but under the Act 1669, c. 9, which introduced the quinquennial prescription as to "all bargains concerning moveables." The words limiting the mode of proving such bargains after the lapse of the quinquennial period are much the same with the words in the Statute of 1579 as to the triennial period, and I do not mean to suggest any difference in the rule of construction between them. But in the particular case of *Gordon* it is important to observe that the ground of judgment stated in the report, that the transaction as to the cow "was in effect a new sale," may be of great explanatory importance, for as both transactions had undergone the quinquennial prescription it may very reasonably have been thought that resting-owing of the price of the cow fell to be established by the oath of the purchaser of the cow, just as resting-owing of the price of the horse fell to be established by the oath of the purchaser of the horse. The latter could not well be held entitled, simply by his own oath, to compensate one prescribed debt by another prescribed debt. A good deal of discussion on the competency of such compensation took place in the modern case of *Fraser* v. *Fraser*, 27th June 1809, F.C., which was ultimately solved by a majority of the Court holding that the later prescribed bill granted by the one party had been granted in part payment of the larger and prior prescribed bill granted by the other party, and consequently fell to be so applied.

This last, however, was a case upon the sexennial prescription (which, as the Lord Justice-Clerk observed in *Alcock's* case, raises other considerations), and upon which, therefore, I do not mean to enter.

Gordon's case, as I have said, was not upon that statute, but my observation upon it is that I am by no means satisfied that it was intended to decide in that case that extinction by other means than payment of a debt falling within the Statute 1669, c. 9, must always be extrinsic in an oath of reference, unless sworn to have been stipulated for at the time of contracting the debt. But if the judgment could be held to import that doctrine as applicable to an oath of reference under either of the two statutes, I should say that the judgment was unsound, and much has since been decided which goes to show it to be so.

The Statute of 1579, c. 83, as has often been observed, is clear and simple in itself. It enacts that "all actions of debt for house-mails, men's ordinaries, servants' fees, and other the like debts that are not founded on written obligations, be pursued within three years, otherwise the creditor shall have nae action except he either prove by writ or by oath of his partie."

Mr Erskine (iii. 7, 18), citing the statute accordingly, lays it down that "after the expiration of the three years it behoves the creditor, if he insists in the terms of the statute, to prove the debt by the debtor's own oath—to refer to him not only the constitution but the subsistence of it; for a debt cannot be said to be proved by the debtor's oath when he depones merely that a debt once existed without also acknowledging that he is still debtor in it;" and he cites the case of *Nicolson*, 22d December 1702, M. 13,211, where the debtor admitted in his oath that he got the goods from Nicolson, but alleged that Home was in partnership with Nicolson, and that he had paid to Home. The bailies found that the oath could not prove the partnership, so that the quality was extrinsic. But in an advocation "The Lords found the quality intrinsic, being without the three years, and therefore assoilzied the defender," which they could only have done on the footing that the oath did not prove the subsistence of the

debt. There are many other cases of the same class with this case of *Nicolson* which it is needless to go into, such as cases in which the debtor deponed merely to his belief that the debt had been paid on his behalf by a third party, and which can only be solved on the same principle, viz., that it was held enough that the oath did not prove the debt to be resting-owing.

I have not found any case subsequent to that of *Gordon* in 1674 which can be said to have decided that a debt falling within the Statute of 1579, and the constitution of which depends entirely upon the oath, cannot be extinguished by an *ex post facto* agreement, sworn to in the oath, to hold the debt satisfied in other ways than by payment in money. On the contrary, I find the intrinsic nature of such a qualification recognised not long after the case of *Gordon*, viz., in the case of *Johnston's Assignee*, November 1687, where the reason given for not holding the debt extinguished by goods to the value got by the cedent is stated in Morrison's report, 13,241, to have been—"Seeing the oath did not bear that the defender gave the cedent goods in satisfaction of the debt due to him (the cedent), it did not prove payment, as it might have done had the quality been so conceived, although the cedent was then bankrupt and in America." It is important to observe that in Harcarse's report of this case, 2 Fol. Dict. p. 301, from which the report in Morrison bears to have been taken, the words are not "as it *might* have done" but "as it *would* have done had the quality been so conceived"—that is to say, had the debtor deponed that the goods had been accepted in satisfaction of the debt.

Advancing now to the case of *Alcock* v. *Easson*, Dec. 20, 1842, 5 D. 386, we find an important step taken towards vindicating the terms and object of the Statute of 1579 by clearing away various misapprehensions in regard to it; establishing its simple and imperative character; that it is not a statute of prescription, but a statute of "no action," unless on condition of proving the subsistence as well as the constitution of the debt by the writ or oath of the debtor; and that it is not necessary to aver in defence either payment or extinction of the debt, it being sufficient to plead the statute and leave the creditor to overcome it if he can by the statutory evidence on both branches of the question referred.

The next case in the order of dates after *Alcock's* case is that of *Johnstone* v. *Law*, December 9, 1843, 6 D. 201—a case of extreme importance, because it followed within a year after the case of *Alcock*, and was decided in the same Division of the Court—three of the same Judges (including the Lord Justice-Clerk (Hope), who had led in the case of *Alcock*) being present and concurring in the unanimous judgment.

The action in *Law's* case had been brought before the Sheriff by *Johnston*, as trustee on the sequestrated estate of Cameron, for the price of shop goods sold by Cameron to Law, and came into this Court by advocation, as appears from the report of it at a previous stage, July 15, 1843, 5 D. 1372. An oath of reference emitted at that stage was held not to have satisfactorily exhausted the cause, and a new reference to oath was allowed, whether the debt sued for was not resting-owing under deduction of a sum of £9 found to be due by the previous interlocutor. In his second oath Law admitted, as he had previously done, the constitution of the debt, and that he had paid nothing towards it except two sums of £4 and £5, making up the deduction of £9. From the two oaths taken together it appeared that Law's son was a clerk or salesman in the employment of Cameron, at the wages of £1 or a guinea a-week, and the way in which Law deponed that the balance of the debt had been settled was by an agreement made between his son and Cameron, in Law's presence, that Cameron should retain that balance out of the son's wages. The oath bore that "Cameron was well pleased that it should be so settled. The deponent did not see the balance scored out of the books; but Cameron's servant came to the room where the deponent and Cameron were sitting, and said that the book was engaged, and then Cameron promised on his honour to see the balance scored out immediately." "And being interrogated whether he is owing Cameron anything?—Depones that he is not owing him anything after the settlement which took place as above deponed to."

Cameron sometime afterwards absconded, and whether he realised payment or not out of the son's wages does not appear. That point seems not to have been regarded as of any relevancy, and no inquiry was desiderated or made in regard to it. There had been nothing suspensive in the agreement. The balance was agreed to be immediately scored out, and the extinction of the debt was obviously held to have been immediate. It appears to me to be impossible to explain this judgment on any other principle than that an explicit *ex post facto* agreement to hold a debt of the kind now in question discharged or extinguished, for any distinct reason whatsoever, is intrinsic of the oath of reference, and consequently that the judgment is a direct authority in the present case.

In the case of *Mackay* v. *Ure*, March 7, 1849, 11 D. 982, the defender Mr Ure deponed that he had not personally paid the workman's account sued for, but that he had furnished his factor with money to pay all such accounts, and he therefore believed it to have been paid. Such a case, as I have already observed, is one of a somewhat different class from the present, but I notice it specially because it proceeds upon *Alcock* v. *Easson*, and the opinions delivered in it bring out very distinctly that the ground of judgment was simply of a negative kind, viz., that resting-owing had not been proved by the oath. The Lord Ordinary (Wood) had refused to sustain a reference to the oath of the factor, and assoilzied the defender. At advising, the Lord Justice-Clerk (Hope) observed—"I am quite satisfied that the interlocutor of the Lord Ordinary is right. After three years a party can prove a debt only by the writ or oath of the debtor. It is not necessary that the statement in the oath should be such as would be a good defence if proved within the three years. The pursuer must prove that the debt is still due, and that the defender acknowledges it to be unpaid. It is now proposed to refer to the factor's oath to prove non-payment of the debt; that might have been a proper course within the three years, for then the debtor would have been bound to produce a receipt; but even that is questionable." Lord Medwyn said—"I concur. We can only look to the oath to see if it proves the existence of the debt. On looking at it I see

the defender believes the debt to have been paid, and provided the means of payment. I agree with the Lord Ordinary." Lord Cockburn said —"I am of the same opinion. The pursuer was bound to prove resting-owing."

The next case in the order of dates is *Cullen* v. *Smeal*, decided by the whole Court, July 12, 1853, 15 D. 868. That case carried out to its legitimate conclusion the principle of literal construction of the Statute of 1579 established by the case of *Alcock*. It had been supposed that although the statute allowed no action after the lapse of three years, unless upon proof by the writ or oath of the debtor, this could not have been intended to apply to such a case as there occurred, where the debtor who had contracted the debt had died within the three years, so that his oath could not be obtained.

The unanimous decision, however, was that the rule of the statute was absolute and universal—that there could be no action except on condition of proving by writ or oath of the debtor the subsistence as well as the constitution of the debt—that this rule admitted of no exception whatsoever; and accordingly the judgment bore—"In pursuance of the opinions of the whole Judges, Find that this case falls under the Statute 1579, c. 83, and that the pursuer must, in terms of that statute, prove the constitution and subsistence of the debt by the writ or oath of the party."

Elaborate opinions were delivered in that case, particularly by the Lord Justice-Clerk (Hope) and Lord Rutherfurd. The whole history of what had followed upon the statute was gone over, and the question was boldly re-opened by the pursuer, whether under the words "except he prove by writ or oath of his party" it was incumbent on the creditor thereby to prove the subsistence as well as the constitution of the debt. This appears distinctly from the opinion of Lord Rutherfurd, who observed—"The pursuer contended that under these words it would be sufficient even after the lapse of the three years to prove by writ or oath the constitution of the debt, and that it was not required of him to prove that it was resting-owing. Why the word 'prove' should be so limited as to embrace one part only of the case and not another was not made to appear. The statute plainly implies the whole case, and does not restrict the proof to one part of it only.

To apprehend the full effect of the cases of *Alcock* v. *Easson* and *Cullen* v. *Smeal* upon such a case as the present it is only necessary to read these two cases successively, *ad longum*, in connection with each other, and having done so to ask one's-self the question, are they consistent with holding that the creditor has proved resting-owing by an oath which bears that the creditor expressly agreed, at a time and in a manner specified, to hold the debt satisfied and extinguished. I am totally unable to come to that conclusion.

I do not resume the terms of the oath. I think there was a concluded agreement to accept the larger accounts due to the deponent by his customers, and delivered to the pursuer in satisfaction and extinction of the smaller amount due to the pursuer. I think such an agreement was legally sufficient to satisfy and extinguish the debt.

I further think that there was a subsequent agreement into which the deponent, being, as he says, "in a fix," was constrained to enter to pay £20, which was accepted in full of the debt, and that such an agreement was in like manner legally sufficient to satisfy and extinguish the debt. It is of no consequence whether we look to the first agreement or the second, or to both. The oath in either view does not prove the debt to be resting-owing, and that is enough to warrant recalling the Lord Ordinary's interlocutor and finding the oath negative of the reference.

It may be satisfactory, however, and prevent misapprehension, that I should summarise and explain my views of the general law applicable to oaths of reference under the statute. I hold—

1st, That if the oath bear that some other mode of satisfaction or extinction than payment in money was stipulated or bargained for at the contraction of the debt, that other mode, if the debtor swears it was acted on, will be a competent and intrinsic quality of the oath, although not made the subject of subsequent agreement.

2d, That if the debtor depones to an express subsequent agreement to hold the debt satisfied or extinguished by some other specific mode than payment in money, that other mode will be a competent and intrinsic quality of the oath, although not stipulated for when the debt was contracted.

3d, That an express subsequent agreement to forgive the debt, in whole or in part, deponed to by the debtor, will in like manner be intrinsic, and receive effect accordingly, because, so far as thus deponed to, the oath cannot be said to be resting-owing.

If I am asked how these views are reconcileable with holding that an allegation in the oath that the debt has been compensated is held, in the general case, extrinsic, my answer is that compensation, if not sworn to have been sanctioned and agreed to by the creditor, will be extrinsic, because compensation usually involves matter of law, and although the deponent may establish any relevant matter of fact by his own oath, he cannot thereby establish matter of law.

I have to apologise for the length of this opinion, but there is no statute that affects every-day transactions more than the Statute of 1579, and it is desirable that there should be as little doubt or misapprehension about it as possible.

Lord Mure and Lord Shand concurred.

Lord President—I feel great difficulty, but having regard to the opinions already delivered, I am not prepared to dissent from the judgment proposed.

The Court therefore pronounced an interlocutor recalling the Lord Ordinary's interlocutor, and finding the defender's deposition negative of the reference, and therefore assoilzieing him.

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