COURT OF SESSION.

Friday, November 19.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THOMSON'S EXECUTOR v. THOMSON.

Proof—Reference to Oath — Intrinsic or Extrinsic.

In an action by the executor-dative of a deceased for payment of a prescribed debt the pursuer referred the constitution and subsistence of the debt to the oath of the defender. The latter admitted the constitution of the debt, but deponed that it had been discharged partly by cash, partly by cheque, and partly by goods delivered to the deceased and accepted by her in place of payment by cash, in terms of an express agreement between them made at the time the debt was contracted. *Held* that the oath was negative of the reference, and defender *assoilzied.*

William Thomson, executor-dative of the late Miss Agnes Brown Thomson, dressmaker, Glasgow, *pursuer*, sued George W. Thomson, Mount Florida, Glasgow, *defender*, for payment of £102, 13s. 4d., as the balance of an account for goods furnished by the deceased to the defender prior to October 1914.

The defender pleaded—"(1) The alleged account of £113, 13s. 4d., being prescribed, its constitution and resting-owing can only be proved by the writ or oath of the defender. (3) The account sued for being paid or otherwise discharged, the defender should be assoilzied, with costs."

The Case was referred to the defender's oath, and he was examined on 6th October 1919. He admitted the constitution of the debt to the extent of £100, 13s, 4d., but denied that any part of it was resting-owing. He deponed that it was paid partly by cash, partly by cheque, and partly by contra account, under an express agreement between the deceased Miss Thomson and himself, made when he started business as a butcher in 1909, the date when the debt was contracted; that the agreement was that she would accept butcher meat in payment of the balance due to her in place of payment by cash, and that the agreement was acted upon by both parties to it.

On 13th November 1919 the Sheriff-Substitute (FYFE) found the deposition negative of the reference; found that the defender's indebtedness to the late Agnes Brown Thomson was in part paid in cash and in part extinguished by contra account; and therefore assoilzied the defender.

The pursuer appealed to the Sheriff (A. O. M. MACKENZIE), who on 27th January 1920 recalled his Substitute's interlocutor and found (1) that to the extent of £53 the debt had been paid, and to that extent the oath was negative of the reference, (2) that to the extent of £2 the debt claimed was erroneously overstated, and (3) "that as regards the balance of the pursuer's claim, amounting to £47, 13s. 4d., the constitution and resting-owing thereof is proved by the defender's oath." He therefore decerned against the defender for payment of £47 13s. 4d.

He added the following *note*:—"It was not disputed by the appellant that to the extent of £53 alleged by the defender to have been paid by cheques his oath was negative of the reference, but as regards the balance of £47, 13s. 4d. the contrary was maintained. It was not disputed, I think, that where the resting-owing of a prescribed account has been referred to the defender's oath, and the defender depones that the account sued for has been extinguished by a counter account incurred by the pursuer to him, and which the pursuer agreed should be set off against the account due to him, the oath would be negative of the reference. But the peculiarity in the present case is that the counter account by which the defender seeks to compensate *pro tanto* the account sued for is, like the account sued for, prescribed, and it is contended for the pursuer and appellant that it is not sufficient for the defender to prove that at the inception of the counter account it was agreed between him and the deceased Miss Thomson that the price of the butcher-meat supplied by him to her should be set *pro tanto* against the account due to her by him, but that he must also prove *habili modo*, that is, by the writ or oath of the debtor, the amount of the counter account which is to be set off against the account sued for. In my opinion this contention is well founded. It is settled law that claims of compensation in an oath of reference of a claim of debt are extrinsic unless the mutual claims of parties have been applied to each other by some regular settlement or transaction between them—*Hepburn* v. *Hepburn*, Hume's Decisions, 417. In the present case the defender depones that when he started business in 1909 an agreement was concluded between him and the deceased Miss Thomson that his account for butcher-meat should be set against her account for dressmaking goods, but I cannot find in the deposition any statement that he and Miss Thomson ever settled between them the amount of his counter account which was to be so charged. All he says in his deposition is that the deceased Miss Thomson saw the account from time to time and that she last saw it in 1915, but he nowhere states that she accepted it as correct. Now as his account is prescribed, I do not think he is entitled simply by his own oath to prove its amount. He can only prove it, in my opinion, as I have already said, by the writ or oath of his debtor—*Cowbrough & Company*, 6 R. *per* Lord Deas at page 1309—and I am accordingly of opinion that the oath in this case must be regarded as affirmative of the reference *quoad* the balance with which I am now dealing, in respect that the defender admits the constitution and resting-owing of the debt sued for and seeks to maintain that it has been extinguished by his counter account, and has failed to prove that the deceased Miss Thomson ever accepted that counter account as

correct or agreed that the amount thereof should be set against the debt due to her."

The defender appealed, and argued—The deposition on oath bears (1) that there was an express agreement between the parties at the time the debt was contracted that it should be discharged by supplies of butcher-meat, and (2) that the agreement was carried out. The specific mode of settlement thus deponed to was intrinsic to the oath. The following authorities were referred to—Dickson on Evidence, secs. 1513, 1521, 1524, 1525, 1526; *Forbes* v. *Forbes' Creditors*, M. 12,464; *Mitchell* v. *Ferrier*, 5 D. 169; *Cooper* v. *Marshall*, November 28, 1877, 5 R. 258, 15 S.L.R. 161; *Cowbrough* v. *Robertson*, July 18, 1879, 6 R. 1301, 16 S.L.R. 777.

Argued for the respondent—The oath on reference bears that the agreement was merely to keep contra accounts for supplies of butcher-meat and drapery. Such accounts would require to be applied to each other by a subsequent settlement between the parties. No such settlement was ever effected. The oath therefore was affirmative of the reference—Dickson on Evidence, secs. 1504, 1614, 1618; *Hepburn* v. *Hepburn*, Hume 417; *Millar* v. *Baird*, Hume 480; *Hunter* v. *Geddes*, January 29, 1835, 13 S. 369; *Grant* v. *Wishart*, January 17, 1845, 7 D. 274; *Thiem's Trustees* v. *Collie*, March 14, 1889, 1 F. 764, 36 S.L.R. 557; *Chrystal* v. *Chrystal*, January 11, 1900, 2 F. 373, 37 S.L.R. 278.

LORD PRESIDENT—In this case reference was made to the oath of the debtor with regard to the constitution and resting-owing of the debt sued for. The defender admitted on record the constitution of the debt and adhered to that admission in his oath. It is with that part of the oath which negatives the resting-owing of the debt that the question in the case is concerned.

There is, I think, no doubt that it is intrinsic to such an oath to prove that antecedently to the contraction of the debt the debtor and creditor made an agreement that the debt should be discharged by some *modus solutionis* legal by the law of Scotland but other than payment in cash; and further, that it is also intrinsic to the oath to prove with regard to such an agreement that the *modus solutionis* agreed to was acted on and carried out. The performance of the agreement proved by the oath as a matter of fact operates the discharge.

In the present case there are two passages in the oath which require particular attention. The first is as follows—"The agreement that my account for butcher-meat should be put against the deceased's account for dressmaking goods was made at the beginning when I started business in 1909. (Q) That you would supply her with butcher-meat and she would supply you with drapery and dressmaking goods?—(A) When I started the business at first I got the offer of the shop and I had not the money to start it, and I was owing Miss Thomson money in respect of a drapery account, and she said she would advance me £25, for which I granted an I O U, and which I paid back in one month, and she said she would take butcher-meat for the rest that I was owing her, as far as it would go, and she got butcher-meat for herself, and for other people sometimes too. My shop was in Cathcart Road. (Q) And did she send for butcher-meat on all the days mentioned in your account?—(A) She was over mostly two or three times a week. She then got the butcher-meat herself, and examined my ledger to see how the account was going on. I now produce my ledger. The first day I opened was the first day the deceased got meat." The second passage is as follows—"My claim has never been paid; it is a contra account. I never met the deceased and exchanged books; I did not need to, because she examined my books and knew how her account was going. I could not tell when she examined the book for the last time. She examined the book mostly once or twice a week. (Q) Up till 1915?—(A) Yes, she used to come over when I was having a cup of tea, and she had a cup of tea along with me in the shop, and went into the office of the shop and examined the book while she was drinking her tea. She never examined my book after I shut my shop. That is to say, from 1915 to 1918 she never saw my account against her." It seems to me that the fair construction of these (which are the relevant) parts of the oath, is (1) that these two people, who were cousins, agreed at the time that the debt was contracted that, at anyrate *pro tanto*, the debt should be discharged by a particular *modus* of payment, namely, by way of supplies of butcher-meat instead of by way of payment in cash; and (2) that in point of fact that agreement was carried out to the extent to which supplies of butcher-meat are deponed to in the oath and vouched by the deponent's ledger. It is not suggested that the prices charged and appearing in the ledger were other than appropriate to the market conditions of the day. It seems to me that there is nothing extrinsic to the oath involved in holding that the *modus solutionis* agreed upon by the parties was actually performed to the extent to which the deponent, supported by his ledger, speaks.

It was argued to us by Mr Gibson—and he said everything that could be said for his client's case—that the true construction of this oath is not that the parties antecedently agreed on a particular *modus solutionis* by which the defender should supply butcher-meat to his cousin, and the price should be imputed *pro tanto* to the debt, but that the parties merely agreed (on Miss Thomson's part), to provide dressmaking and drapery supplies, and (on the defender's part) to provide supplies of butcher-meat, the two sets of supplies being to be treated as two contra accounts, the ultimate settlement of which should abide by such discharges by way of compensation or by payment *hinc inde* as the parties might subsequently make between them. Now if that were the true construction of the oath, I think the argument which Mr Gibson addressed to us would have to be

sustained, because there would be no antecedently agreed *modus solutionis*. On the contrary, there would be merely an antecedent agreement as to how the parties were mutually to conduct two distinct sets of commercial transactions; and the discharge of those transactions would have to await settlement by compensation either pled or agreed to, or by some balancing of accounts between them, or by some other transaction having the effect of a legal discharge, and appropriate to the situation recorded in the two sets of contra accounts. But I am unable to give the oath the construction contended for, and think it bears the simpler and more natural construction which I have put upon it above. One other point requires to be noticed. It appeared at one stage as if we might have to consider the question whether the deposition involved an attempt to establish as at its date the resting-owing by Miss Thomson of the defender's contra account for butcher-meat, although owing to lapse of time that contra account was then prescribed. Plainly, however, the circumstances in this case involve no question of the kind.

In these circumstances it appears to me that we are compelled to revert to the interlocutor of the Sheriff-Substitute, which has the effect of assoilzieing the defender.

LORD MACKENZIE—I am of the same opinion, and I agree with the view of the Sheriff-Substitute, which is to the effect that the oath is negative of the reference. My view depends on a construction of what the deponent says. The particular passage is that in which he depones—"The agreement that my account for butcher-meat should be put against the deceased's account for dressmaking goods was made at the beginning when I started business in 1909." I think that, looking to the evidence, the fair construction to put upon that passage is that the agreement was that butcher-meat should be put against the dressmaking goods. The argument which was forcibly stated by Mr Gibson that the whole weight was to be put upon the form of the account as a contra account I am unable to accept. If the bargain really meant what he contended for, then it simply means this, that there was in truth no bargain at all, but merely a statement by the one party to the other. "Of course, whatever you run up against me will be put against my account which I am running up against you." That seems to me not to be the true nature of their bargain at all. Of course, if that had been the true relation of parties the observations of the Sheriff would have been applicable. It is because I construe the passage I have read to a different effect that I think there is no legal difficulty in the case when once that view is taken. The other passages in the evidence are to the effect that the agreement was acted upon and carried out, and the amount sufficiently vouched. The matter having been referred to the oath of the deponent, he swears the amount is correct.

LORD SKERRINGTON—I agree with your Lordships in regard to the interpretation of the defender's oath of reference. If that interpretation is right, then the present case falls within the first of the three categories mentioned by Lord Deas in his opinion in the case of *Cowbrough & Company* v. *Robertson*, 6 R. 1301, at p. 1312.

I respectfully think that Lord Deas' summary of the law is consistent both with the earlier authorities and with legal principle. It follows that the judgment of the Sheriff-Substitute ought to be restored.

LORD CULLEN—As I construe the deposition of the defender, the agreement which the parties made as *pars contractus* was not a mere agreement that there should be two accounts, and that these should be susceptible of compensation according to the common law rule—which is in effect the construction maintained by the pursuer—but was an agreement for a mode of solution of the debt sued on alternative to payment in money. On that footing I think the defender's statement that he followed such alternative mode of solution, and made deliveries of goods to the deceased and thereby extinguished *pro tanto* his debt, is necessarily intrinsic to the oath. I accordingly concur in the judgment which your Lordships propose.

The Court sustained the appeal, recalled the interlocutor of the Sheriff dated 27th January 1920, affirmed the interlocutor of the Sheriff-Substitute dated 13th November 1919, and of new assoilzied the defender.

Counsel for Pursuer and Respondent—Morton, K.C.—Gibson. Agents—Hamilton & Burnet Mackie, S.S.C.

Counsel for Defender and Appellant—Mackay, K.C.—J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.

Wednesday, December 8.

SECOND DIVISION.

BISHOP *v.* NICOL'S TRUSTEES.

Partnership — Construction — Goodwill — "Profits of the Business"—Deduction of Excess Profits Duty—Finance (No. 2) Act 1915 (5 *and* 6 *Geo. V, cap.* 89), *sec.* 38.

By a contract of copartnery between three partners made in 1912 and renewed in 1917 an option was given to the surviving partners, in the event of the death of one of their number, to pay out his interest and continue the partnership. This interest included a sum in name of goodwill which was defined as a sum equal to the deceasor's proportion of the profits of the business for the four preceding financial years, as such profits should be ascertained from the profit and loss accounts for the eight preceding half years of the copartnery. One of the partners having died and the surviving partners having decided to exercise this option, a question arose as