

is clearly established that the appellant Bryce agreed, for a special family purpose, to pay £45 out of the legacy of £145 left by his father to the respondent Mrs Kirkwood in life, and her children in fee. A deed of discharge, acknowledging receipt of this sum, was signed by Mrs Kirkwood, her husband, and her children, and handed to the appellant, of course on the footing of the sum of £45 being paid in return. It is clearly established that only £15 out of the £45 were paid, and therefore £30 remain due, unless it be established by the appellant that some equivalent to this sum was taken, or in some way or other the right to receive it was effectually discharged. What is said is, that Mrs Kirkwood was owing an old debt of £10 to the appellant; another sum of £10 for law expenses to Mr Adam Smith, writer in Falkirk; and a further sum of £10 or £12 to her brother-in-law, Joseph Gartshore; and that by arrangement this sum of £30 was retained by the appellant to answer these sums. Nothing short of the clearest proof would suffice to establish this case, which is essentially at variance with the agreement on the footing of which the deed was presumptively signed, that the whole £45 were to be paid down in cash. It would be necessary also that the arrangement should be proved to have been engaged in with the assent of the fiars, to whom the sum of £30 belonged, and not to Mrs Kirkwood, who had no right to dispose of it. Giving effect to the evidence which has been led on both sides, I am of opinion that the appellant has failed to make good the case which it was incumbent on him to establish, having neither proved by sufficient evidence the alleged debts, nor the alleged arrangement to pay them. The sum of £30 must be therefore held to remain due by him. The pursuer is not entitled to recover the capital sum as it is not her property, but that of the fiars. But she is entitled to payment of the interest of this sum, as well as of the balance of £100 of the legacy, from the period when interest was last paid. And to this extent she is entitled to decree under the conclusions of her amended summons.

The LORD PRESIDENT—I concur. My only difficulty was about the record. We are in no way contravening the rule that it is incompetent to contradict a probative deed by parole evidence.

The Court decreed in terms of the alternative conclusion of the summons, and found the defender liable in expenses.

Agents for Pursuer—J. & A. Peddie, W.S.

Agents for Defender—Waddell & M'Intosh, W.S.

Friday, March 17.

SPECIAL CASE FOR SIR JAMES LUMSDEN  
AND OTHERS, (WILSON'S TRUSTEES),  
ETC.

*Trust—Realisation of Funds—Fiar and Liferenter—Business Profits.* Circumstances in which it was held that the liferentices were entitled to the full business profits of a portion of the residue of the trust-estate, which the trustees had, under a power conferred on them, left invested in a business concern, although one of the clauses of the agreement of copartnership

required that 7 per cent interest should be paid upon all sums at the credit of partners before any division of profits took place; and in which it was held *contra* that the fiars were not entitled to have the balance of profit over and above the 7 per cent invested as capital of the estate.

This was a Special Case, in which Sir James Lumsden and others, trustees of Hugh Wilson, engraver in Glasgow, were the parties of the first part; Margaret Kay Wilson and Mrs Janet Wilson or Haig, two of his daughters, parties of the second part; and the said trustees as tutors and curators of the children of Mrs Eliza Wilson or M'Leod, his third and remaining daughter, parties of the third part.

Mr Wilson, the truster, died on 27th June 1869. His trust-disposition and settlement, dated 2d March 1858, contained the following provision for the disposal of the residue of his estate:—"In the third place, and with regard to the residue of my said means and estate, I direct and appoint my said trustees to hold and apply, pay and convey the same to and for behoof of my three daughters, Margaret Kay Wilson, Mrs Janet Sarah Wilson or Haig, spouse of the Reverend Thomas Haig, presently of Beauharnois, Canada, and Mrs Eliza Wilson or M'Leod, spouse of Donald M'Leod, presently in Melbourne, equally among them, share and share alike, in life, for their respective life-uses and enjoyment thereof alienably, during all the days and years of their lives after my decease, and to and for behoof of their respective children in fee, the children of each daughter succeeding, equally among them, share and share alike, to the share of the said residue life-entailed by their respective parent, payable and divisible, the said residue, to and among the said children upon their respectively attaining the age of twenty-one after the decease of their respective mothers."

Mr Wilson had long been, and was up to the time of his death, in business as an engraver in Glasgow. At the time he executed this trust-disposition he was carrying on his business alone. On 2d April 1867, while he was still alone in the business, he executed a codicil to the above mentioned trust-disposition, which contained the following clause:—"I empower my said trustees to carry on my business, or to dispose of or wind up the same, as to them may seem most advisable; and with the view of facilitating a sale of my business on the most advantageous terms for the estate, if my trustees should consider a sale thereof to be judicious, I empower my trustees to lend to the purchaser such sum out of the proceeds of my estate, for such period and on such terms as they may consider reasonable."

Shortly after executing this codicil Mr Wilson took Mr Andrew Woodrow, his manager, into partnership. The deed of copartnership (which was to last for five years from 1st July 1867) contained the following clause:—"In the event of the death of the first party (Mr Wilson) during the currency of the partnership, the second party (Mr Woodrow) shall, if required by the trustees or representatives of the first party, continue to carry on the business, for behoof of himself and the representatives of the first party, till the termination of the financial year then current, upon the terms with respect to division of profit and loss before written, and thereafter till the termination of the said period of five years, during which latter period the trustees or

representatives of the first party and the second party shall be interested in the business equally for profit and loss; but it shall be in the power of the representatives of the first party to withdraw at any time from all connection with the business on giving three months' prior notice in writing to the second party; and in the event of their so withdrawing, the whole property, business, stock-in-trade, and assets shall devolve upon and vest in the second party, who shall pay out the first party's interest therein, as the same shall have been ascertained by the immediately preceding balance, by equal instalments at twelve, eighteen, and twenty-four months from the date of such balance, with interest at 5 per cent per annum on each instalment, and for which instalments the second party shall grant bills." The arrangement between the partners was that Mr Wilson was to contribute two-thirds, and Mr Woodrow one-third of the capital, and that they were to share the profit and loss in these proportions. Interest was first to be allowed at the rate of 7 per cent upon all sums standing at the credit of the partners before the balance of profit and loss was struck. A balance was to be struck every year on 30th June during the subsistence of the copartnership. The amount of Mr Wilson's capital in the business at the time of his death was £3333, 13s. 4d., on which interest was due by the copartnership at the rate of 7 per cent.

The business having hitherto been prosperous the trustees, believing that it was for the advantage of the beneficiaries under the settlement that they should remain connected with it, resolved to hold, for a time at least, an interest therein, under the ninth article of the contract of copartnership above quoted. The business, under the same firm of H. Wilson & Company, engravers, Glasgow, has accordingly, since the death of the said Hugh Wilson, been carried on by the said Alexander Woodrow, for behoof of himself and the representatives of the said Hugh Wilson. The profits accrued for the year ended 30th June 1870, being the only financial year completed since Mr Wilson's death, amount to the sum of £3671, 5s. 7d. (exclusive of the said 7 per cent interest), of which the sum of £1835, 12s. 9d. belongs to the estate and representatives of Mr Wilson. The share of profits falling to the estate is greatly in excess of any return which could be derived from the capital by investing it in any other way sanctioned by the settlement. The profits and 7 per cent. interest which accrued to the late Mr Wilson as at 30th June 1869, being the first balance after his death, have been treated as capital. With regard to the profits and 7 per cent. interest accruing to Mr Wilson's trust-estate subsequent to the said 30th June 1869, the liferentices claim that the same shall be wholly dealt with and paid to them as income falling under their rights of liferent. On the other hand, it is contended, on behalf of the fiars, that the right of the liferentices in the capital embarked in the business is limited to interest at the legal rate of 5 per cent thereon, or, at all events, to the said 7 per cent. interest, and that the profits should be dealt with as capital, only the interest thereof, upon investment in the usual securities, belonging to the liferentices.

The questions on which the opinion of the Court was requested, were:—

"Do the business profits and 7 per cent. interest accruing since 30th June 1869 to Mr Wilson's trust-estate form part of the income or liferent

of the said estate divisible amongst the liferentices?"

or,

"Does any portion thereof—and if so, what portion—form part of the capital or fee of the estate, and fall to be treated as such?"

SOLICITOR-GENERAL and INNES for the trustees and liferentices, the parties of the first and second part.

WATSON and R. V. CAMPBELL for the fiars, the parties of the third part.

Reference was made to *Weddel*, January 21, 1812, F. C.; *Cochrane v. Black*, February 1, 1855, 17 D. 322; and *Laird v. Laird*, June 26, 1855, 17 D. 984.

The Court held that the question was to be determined according to the testator's intention, as evidenced by the terms of the trust-deed and deed of copartnership, and that his meaning clearly was, that the profits and interest should fall to the liferentices.

Agents for the First and Second Parties—Maconochie & Hare, W.S.

Agent for the Third Parties—T. J. Gordon, W.S.

Friday, March 17.

MACKAY v. MONRO.

*Proof—Oath on Reference—Intrinsic Quality.* Where two parties, who were related to one another, had been in the habit of accommodating each other with advances to a small extent as occasion required, but without taking any acknowledgments or documents of debt, and where they were accustomed to have periodical settlements when the balance due was paid over by the debtor,—on the death of one of them his executor sued the other for the amount of a specific one of these advances. The constitution but not the resting owing was referred to his oath. In his deposition he admitted the constitution, but qualified it with the statement that the debt was not resting owing, he having subsequently made an advance, in the ordinary course of transactions between the parties, of a larger amount than the sum sued for, and they having twice, subsequently to this last advance, had a settlement of accounts in their ordinary way. *Held*, that the reference was truly as to the resting owing, notwithstanding the terms of the minute; and that the qualification in the deposition was intrinsic, it not being a mere statement of a counter-claim, but a statement and explanation of a settlement of accounts, according to the natural way, looking to the cause of dealing of the parties, and that the oath was therefore negative of the reference.

This was an appeal from the Sheriff-court of Inverness in an action in which Donald Mackay, as executor of the deceased John Mackay, sued Duncan Munro for the sum of £30, "being the amount of cash lent by the deceased John Mackay to the defender on or about the 18th day of February 1865."

The defender's minute of defence was as follows—"The defender stated his grounds of defence to be a denial of resting-owing of the sum said to have been lent. He admits having received in loan the £30 from the deceased, but repaid the money to him before his death."

The Sheriff-Substitute (FRASER) allowed the