In regard to the third point, I was at first inclined to think there was something in it, but on looking more closely into it, it is clear that the bills were not bills in the hands of the National Bank, to which that provision applied, but were in the hands of Mr Gourlay, which he would have to collect.

On these three matters, for the reasons I have now shortly stated, I am of opinion that nothing has been put before us to induce us to alter the Lord Ordinary's interlocutor.

Lord Craighill—I listened with great interest and attention to the argument from the bar, but at the end of that argument I confess I was in no manner of doubt on any of the three questions submitted to us, and I entirely concur in the views on which your Lordship proposes to base the judgment of the Court.

Lord Rutherfurd Clark concurred.

Lord Young was absent.

The Lords of new assoilzied the defenders.

Counsel for Pursuer (Appellant)—Trayner—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Counsel for Defenders (Respondents)—Robertson—Pearson. Agents—Dove & Lockhart, S.S.C.

Tuesday, February 7.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

EWING *v.* EWING'S TRUSTEES.

Succession—Payment—Interest—Instalments.

A contract of copartnery provided that in the event of the death of any of the partners the surviving and solvent partners who should continue the business should pay out to the representatives of the deceased the amount at his credit in the books of the firm by ten biennial instalments, "with interest thereon at the rate of five per cent. per annum from the date of the balance." *Held* (*diss.* Lord Craighill, and *rev.* Lord Lee) that at each payment interest must be paid upon the whole balance of the debt then remaining unpaid, and not upon the instalment.

The firm of John Orr Ewing & Company carried on business in Glasgow as Turkey-red dyers and manufacturers under a contract of copartnery dated 15th and 16th January 1878. By the 16th article of this copartnery it was provided that "In the event of the death, bankruptcy, or declared insolvency of any of the partners during the subsistence of the copartnership, the surviving or solvent actual partners at the time shall be allowed the period of three months from the date of such death, bankruptcy, or insolvency to consider and determine whether they shall continue to carry on the business and pay out the share and interest of such deceasing bankrupt or insolvent partner, as the case may be, or whether the business shall be wound up, which option shall be declared at the end of the said period of three months, or sooner if the surviving and solvent partners shall find it suitable to do so, and during the interval the business shall be continued by the surviving and solvent partners. In the event of the surviving and solvent partners electing to continue the business, the amount at the credit of the deceasing or insolvent partner as at the last balance of the company's books, taken as at the 31st December preceding such death or insolvency, when the books are balanced or ought to have been balanced as hereinbefore provided, together with any sum subsequently paid to the firm by him, and in the case of the said John Christie, the balance of salary, if any due to him, shall, under deduction of any sums withdrawn by such deceasing or insolvent partner, be paid out to his representatives (except the representatives of the said John Orr Ewing) or creditors, as the case may be, by instalments of equal amount at six, twelve, eighteen, twenty-four, thirty, and thirty-six months' date, from the date of the surviving and solvent partners declaring their election, or at shorter periods if the solvent and remaining partners shall so determine, with interest thereon at the rate of five per cent. per annum from the date of the balance in the event of the death, but without interest in the event of insolvency or bankruptcy, and for these instalments bills with sufficient security shall be granted. But provided always, that in case of the death of the said John Orr Ewing, his interest in the company, ascertained as aforesaid, shall be paid out to his representatives by instalments of equal amount at six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, and sixty months' date as aforesaid, with interest as aforesaid, and for these instalments bills of the company shall be granted, with the security of the works and lands in Dumbartonshire, being the property included in the company's books under the names of 'Field Account' and 'Land Account,' and also the property numbered 46 and 44 West George Street, Glasgow, and all other heritable property which may belong to the company. But in the event of the said John Orr Ewing dying before his nephews, the said Archibald Orr Ewing junior and Hugh Moodie Robertson Ewing, or either of them, are assumed, and in the event of his not having terminated the contract as regards the said nephews or either of them, in virtue of article tenth hereof, his trustees or representatives shall be bound to allow a sum of £100,000 if both nephews have still to be assumed, but if only one of the said nephews has still to be assumed, £50,000 of the said John Orr Ewing's capital to remain in the business as a loan to the company by such trustees or representatives, bearing interest at five per cent. per annum until the assumption of such nephews or nephew; and on each nephew being assumed as aforesaid £50,000 of the money so lent shall be transferred by the said trustees or representatives to the credit of such nephew as his own absolute property; but in the event of either of the said nephews dying before being assumed, the sum of £50,000 set free by his death, or in the event of both dying before being assumed the sum of £100,000 set free by their deaths, shall be repaid to the trustees or representatives of the said John Orr Ewing in the same manner as the remainder of the said John Orr Ewing's capital is before directed to be paid out."

John Orr Ewing, one of the partners, died on

15th April 1878, before either of his nephews had been assumed as partners, leaving a trust-disposition and settlement, under which his nephew John Orr Ewing, the pursuer of this action, was to receive a share of £60,000, and a share of the residue equally with his brothers. At the date of the last balance of the books of the copartnery the sum at the credit of John Orr Ewing, the uncle, was £394,000. John Orr Ewing, the nephew, raised this action against his uncle's trustees, and also against the copartnery, for declarator that this sum was, under deduction of £100,000, a debt due by the company to the "representatives of the said deceased John Orr Ewing, and payable to them as such representatives by instalments of equal amount at six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, and sixty months from the 1st day of July 1878, together with the interest on the said principal sum at the rate of five per cent. per annum from the said 15th day of April 1878 until payment; and that for the said instalments the defenders, the said John Orr Ewing & Company, are bound to grant bills with the security stipulated in the contract of copartnery of the said firm of John Orr Ewing & Company dated the 15th and 16th days of January 1878; and it ought and should be found and declared by decree foresaid that each of the said bills should be drawn for one-tenth part of the said principal sum of £394,834, 8s. 9d. sterling, under deduction of the sum of £100,000 as aforesaid, together with interest at the rate foresaid from the said 15th day of April 1878 on the balance of the said principal sum due and unpaid at the date when each such instalment shall become due;" and that the trustees should be interdicted from making any other arrangement or agreement with the company whereby the company should be discharged on payment of any smaller sum than that above set forth as the true amount of their debt.

The trustees stated—"The present defenders have no interest to maintain the said method of calculation if the same shall be found to be erroneous, and they have no intention of taking any further steps in the matter until the question at issue has been tried between the pursuer and the other defenders. They (the present defenders) are willing, and have always been so, to give the pursuer all facilities for having the question so tried, and beyond appearing to explain their position and prevent any decree going out which might affect them personally they do not propose to take any part in the present suit."

The company contended that on a sound construction of the clause of the copartnery quoted the amount of interest payable with each instalment was merely the interest on that instalment from 30th June 1870 to the date of payment.

The company had paid, and the trustees had accepted, eight payments of instalments on the footing maintained by the defenders to be correct, and now challenged by the pursuer of this action. They maintained that the contract of copartnery must be construed to that effect, and stated that this method of payment "is the same as that practised by the deceased John Orr Ewing in settling with Mr James Readman and Mr Matthew Clark, who were respectively partners of the firm of John Orr Ewing & Company under previous contracts of copartnery, dated 31st January 1860 and 10th and 11th March 1870, containing provisions of a like nature with those in the contract of copartnery of 1878. It is also the practice followed in Glasgow where a partnership interest is paid out by instalment bills."

The pursuer pleaded—"(1) Upon a sound construction of the said contract of copartnery and trust-disposition and settlement, payment of the interest of the said deceased John Orr Ewing in the company of John Orr Ewing & Company falls to be made in the matter contended for by the pursuer. (3) The proceedings of the defenders condescended on being founded on an erroneous construction of the said writs, and being materially injurious to the interests of the pursuer, interdict should be pronounced, with expenses, as concluded for."

The trustees pleaded—"(2) The present defenders having acted throughout in *bona fide*, and according to their best judgment, and there being no proposal by them to take any action adverse to the pursuer, they are entitled to absolvitor."

The company pleaded—"(2) On a sound construction of the contract of copartnery, and *separatim*, in respect of the practice averred, payment was properly made by the bills mentioned."

The amount which the pursuer would gain by his pleas being sustained was stated to be £2365, 19s. 9d.

The Lord Ordinary on Nov. 23, 1881, assoilzied the defenders, adding this note:—"The stipulation as to payment by instalments contained in the 16th article of the contract was, in my opinion, a stipulation in favour of the company; and the effect of it, I think, was that the amount payable to the representatives of the deceased partner, in the event contemplated, became by agreement a debt payable and due only in instalments at the several periods mentioned, and with interest 'thereon,' viz., on the instalments from the date of the balance to the date of payment. The amount at the deceased partner's credit was no doubt a debt bearing interest, but the 16th article expressly provides that, in the event referred to, that debt shall be paid out to his representatives in instalments of equal amount at various dates, with interest thereon at the rate of five per cent. per annum from the date of the balance. For these instalments bills were to be granted, and bills have been granted, each of which includes the amount of the instalment and interest thereupon to the due date of the bill. The pursuer, however, contends that the first instalment ought to have included interest upon the whole amount of the debt to the due date of the bill; the second, interest upon the unpaid balance to the due date of that bill; and so on in the case of each of the other bills to the bill for the tenth or last instalment, which, according to his view, would include only the amount of the instalment and the interest upon that sum from the due date of the bill for the ninth instalment to the date of the tenth bill falling due. I can find nothing either in the words of the 16th article or in the nature of the arrangement provided thereby to support this contention. It is scarcely to be presumed that the company in stipulating for payment by instalments, and by bills to be granted for these instalments,

intended to do otherwise than postpone the date when the several instalments, with the corresponding interest on each, should be exigible. For the object of the arrangement was postponement for the benefit of the company. The contract appears to me to favour the view that this was the mode in which claims between the partners were to be dealt with when settled by instalments. It contemplates the whole interest on each instalment 'from the date of the balance,' as payable along with that instalment. This is said in so many words in the case of some of the payments so provided, and in clause 16 it is, in my opinion, the fair construction of the words 'with the interest thereon from the date of the balance.'

"Had it been possible to say that the method adopted by the defenders deprived the representatives to any extent of payment of the deceased's share, with interest thereon from the date of the balance, there might have been more to say against it. But the method contended for by the pursuer gives to them precisely the same amount of interest—the only difference between the two methods being that under the latter the largest payment of interest is at the beginning, and the smallest at the end; whereas under the method adopted by the defenders the payment of interest is postponed with each instalment until the instalment becomes due.

"It was urged that the representatives of the deceased partner and the pursuer, as interested in the income of the residue of his estate, were entitled to the benefit of having the larger instalments of interest paid at the earliest date, because, apart from the stipulations of the contract, they might have demanded immediate payment of the whole balance at the credit of the deceased partner's account. It appears to me that a stipulation that was intended to exclude such a demand, and to limit the right of the representatives to payments by instalments, must exclude the operation of the ordinary rule, and make it entirely a question of construction of the contract whether the interest shall be payable on each instalment from the date of the balance, or is exigible always on the unpaid balance; it must run after the first instalment, and not from the date of the balance, but from the last payment."

The pursuer appealed, and argued that apart from the contract, the principal sum being a debt due by the company, would bear 5 per cent interest so long as it was unpaid; there was not any distinct qualification of this rule of law in the contract, and it should therefore receive its effect.

The respondents argued—If the language of the clause was dubious, it must be read in favour of the debtor (Ersk. iii. 3, 87). But the language of the contract and the actings of parties, as well as the custom averred, were sufficient to establish the contention that the interest was payable on the instalments and not on the debt.

Authorities—*Cook* v. *Fowler*, L.R., 7 E. and I. App. 27; *Findlay, Bannatyne, & Co.'s Assignee* v. *Donaldson*, 2 Macph. H. of L. 105.

At advising—

Lord Young—In this case the conflicting views of the parties are quite intelligible, and are clearly stated by the Lord Ordinary. We have also the advantage of seeing the result of each brought out in figures by accountants in the reports. The question is, which of them is right, according to the true meaning of clause 16 of the deed of partnership, which is to this effect—"In the event of the surviving and solvent partners electing to continue the business, the amount at the credit of the deceasing or insolvent partner, as at the last balance of the company's books, taken as at the 31st December preceding such death or insolvency, when the books were balanced or ought to have been balanced as hereinbefore provided, together with any sum subsequently paid to the firm by him, and in the case of the said John Christie, the balance of salary, if any, due to him, shall, under deduction of any sums withdrawn by such deceasing or insolvent partner, be paid out to his representatives (except the representatives of the said John Orr Ewing) or creditors, as the case may be, by instalments of equal amount at 6, 12, 18, 24, 30, and 36 months' date from the date of the surviving and solvent partners declaring their election, or at shorter periods if the solvent and remaining partners shall so determine, with interest thereon at the rate of five per cent. per annum from the date of the balance in the event of the death, but without interest in the event of insolvency or bankruptcy; and for these instalments bills with sufficient security shall be granted. But provided always, that in case of the death of the said John Orr Ewing, his interest in the company, ascertained as aforesaid, shall be paid out to his representatives by instalments of equal amount at 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months' date as aforesaid, with interest as aforesaid," &c.

I am of opinion, differing from the Lord Ordinary, that the pursuer's reading is the true one. I do not say that the clause is incapable of the construction contended for by the defenders, but thinking it also capable of that maintained by the pursuer, which is certainly, in my opinion, more just and equitable, I prefer the latter as more probably according to the meaning and intention of the parties.

It is the fact that at Mr Orr Ewing's death the amount at his credit in the books of the company was £294,000, and that, apart from clause 16, this was a debt bearing interest at five per cent. per annum. The purpose of that clause was to give indulgence to the company in paying out this debt to Mr Orr Ewing's representatives, the general import of it being that the whole debt should not be demandable at once, but should be 'paid out'—that is the expression in the deed—by instalments. Now, when a debtor in a debt bearing interest obtains indulgence to pay up instalments, the indulgence is usually, so far as I know, invariably confined to the principal; and the notion of paying up instalments of current interest in a debt of fixed amount is one that I am unable to comprehend. If interest is allowed to run into arrear, there may be provision to pay it in that way, and it might be as intelligible as one about the principal being paid in that way. But a bargain to allow the interest to run on and accumulate after a lapse of years, though lawful enough, is so unlikely, that I should not *in dubio* favour a construction which imported it, for such a bargain involves a pecuniary sacrifice by the creditor of the same order, and quite as real as an agreement to reduce the amount of principal or the rate of interest. The pecuniary sacrifice to the

creditor which the defenders' construction of the bargain involves is, we are told, £2365. What reduction of the rate of interest this is equivalent to I have not calculated, but it is exactly equivalent to an abatement of principal to the amount of £2365.

But, as I have said, I am unable so to construe the contract, the language of which, although ambiguous and inaccurate, is reasonably capable of a construction which will give an indulgence in the matter of time for paying up the principal, while the accruing interest from the debt outstanding is paid termly, according to the *prima facie* just rights of the creditor. The contract, as I read it, is that the debt standing at the credit of the deceased, with interest thereon at the rate of five per cent. per annum from the date of the balance, should be paid by instalments. The interest is not on the instalments, but on the debt which is made payable by instalments; but indeed interest cannot be due or begin to run on any instalment as such until it is due; and the sense and reason of the thing is, that the interest to be included in a bill for an instalment is not interest on that instalment, but on the outstanding debt on which interest is running. But the result of the defenders' contention is, that the larger the outstanding debt the less the interest, and the more the debt is reduced the more interest becomes payable in respect of it; which seems to be so whimsical, not to say so substantially unjust, that I should even favour a subtle and ingenious construction to avoid it.

Lord Craighill—The controversy between the parties in this action relates to the import of a clause in article 16 of the contract of copartnery of John Orr Ewing & Company, by which, omitting parenthetical words not affecting the matter of interpretation, it is provided, that in case of the death of John Orr Ewing, his interest in the company, ascertained as at the last balance of the company's books, taken as at the 31st December preceding his death, shall be paid to his representatives by instalments of equal amount at 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months' date, with interest as aforesaid—that is to say, "with interest thereon at the rate of five per cent. per annum from the date of said balance." The pursuer contends that the interest due upon the whole unpaid capital is to be paid at the payment of each instalment. The defenders, on the other hand, contended that the interest then to be paid is only the interest of the particular instalment which has become due. The Lord Ordinary has adopted the reading for which the defenders contend; and I think that his judgment ought to be supported. My reasons for agreeing with his Lordship are those now to be explained.

In the first place, it appears to me that the construction which the Lord Ordinary prefers is the more natural, and is one more consonant with the ordinary rules of grammatical connection. The question really is, what is meant by "interest thereon?" To determine this we must find the antecedent to "thereon." I think that this is the word "instalments," and accordingly that what has to be paid at each period specified is a tenth part of the capital, with the interest of that part of capital. "Instalment" no doubt is the nearest antecedent, and unless we are forced by some consideration suggested by the clause, we are not entitled to pass it over. There is here no such consideration, as I think, but the contrary. Had the pursuer's interpretation been the true one, there would presumably have been a provision to the effect that the interest to be paid with the instalment of capital was not the interest of that instalment merely, but the interest of all unpaid capital. There is nothing which, according to my reading of the clause, either directly or by reasonable, not to say necessary implication, leads to this result.

In the second place, the only other antecedent which could be chosen whereby the import of interest "thereon" could be explained is the amount at the credit of John Orr Ewing as at the last balance of the company's books, taken as at the 31st December preceding his death. But the selection of this is inadmissible, because its adoption as it stands would involve as a result the payment of interest even upon capital that had been paid. Nor is this result merely inferential, because the clause farther on expressly declares that the interest to be paid is interest from the date of "the balance in the event of death." Now, the interest offered by the defenders is calculated from the balance preceding Mr John Orr Ewing's death, and is therefore the very thing provided for by the words of the clause; whereas all the sums of interest claimed by the pursuer, except that paid with the first instalment, are not interest from the balance before the death, but interest from the date of the payment of the last paid instalment. These considerations appear to me to be decisive. The pursuer, no doubt, says that these words of the clause to which I have now specially referred may and must be qualified so as to bring them into harmony with his claim; but I think there is no warrant for the introduction of words of qualification. Were we to sanction interpolation, we would not be construing the contract as made, but making a new contract by which the contention of one of the parties would be supported.

In the third place, I think the Lord Ordinary's reading of the clause is countenanced by similar provisions in the 10th, 12th, and 18th articles of the contract of copartnery. In each of these, payments of capital are to be made at specified periods, with interest from a specified time, but the interest so to be paid at each successive period is the interest only of the instalments.

Lastly, that the reading of the clause which I take is favourable to the defenders, imposing on them an obligation more limited than that to which they would have been subject if the matter of interest to be paid on John Orr Ewing's capital had not been matter of contract is a circumstance quite immaterial in my opinion. The rights and obligations of parties have been fixed by themselves, and the question what these would have been had there been no convention is of no concern in construing the words of the contract. These words must be allowed to have the meaning to which they are entitled by the ordinary rules of construction, whether what we take to be the true meaning shall operate to the advantage of the debtor or of the creditor in the obligation.

For these reasons, I think the Lord Ordinary has adopted the true reading, and that his interlocutor ought to be maintained.

Lord Rutherfurd Clark—I am of the same opinion as Lord Young.

The Lords recalled the Lord Ordinary's interlocutor and gave decree in terms of the declaratory conclusions.

Counsel for Pursuer—Solicitor-General Asher—Lang. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders — Mackintosh — W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Saturday, May 20.

FIRST DIVISION.

DOWDY *v.* M'FARLANE.

*Process — Jury Trial — Enumerated Cause — Special Cause—*6 *Geo. IV. c.* 120, *sec.* 28—29 *and* 30 *Vict. c.* 112, *sec.* 4.

A hotel-keeper brought an action for damages against his landlord, alleging that he had let other premises belonging to him, and situated immediately above those let to the pursuer and used by him as an hotel, to persons who so occupied them as to cause a nuisance to the pursuer. The pursuer alleged that the defender was proprietor of these premises, or at least had sole management and control of them, and was the person most materially interested in them, the same being held in trust for the firm of which he was a partner. The defender averred that the subjects in question belonged to another person altogether. *Held* (*aff.* judgment of Lord Adam) that the pursuer was not entitled to an issue on these averments, the vague nature of his averments as to the character in which the defender was alleged to be responsible for the nuisance complained of being sufficient "special cause" for having the case tried by proof instead of jury trial.

In this action Robert Dowdy sued Daniel M'Farlane for £500 in name of damages caused by an alleged nuisance to the hotel kept by him, for which he maintained that the defender was responsible. The pursuer averred that he took the premises (a flat in Greenside Street, Edinburgh) which formed his hotel from the defender, the proprietor of the premises, for ten years from Whitsunday, at an annual rent of £100, and that the premises were let expressly for use as an hotel. He averred further—"(Cond. 3) The defender is also proprietor of the flat immediately above the pursuer's said hotel. If, as is stated in the answer, the defender is not formally the proprietor of the said upper flat, he at least, during and subsequently to the year 1880, had the sole management and control of, and was the person most materially interested in, the said upper flat, the same being held in trust for his firm of D. & H. M'Farlane, grocers and wine merchants, 2 Greenside Street, Edinburgh, of which he is the principal, and his brother Henry M'Farlane the only other partner. At or about Whitsunday 1880, and after he had entered into the said lease with the pursuer, whom he assured that the said upper flat and his other properties in the stair would only be let for ordinary dwelling-houses, the defender let the northmost half of the said upper flat to a number of persons, who started therein what they termed a 'Musical and Dramatic Club,' but what was really a billiard, draught, card-playing, and drinking club, keeping open house for the greater part of the night and morning. Under guise of being a private club, the said persons kept and sold spirituous liquors therein. All this, as well as the proceedings after mentioned, was done with the knowledge and authority of the defender, and continued down to the breaking up of the said club as after mentioned. At the time the defender let the said upper premises for the use of the said club he informed and assured the pursuer that should their existence in the stair prove an annoyance to him, or interfere with the comfort of his visitors, he would have them turned out. Shortly after the said club took possession of the said premises billiard-playing and drinking almost nightly began about eleven o'clock, and were often carried on until three o'clock in the morning. The pursuer complained to the defender (and it was the fact) that the existence of the said club in the stair was causing a nuisance to him, and that his visitors were leaving his hotel in consequence of want of sleep caused by the great noise overhead occasioned by the playing of billiards and other entertainments, which, with the knowledge and authority or license of the defender, were being carried on in his premises occupied by the said club. The defender, in answer to the pursuer's complaints above and after condescended on, acknowledged and accepted liability for the nuisance complained of, but took no steps whatever to have the same removed." He further averred that in consequence of the annoyance caused to his customers by the noisy and disreputable conduct of the club his business greatly fell off, and he had suffered damages to the amount sued for. Notwithstanding this he alleged that the defender had again let the same apartments to the club for a second year from Whitsunday 1881.

The defender admitted that he was proprietor of the premises occupied by the pursuer, but denied that he was proprietor of the premises let to the club. These premises he alleged belonged to his brother Henry M'Farlane. He denied that he had ever sanctioned or was in any way responsible for any improper use of those premises by the club.

The Lord Ordinary (Adam) having allowed both parties a proof of their averments, the pursuer reclaimed, and asked that issues should be adjusted, arguing that an action for causing a nuisance such as the present was specially marked out for trial by jury under the Act 6 Geo. IV. c. 120, sec. 28, and was not removed from that category by the subsequent Acts 13 and 14 Vict. c. 36, sec. 49, and 29 and 30 Vict. c. 112, sec. 4. There was no "special cause" to prevent it from being so tried—*Ross Hume* v. *Young*, January 19, 1875, 2 R. 338; *M'Avoy* v. *Young's Paraffin Oil Company*, November 5, 1881, 19 Scot. Law Rep. 691, 9 R. 100. The tenant injured as the pursuer had been might sue either the person causing the nuisance or the landlord—*Weston* v. *Tailors of Potterrow*, July 10, 1839, 1 D. 1218; *Young* v. *Hamilton*, March 11, 1837, 15 S. 853.

The defender argued—There was here ample "special cause" in the fact that the property of the subjects alleged to be used so as to cause a