LORD SHAND—I am of the same opinion with your Lordships. I think that the Lord Ordinary was right in the view which he took of the case, and that it admits of being decided upon the short grounds stated by my brother Lord Mure. The action is laid upon loan, and we have an admission by the claimant Thomas Ker of the advance of the sum in question, but this admission is qualified by an explanation that all claims under this advance had been abandoned by Miss Morland, and that no claim had been made by her in his subsequent bankruptcy. If it could have been shown to us that the qualification here made by Thomas Ker was disproved by the evidence, we might then have looked at the admission apart from the qualification, but no evidence of this character has been presented to us. There is no writ by Thomas Ker produced showing an admission of the subsistence of the debt. We are no doubt pointed to entries in John Kerr's books showing payments of interest while the bill was still an operative document, but such entries cannot be taken as proof of the existence of the debt after the bill has expired. As far as I can gather from the evidence, there is no other proof of resting-owing, and that does not to my mind appear to be sufficient. I think that the reclaimers have failed to disprove the qualification of the admission made by Thomas Ker, and that being so, the case for the reclaimers fails.

LORD DEAS was absent.

The Court repelled the claim for Mrs Kerr's trustees, and sustained Thomas Ker's claim.

Counsel for Mrs Kerr's Trustees—Solicitor-General (Asher, Q.C.)—Jameson. Agent—David Milne, S.S.C.

Counsel for Thomas Ker—R. Johnstone—Keir. Agents—Hope, Mann, & Kirk, W.S.

Saturday, November 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

JOHN NEILSON'S TRUSTEES *v.* WILLIAM NEILSON'S TRUSTEES.

Loan—Acknowledgment of Debt—Implied Discharge.

A writing forming a mere acknowledgment of a debt, as distinguished from a formal instrument expressing an obligation to pay a certain sum, is mere evidence of the debt, of greater or less importance according to the circumstances in which it is offered.

Loan—Presumption.

In 1843 a father advanced to his son £1798, for which the son granted a letter of acknowledgment admitting it to be a loan. Until 1852 the father and son carried on business as partners. An arrangement was then made that the father should retire, that other two sons should be taken into the business, that the books of the old company should be brought to a balance, and that the father should be credited in the books of the new company with the sum of £417 in satisfaction of all claims against the old company, or the son as a partner of it. The father left in the business a sum of £7500, and it was stipulated that the value of this advance should be taken into account in settling his son's claims in his succession. In 1855 he died, and twenty-eight years after his death his trustees brought an action for payment of the £1798, founding on the acknowledgment of 1843, which they had newly discovered. *Held* that the acknowledgment, containing only an implicit obligation to pay, could only be received as evidence of the subsistence of the debt, and in the circumstances was not conclusive evidence.

This was an action raised at the instance of the trustees and executors of the deceased John Neilson, engineer and ironfounder, Oakbank Foundry, Glasgow, acting under his trust-disposition and settlement, against the accepting and acting trustees and executors of William Neilson, iron and coal master, Mossend, son of John Neilson. The pursuers concluded for payment of £1798, 10s. 4½d., sterling, with interest thereon at the rate of 5 per cent. per annum from 23d April 1843 till payment.

The action was raised in the following circumstances:—From the year 1843 till the year 1852 the said John Neilson and the said William Neilson were sole partners of the Mossend Iron Company, and carried on business as iron and coal masters in Glasgow and elsewhere. When the partnership was arranged on 28th April 1843 each partner was, under the contract, to put £2000 into the business. William Neilson at that date granted to his father the following letter, which was founded on by the pursuers in this action:—"John Neilson, Esquire, engineer, Glasgow. My dear father, I, William Neilson, engineer, residing at Bellshill, referring to the contract and agreement betwixt us and others interested, and subscribed by me this day, as to the transfer of the stock and assets of the business at Mossend, carried on by me, to the new company called the 'Mossend Iron Company,' whereof we are partners, under which contract the *cumulo* sums standing at your and my credit in the balance-sheet of the old concern are agreed to be carried, and accordingly are carried, after making certain deductions therefrom, to account of our input capitals of Two thousand pounds each in the said new company, Do hereby acknowledge and declare that, although it thus appears in the books of said Company that we have respectively advanced said sums of input stock, yet the fact is that the sum actually advanced by me was Two hundred and one pounds nine shillings and seven pence ½d. sterling, and I am consequently indebted and owing to you the difference between said capital at my credit as aforesaid and the sum actually advanced by me as aforesaid, namely, the sum of One thousand seven hundred and ninety-eight pounds 10/4½ sterling."—[*Here followed a testing clause.*]

In 1852 this partnership was dissolved as from 31st May 1851, and in view of arrangements for the constitution of a new partnership, an agreement, dated 22d September 1852, was entered into between John, William, Walter, and Hugh Neilson, the two persons last named being other sons of John Neilson. In the fifth article of this said agreement this provision was made:—"It is hereby mutually agreed that the said Mossend Iron Company, consisting of

Walter Neilson, William Neilson, and Hugh Neilson, shall immediately, if not already done, bring the books of the said old company to a balance as at the date of the said dissolution on the said 31st day of May 1851, and shall cause a valuation of the whole of the capital, stock, assets, and all other property of the company, to be made as at that date, and upon this being done the said John Neilson shall be credited by the saids Walter Neilson, William Neilson, and Hugh Neilson, in the books of the said new Mossend Iron Company, with the sum of £417, 1s. 5d., as the agreed-on worth and value of his right to and interest in the stock, property, and assets of the said old Mossend Iron Company, and the said John Neilson shall thereafter have no other claim whatever against the said company, or his partner William Neilson, or the said new company and the partners thereof; the said sum of £417, 1s. 5d. being hereby held and agreed to be in full of all claim and demand competent to the said John Neilson for and in respect of his interest in said old company." The eighth article was in the following terms:—"As the said John Neilson sometime ago negotiated with the Bank of Scotland a loan to the extent of £7500 to enable the business of the Mossend Iron Company (of which he and the said William Neilson were then the sole partners) to be carried on, and in security of the repayment of which he conveyed his property of Oakbank and another heritable property, it is hereby specially provided and agreed upon that on the death of the said John Neilson, or as soon as possible thereafter, the value of the share or shares falling payable to his said sons Walter, William, and Hugh, under his, the deceased's, estate shall be ascertained, and thereupon the said Walter, William, and Hugh Neilson shall be allowed credit therefor, and be bound to pay over to the said John Neilson's trustees, or others representing him, the balance or difference only between the amount of such share or shares and the said sum due under said bond, the said parties coming in right of the said John Neilson being bound to make up the remainder: But declaring in like manner that the said balance or difference shall not be exigible from the saids Walter, William, and Hugh Neilsons for the like period of five years from the decease of the said John Neilson."

John Neilson died in 1855, leaving a settlement dated in 1849, and having codicils thereto, one of which was dated in 1853. This settlement contained no reference to the acknowledgment of 1843, or the debt therein referred to. His trustees (the pursuers) thereupon entered on the management and realisation of his estate, and William Neilson received about £3000 as beneficiary under his father's settlement. William Neilson died in 1882, leaving a settlement by which he appointed his widow and certain others, to be defenders in this action, his trustees. After his death disputes arose between the pursuers and Mrs Neilson, widow of William Neilson, as one of the trustees on his estate, in regard to his interest in the Mossend Iron Company. It was after these disputes had arisen that the pursuers first intimated their present claim, founding on the acknowledgment for £1798, 10s. 4½d. of 1843, which they averred they had only discovered after the death of William Neilson.

Separate defences were lodged for William Neilson's widow and for the other trustees.

The defenders averred that the whole accounts between John and William Neilson arising out of their partnership from 1843 to 1852 had been settled and adjusted at the making of the agreement in 1852.

The pursuers pleaded, *inter alia*, "the extinction of the obligation founded on can be proved only by writ or oath."

The defenders William Neilson's trustees (other than Mrs Neilson) pleaded—"(1) *Mora.* (3) In the circumstances stated, the document founded on not being sufficient to instruct the alleged debt, or to impose liability therefor against the said William Neilson's trustees, decree of absolvitor ought to pass in their favour, with costs. (4) The sum sued for not being resting-owing, the said trustees and executors, including these defenders, are entitled to absolvitor with costs."

Mrs Neilson pleaded, *inter alia*—"The present claim is discharged by said agreement, dated 22d September 1852."

On the 23d May 1883 the Sheriff-Substitute (SPENS) pronounced the following interlocutor:—"Finds that by letter of acknowledgment, dated 25th April 1843, the deceased William Neilson acknowledged his indebtedness to his father, the deceased John Neilson, to the extent of £1798 odds, said sum being the difference between the amount of capital appearing in the books of the Mossend Iron Company as advanced by the said William Neilson and the sum actually advanced by him: Finds that in 1852 the partnership between John Neilson and William Neilson was dissolved as on 31st May 1851; and on 22d September 1852 a new contract of copartnery was entered into between Walter, William, and Hugh Neilson; and of the same date the agreement was entered into by the said John Neilson, Walter Neilson, William Neilson, and Hugh Neilson: Finds, under reference to note, that if, as at said last mentioned date the claim for the debt acknowledged in 1843 by the said William Neilson still subsisted, it was discharged by the said John Neilson: Sustains accordingly the fourth plea-in-law stated for Mrs Neilson, as also the fourth plea-in-law stated for James Rodger Thomson and James Neilson [William Nelson's trustees]: Finds it unnecessary to consider the other defences, and assoilzies the defenders from the craving of the petition: Finds the defenders entitled to expenses, &c.

"*Note.*—This case involves questions of importance as well as a large sum of money. But if I am right in the view I have taken, a single point is decisive of the case. I adopt the construction which is put upon the fifth article of the agreement by the agent for Mrs Neilson. That article is in these terms:—[*His Lordship here quoted the article, ut supra.*] At 22d September 1852 William Neilson had been in partnership with his father for a good many years. At this date the father proposed, or it was previously arranged, that William, Walter, and Hugh Neilson should carry on the Mossend Iron Company. In 1843 I assume (though this is not admitted by defenders) that the letter of acknowledgment was duly delivered by William Neilson to his father. Prior to 1852 William may or may not have diminished this debt, but at the

date of the agreement referred to there is in my opinion nothing at all extraordinary in the father agreeing with his son William, when the arrangement was made that the father should retire, and that other two sons should be taken into the business, to discharge any claim which he might have in connection with capital appearing in the books to be advanced by the son, but which in reality had been contributed by the father. The letter of acknowledgment was a back-letter to the father with reference to the real position of the capital appearing in the Mossend Iron Company's books to the credit of William Neilson. The contention of the pursuers' agent is that the agreement referred to is solely with reference to the Mossend Iron Company and the state of matters as disclosed in the books of that company; but that the debt admitted in the letter of acknowledgment is one solely of a private character, and absolutely distinct from questions connected with the business. I am bound to say that I cannot adopt this construction. A certain amount of capital was standing in William's name in the books; the real position was, if pursuer was right, that at that date that capital appearing in William Neilson's name had been chiefly contributed by John Neilson, and had not since the letter of acknowledgment in any way or to any extent been affected by payment of any sum. It seems to me that it was unquestionably a company affair. I observe that Hugh Neilson is one of the pursuers; and I suppose that he is the Hugh Neilson who was taken into partnership on 22d September 1852. It may be the case that his father said nothing to him about this claim. Possibly enough both father and son may not have wished the other two sons and brothers to know that the father intended to give up the claim in question. If, however, the claim then still subsisted, I agree with Mrs Neilson's agent that no apter words could have been conceived (unless there had been an unequivocal reference to the subject) than those which are used in the agreement in question to discharge the claim he had against William in connection with the capital stock appearing at William's name, but really contributed by himself—'the said John Neilson shall thereafter have no other claim whatever against the said company or his partner William Neilson.' John Neilson admittedly died in 1855, leaving a trust-disposition and settlement. It is true that that settlement is dated in 1849, but according to pursuer's statement there are codicils subsequent to John Neilson's retiral from business, one of them being 31st August 1853. The pursuer's title is derived from that trust-settlement. It is only now, after a lapse of twenty-eight years, that the letter of acknowledgment has turned up. The settlement of the deceased is not produced, but it is not disputed that no reference whatever was made in it (either in the body or in codicils) to the debt in question, otherwise the matter would have been settled long ago, and, at all events, would have been founded upon by the pursuers in this case. The debt of £1798, with twelve years' interest, would have amounted to a sum of at least £3000 in 1855. It is most unlikely, to say the least of it, that unless John Neilson had intended to discharge the claim, and understood that he had done so, it should not have been referred to in the will, or at all events in a codicil after his retiral from business. Further, it is not practically disputed that at John Neilson's death a certain amount of succession came to William and was paid by the pursuers or their predecessors, as trustees of the deceased John Neilson. If William Neilson took payment of this money, keeping back the fact that he was really due the estate a considerable sum, he was guilty of fraudulent conduct. Fraud is not to be presumed, and I prefer to construe the agreement not only in the way which seems to me the natural one, but in a way which is consistent with the good faith of a dead man."

The pursuers appealed to the Court of Session.

Argued for them—It was sufficient for them to show their document in order to entitle them to decree. It acknowledged a debt, and in the absence of any discharge competently proved, that debt must be held still subsisting. The clause founded on by the defenders in the agreement dealt with the partners *qua* partners, and did not apply to this private debt.

Argued for the defenders—Here there was sufficient for a discharge supported by corroborative circumstances. The clause in the agreement dealt with copartnery matters; but the only partners were father and son. It was thus reduced to a family arrangement.

Authorities—*Cuninghame* v. *Boswell*, May 29, 1868, 6 Macph. 890; *Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537.

At advising—

Lord Young—The pursuers do not ask to be allowed to lead evidence in support of their claim, and declined the suggestion made from the bench to move for a proof—resting their case exclusively on the document referred to, and quoted in the condescendence, which they contended was sufficient by its own inherent virtue to entitle them to claim, unless the defenders should prove by writ or oath of party that it was discharged. And indeed, if this view of the law be sound, viz., that the instrument is equivalent to a bond or other known obligatory instrument for money lent, granted by the borrower to the lender, I should assent to their conclusion. In that view the pursuers must prevail unless the defenders satisfy us that the agreement of September 1852 imports a discharge of any such bond or instrument.

The defenders contend that the document is not a bond or obligatory instrument, *i.e.*, an instrument expressing an obligation to pay a certain sum, but only an acknowledgment of debt or indebtedness in a certain amount at its date, which although evidence of a debt is not necessarily sufficient and *per se* conclusive. In accordance with this view of the legal character of the instrument, they rely on the agreement of September 1852, as if not a discharge, at least a circumstance materially bearing on the question whether the instrument of 1843 is sufficient and *per se* conclusive to instruct a debt as outstanding in 1883.

I must assent to the distinction between a mere acknowledgment of debt, of which an I O U is the vulgar and most familiar example, and a bond or obligatory instrument (in the sense which I have explained)—a distinction which the Stamp

Act pointedly exhibits, not to mention the law of bills and promissory-notes. An I O U does indeed *prima facie* imply a promise to pay, but if it expressed such promise it would be a promissory-note, be governed by the law of promissory-notes, and be incurably bad unless stamped accordingly. And if the implication were as good as the expression, I O U's would supersede promissory-notes as inexpensive equivalents. So also if an implied obligation to pay were in all circumstances equivalent to an expressed obligation, bonds would disappear. But the common law distinguishes between the promise or obligation which an acknowledgment *prima facie* implies, and an expressed promise or obligation, just as clearly and pointedly as the Stamp Act. The holder of a bond or promissory-note need not concern himself with the debt for which it was granted so long as the instrument retains its virtue, for he sues on it and not on the debt, while the holder of a mere acknowledgment of debt must sue on the debt with the acknowledgment as evidence, which may be sufficient or not according to circumstances, whether *per se* or aided by other evidence.

Now, the document here sued on is a mere acknowledgment of debt as distinguished from a bond or obligatory instrument, and the question regards its value and force as evidence in the circumstances in which it is offered. By using this language I mean to express the opinion that it is a question of circumstances. I should accordingly have been disposed to permit the pursuers to amend their record by stating any circumstances material to the question which they might desire to prove or aver, with the meagre record before us, and to allow them a proof at large; but my repeated suggestions to that effect were very decidedly rejected by the pursuers' counsel, no doubt because the pursuers were unable to prove anything in aid of the instrument on which they found. Nor is their inability wonderful, for the instrument was forty years old, and all who were likely to know anything of it or of any facts regarding it are dead,

The material features of the case seem to me to be these:—The acknowledgment of indebtedness bears express reference to the business of the Mossend Iron Co., of which the son who granted it and the father who received it were partners, and is in fact an acknowledgment by the son that his father had to the extent of £1798 aided him to make up his share of input capital. 2d., The business of the company was carried on for nine years thereafter, *i.e.*, till 1852, latterly by the father and son as the only partners, and on the father's retirement in 1852 he and his son settled their accounts relating to the business. 3d., Part of the agreement by which this settlement was made was that the son should assume his brothers (the present pursuers) as partners, the father aiding them to the extent of £7500, to bear interest during his life, and on his death to be deducted proportionally from his sons' shares of his succession. 4th., The father survived till October 1855, and his succession has been distributed according to his will, the sons suffering the deductions prescribed. 5th., The son (William) who granted the acknowledgment of 1843, died in 1882, and in 1883 his father's testamentary trustees, in the twenty-eighth year of their trust, bring this action against William's executors on the acknowledgment, of which they say no more than that they "have only discovered the same since his (William's) death."

In these circumstances I am not of opinion that the acknowledgment is conclusive or sufficient evidence of the subsistence of the debt. That it once existed is clear enough, but a long time has elapsed and a good deal has happened since it was granted. Had it been regarded by the parties as a subsisting debt in 1852, I think it would have been noticed and provided for in the agreement of that year, just as the debt of £7500 was, which was a loan by the father to his sons William, Walter, and Hugh, just as much as the £1798 was a loan by him to William in 1843. They were of exactly the same character. I think it a reasonable inference from the agreement that the father did not intend William's share of his succession to be diminished, in respect of his advances or aid connected with the business referred to, beyond his proportion of the £7500. But, indeed, it is possible and was likely that the advance of 1843 was paid to his satisfaction before the agreement of 1852. The parties who knew the facts are dead.

I must therefore decline to hold that the document is sufficient proof of the debt sued for, although in other circumstances it might have been. I have already said that I do not regard it as a bond or equivalent to a bond, or otherwise than as an item of evidence, and that of a character which is not necessarily in all circumstances, although it may be in certain circumstances sufficient.

Lord Craighill.—[*After narrating the facts*]—The primary question is, whether or not the words which I am now about to read amount to a discharge of the debt—[*reads the fifth article of the agreement of* 1852 *quoted supra.*] Now, assuming that in 1852 the sum remained unpaid, does this clause amount in the circumstances to a discharge of this particular claim? It seems to me that the words are susceptible of a wide interpretation, and I think we are to interpret them by that which supervened upon the discharge. No claim was made by the father during his survivance. He left his estate in the hands of trustees, and he bequeathed William a share in that estate. It is certain that no claim was made then against William, but his share was paid on the footing that there was no debt exigible. It is said that this document was then unknown, but if it be the case that this document was not among the other muniments, that points to a discharge. Accordingly, when in circumstances such as these we have a document granted in 1843, and no claim raised upon it for all but forty years, what conclusion can we form but that this clause I have read amounts to a discharge? I therefore coincide with the Sheriff's views, and in your Lordship's judgment.

Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court affirmed the interlocutor of the Sheriff.

Counsel for Pursuers (Appellants)—Mackintosh—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Mrs Neilson—Pearson—Guthrie. Agents—J. & J. Ross, W.S.

Counsel for other Defenders—Low. Agents—Morton, Neilson, & Smart, W.S.

Saturday, November 17.

FIRST DIVISION.

[Lord Kinnear, Ordinary on the Bills.

SCOTTISH IMPERIAL INSURANCE COMPANY *v.* LAMOND.

Right in Security—Heritable Security—Sale by Creditor—Purchase of Subjects by Second Bondholder.

A proprietor of heritable subjects over which there were two bonds, one of which was postponed to the other, being charged by the second bondholder under the personal obligation in his bond to pay the debt, granted to him a letter of authority, if an opportunity offered within a certain time, to sell the subjects at a price not less than a certain sum. This sale was not effected, but within the stipulated period the first bondholder sold the subjects under the powers contained in his bond, and the second bondholder purchased them at a price less than had been contemplated in the letter of authority. *Held* that there was no relation of trust between the proprietor and the second bondholder; that the sale to him was unobjectionable; and that a second charge on his bond which he gave after the purchase was regular and not subject to suspension.

This was a note of suspension for Henry Lamond of a charge at the instance of the Scottish Imperial Insurance Company to pay the sum of £18,500, with interest and penalty, under deduction of £13,209, 15s. 5d. said to have been received to account. The complainer did not offer caution or consignation.

In 1877 the suspender along with John Miller purchased from Gavin Park certain heritable subjects in Sauchiehall Street, Glasgow, at £41,851, 13s. 9d., the title being taken in the suspender's name. The sum of £18,500 out of the price was allowed to remain a burden on the property, and was secured by bond and disposition in security, dated 8th May 1878, granted in Park's favour. As regarded the personal obligation, this bond was granted jointly by the suspender and Miller, and as regarded the disposition in security, by the suspender only. This bond was postponed to a prior bond for £20,000 granted by Park to the Life Association of Scotland.

The chargers, the Imperial Insurance Company, immediately, by assignation also dated 8th May 1878, took over from Park the bond for £18,500 at a price of £15,000. This had been arranged with him prior to the granting of the bond. No interest was paid upon the bond after Whitsunday 1880, and upon 19th July 1881 the chargers, who had a month previously served the usual intimation, requisition, and protests prior to a sale under the powers in the bond, gave the suspender a charge upon the bond. Upon 21st October 1881, after a correspondence in which sequestration was threatened by the chargers, a mandate was granted by the suspender in favour of the chargers, authorising them, if an opportunity presented, to effect a sale for not less than £40,000, and that this letter of authority be valid up to Candlemas 1882. By a subsequent mandate of 8th February 1882 the power to sell at the same price was continued until 1st August 1882. Each mandate authorised the chargers to sell the subjects, grant all necessary conveyances, and discharge the purchaser, and contained this clause:—"Declaring that the acceptance of these presents, and all and any endeavours to sell the said subjects in virtue hereof, shall in no way prejudice or interfere with the schedules of intimation, requisition, and protest served or to be served in connection with the said bond and disposition in security, or the obligations incumbent on me thereunder." On 21st October 1881, the date of the earlier of these mandates, the charge previously given was withdrawn and cancelled by the chargers. No sale was effected at £40,000. In January 1882 the prior bondholders, the Life Association of Scotland (who had in February 1881 served the usual intimation calling up their bond), advertised the subjects for sale. Previous to their doing so they had had a correspondence with the manager of the chargers' company, in which he requested a short delay, that a private sale which he expected to be effected at a price which would cover both bonds might be carried out, and he also asked them (and they assented) not to name an upset price in the advertisements lest that should be prejudicial to the sale. On 1st February 1882 they exposed the subjects unsuccessfully at £44,000, and thereafter, after further advertisement, they on 21st March 1882 exposed the subjects at £36,000, when they were purchased by the chargers, who were the only offerers at that price. On 19th July 1883 the chargers gave the suspender another charge under their bond, and it was of this charge that suspension was now sought.

In this process of suspension the suspender averred that it was matter of express understanding between himself and the chargers at the time he gave them the authority to sell, that as thus they had the exclusive power to sell and realise, the personal obligation in the bond should be abandoned as against him, and that it was on these terms that the charge was cancelled on 21st October 1881, as already stated. He also averred that in 1881 he could have sold the property for £45,000, or at least for such a sum as would enable him to pay off the bonds, but that he had been by the action of the chargers, in requiring the letter of authority from him, prevented from exercising the means of sale open to him, with the result, as now appeared, that they had taken advantage of their position to purchase the subjects at a price much below their real value, to his great loss. He averred that they were bound to account to him for the sale; and further—"The chargers are bound, as the suspender is advised, to adhere to the terms on which they received the said mandates, and to discharge his said personal obligation and the present charge, or otherwise and failing the first alternative, to indemnify the suspender against the consequences of their violation of the mandates, and to give him credit for the full value of the subjects."

He pleaded, *inter alia*—"(6) The chargers having been in the position of agents and fiduciaries for