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Wednesday, March 15.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

THIEM'S TRUSTEES *v.* COLLIE.

Debt — Document of Debt—I O U — Holograph — Proof — Competence of Parole Evidence.

Held (*diss.* Lord Young) that a holograph I O U admitted to be genuine is a document of debt sufficient in itself to instruct the constitution and resting-owing of a debt, payment of which can only be proved by writ or oath, and not by parole evidence.

Opinion by Lord Trayner that allowance being made for the difference of the technicalities of practice and the right in England to challenge a document not under seal on the ground of want of consideration, the law of England and Scotland do not differ in the views they take of the import and value of an I O U, either as evidence of indebtedness on the part of the granter or as to its affording a sufficient ground of action.

Ernest William Thiem, restaurateur, Glasgow, died on 7th January 1897. After his death there was found in his repositories the following document—"*Glasgow, 16th September* 1886. E. W. Thiem, Esq., St Enoch Hotel. I O U the sum of two hundred and twenty-five pounds sterling, interest to be at 4 (four) per cent. per annum from date.—ALEXANDER COLLIE."

Alexander Collie was a tailor and clothier in Glasgow. The trustees under Mr Thiem's trust-disposition and settlement requested Collie to make payment of the debt, but he refused to do so.

Mr Thiem's trustees thereupon raised an action against him in the Sheriff Court at Glasgow for payment of £225, with interest at 4 per centum per annum from 16th September 1886.

The defender admitted that the I O U was holograph of him, and had been granted by him to Mr Thiem on 16th September for money lent to him. He, however, averred that he had repaid the full amount of the debt to Mr Thiem in instalments between March 1887 and January 1889, and pleaded—"(1) The sum sued for, together with the interest thereon, having been repaid by the defender to the late Mr E. W. Thiem, the defender is entitled to absolvitor, with expenses. (2) *Separatim*, taciturnity."

On 26th May 1898 the Sheriff-Substitute (GUTHRIE) allowed a proof.

Note.—"The pursuer maintains that the loan is admitted on record, and that payment can be proved only by writ or oath.

"But this is not according to the state of the pleadings and of the law. The pursuer founds on an I O U, which would not be sufficient without explanatory proof to prove indebtedness. The proof required for this purpose may, however, be dispensed with by reason of the defender's candid admission that the I O U was granted for money lent. But the pursuer forgets that by a wholesome rule of the law a judicial admission can be founded on only subject to the qualifications attached to it by the party making it, and that whether these qualifications are intrinsic or extrinsic—*Milne* v. *Donaldson*, 14 D. 849; *Picken* v. *Arundale*, 10 Macph. 987, and other cases in Bell's Pr., sec. 2218. The pursuer, however, is at liberty to disprove the qualifications annexed to the admission, and an order for proof is made to enable him to do so. That is how the Judges express the course of procedure in such a case, as it is assumed that the pursuer has always to prove his case. Here he is found in possession of the document of debt, an element of some moment in disproving the qualification, though it may not be conclusive. If I could hold it conclusive, and the original debt proved, the contention that the defender can prove payment only by writ or oath would deserve serious consideration, but even then, though I doubt, there is some authority for holding that he has stated facts and circumstances inferring payment which require an allowance of proof."

The pursuers appealed to the Sheriff (BERRY), who on 9th July 1898 adhered.

Note.—"The authorities place it beyond question that if the pursuers rely on the admission in the defender's pleadings, they must take it subject to the qualification of payment which is attached to it. The rule laid down in *Milne* v. *Donaldson*, 14 D. 849, has been recognised as authoritative in subsequent cases. It is true that in *Picken* v. *Arundale*, 10 Macph. 987, where the rule was applied, hesitation regarding its expediency was expressed on the part of some of the Judges; but again in *Gelstons* v. *Christie*, 2 R. 982, it was held that it could no longer be questioned. It was there said by Lord Deas—'The pursuers are not obliged to accept the admission with its qualifications, but failing their doing so there is nothing to absolve them from proving their debt in the ordinary way.'"

The proof, which was led before Sheriff-Substitute Fyfe, brought out the following facts:—The I O U was found in Mr Thiem's repositories after his death put up with a number of documents of debt granted by other persons, including several I O U s, all of which were admittedly due and unpaid. Mr Thiem and the defender were intimate friends. Mr Thiem sold spirits, wine, and cigars to the defender, while the defender supplied clothes to Thiem, each paying regularly for what he got from the other The defender's clothes' accounts against Thiem between January 1889 and the date

of Thiem's death amounted to £247, 13s., and were paid every year as incurred, and there was no evidence of any demand having been made by Thiem during these eight years for any payment connected with the I O U. The defender gave evidence that the loan for which the holograph I O U had been granted had been paid off as averred by him in his defences. He admitted that the loan was given for a special purpose, and that the loan and the other transactions between Thiem and himself were kept entirely separate. No writing under the hand of Mr Thiem tending to instruct payment was produced. The defender led some parole evidence which he contended showed that Mr Thiem during his life had admitted to third parties that the debt had been paid.

On 9th December 1898 the Sheriff-Substitute (FYFE) pronounced the following interlocutor:—"Finds (1) that pursuers are the surviving and accepting trustees of the late E. W. Thiem, who died on 7th January 1897; (2) that on 16th September 1886 the said E. W. Thiem lent defender £225; (3) that defender granted and delivered to him the I O U which was found in the deceased's repositories; (4) that defender avers, but has failed to prove, that said loan was repaid: Therefore finds that at the date of the death of said E. W. Thiem defender was indebted and resting-owing to him said sum of £225, which sum he is bound to pay to pursuers as trustees foresaid: Decerns against defender for payment to pursuers of £225 sterling, with interest thereon at 4 per cent. per annum from the date hereof."

Note.—. . . . "Having seen the witnesses and considered all the circumstances, I must confess that I should personally have little hesitation in concurring with these others that all the indications are against this loan being still outstanding. But I am of course bound to consider the case in the light of the legal rules which are applicable. . . .

"The pursuers' contention is now, as it was before the order for proof, that the admitted I O U establishes the debt, and just as had it been Mr Thiem who remained alive he could only have proved his loan by defender's writ or oath, so in like manner defender can only prove the repayment of it by Thiem's writ or oath, and as there is nothing equivalent to writ, and as no secondary evidence can supply the place of Mr Thiem's oath, the defender cannot by any competent evidence now prove his averments of repayment, and so his defence must fail.

"The defender, in the first place, contends that as he cannot get the oath of a dead man he is entitled to fall back upon secondary evidence, and to substitute the evidence of Mr France and Mrs Böttger for Mr Thiem's oath. He urges that suppose Mr Thiem had been alive and under reference to his oath and had gone into the witness-box and said to the Court just what he said to his wife, or even had he denied generally that the I O U was paid, if he had admitted that he used the words attributed to him by these two witnesses, the Court would at this distance of time have held defender entitled to succeed. But although this argument is ingenious, it is I think unsound, and the simple fact is that where a fact can only be proved by reference to oath of a party who is now dead, that evidence is lost unless perhaps where there is a factor or law-agent, or some such person who knows and can depone to the facts, which is not the case here.

"The defender very earnestly urges that the rigidity of the rule as to proving money payments is now being relaxed by the Courts, and he refers to *Bryan* v. *Butters* (February 23, 1892, 19 R. 490) as illustrating this. But in that case all the length the Court went in the direction of liberal interpretation of the rule was to hold that the receipt of the cashier of a firm although not holograph or tested was the writ of the firm. But the difficulty of the defender in the present case does not arise upon the form of writ but upon the want of it altogether. The so-called relaxation of the rule as to writ or oath does not go further than to broaden the view of what is to be regarded as writ, and what parole evidence is permissible to set up or to explain the writ, but such cases as *Bryan*, or *Nicoll* v. *Reid* (November 23, 1878, 6 R. 217), and others to which the defender refers, do not support the competency of what he desires to do in this case, viz., to substitute parole evidence for non-existent writ.

"Defender also urges the analogy of the relaxation of the rule in the case of bills. But this is the effect of statutory enactment only, and is not applicable to an I O U. Besides, there was reason for the relaxation in regard to bills, for bills are not always what they seem, while an accommodation I O U—although not perhaps unknown—is a rare occurrence as compared with an accommodation bill. Both parties appeal to the case of *Neilson* (November 17, 1883, 11 R. 119), although I do not see that it affords much aid to either. Pursuers refer to it as recognising the writ or oath rule. Defender refers to it for Lord Young's observations upon what he calls that vulgar and most familiar example of a mere acknowledgment of debt, the I O U, but his dictum, so far as I know, is the only authority in this direction. It was repeated in *Welsh* v. *Forbes* (March 18, 1885, 12 R. 851), but I gather from the opinions there that Lord Craighill and Lord Rutherfurd Clark did not assent to it in that case, and they may be assumed not to have done so in *Neilson's* case, where their doing so was not necessary for the decision.

"The attempt to set up a loan contract by parole in *Haldane* v. *Spiers* (March 7, 1872, 10 Macph. 537) called forth elaborate conflicting opinions, but I think there is no doubt that as the law stands the defender is shut up to establish his averment of repayment by writ or oath, and that having failed to do so he must sacrifice his money to the rigidity of established rules of law in regard to the competency of evidence, which—although they will not probably commend themselves to the defender—are

founded upon valuable principle, and are at all events recognised by legal authorities, which, despite my sympathy with the defender, I cannot ignore.

"Pursuers sue for interest from the date of the I O U, 12 years ago. But there is neither statement nor evidence of a demand for payment of interest. I think the onus is on pursuers to show that the interest is resting-owing, and the only evidence on the subject is the defender's statement that he paid the interest. Having regard to this, and to the defender's plea of taciturnity, I allow interest only from the date of this decree, although I do so with some hesitation in view of the case of *Cunninghame* v. *Boswell* (May 29, 1868, 6 Macph. 890, 40 Jur. 495)."

The defender appealed, and argued—An I O U was not a document of debt; it was a mere adminicle of evidence. It was an acknowledgment that a debt was due at its date, but not an acknowledgment that a debt was due ten years after its date. It was *prima facie* evidence that at the time it was granted the granter was the debtor of the recipient, but the circumstances of the case could be looked at, and parole evidence could be led to prove that the debt had been paid—*Williamson* v. *Allan*, May 29, 1882, 9 R. 859; *Anderson's Trustees* v. *Webster*, October 23, 1883, 11 R. 35; *Neilson's Trustees* v. *Neilson's Trustees*, November 17, 1883, 11 R. 119, opinion of Lord Young, 124; *Welsh's Trustees* v. *Forbes*, March 11, 1885, 12 R. 851, opinion of Lord Young, 856; *Paterson* v. *Paterson*, November 30, 1897, 25 R. 144, opinion of Lord Young, 162. From the parole proof it was plain that after January 1889, when the last instalment of the debt was paid, Mr Thiem held the I O U not as an acknowledgment of debt but on behalf of the defender. The I O U was adopted from the law of England, and by the law of England an I O U taken by itself was not evidence of a loan—Byles on Bills (15th ed.), p. 33; *Fesenmayer* v. *Adcock*, 1847, 16 M. & W. 449. There was here no evidence of loan except the admission of the defender, and an admission of a debt accompanied by a statement that the debt was paid was no proof of the debt. Nothing had been established against him, for there was no evidence of the loan but his admission, which was qualified by the averment that the debt had been paid. It was really a question for a jury whether the evidence led and the whole circumstances of the case did not go to redargue the *prima facie* presumption arising from the fact that the I O U was found in the deceased's repositories—Taylor on Evidence, i. sec. 124. Payment might be presumed from taciturnity, and from the subsequent payment of other debts—Dickson on Evidence, sec. 621. In the present case the debt had been unclaimed for ten years. *Neilson's Trustees*, *supra*, was an authority to the effect that payment should be presumed from a long lapse of time without any claim being made. The pursuers in order to succeed must show not only that the I O U instructed a debt due at its date, but that it instructed a debt due at Mr Thiem's death—in short, that an I O U was equal to a bond. An I O U was not in the same position as a bond. Neither was it of the nature of a receipt. If it were either a bond or a receipt it would require a stamp in terms of the Stamp Acts. It was a mere item of evidence which required to be supported by further testimony, and in the present case the evidence was all against the existence of a debt at Mr Thiem's death, and had indeed convinced the Sheriff-Substitute, as he confessed in his note, that the debt had been paid.

Argued for pursuers—An I O U was an admission of liability to pay, and must therefore be either holograph or tested—*Christie's Trustees* v. *Muirhead*, February 1, 1870, 8 Macph. 461; *Paterson* v. *Patersons*, *supra*. The present I O U was admitted to be holograph of the defender. A holograph acknowledgment of debt was probative, and implied an obligation to repay—Stair, iv. 42, 6; Ersk. iii. 2, 22; *Martin* v. *Crawford*, June 4, 1850, 12 D. 960. An I O U, either holograph or tested, was a deliberate admission of liability by one person to another importing obligation to repay; in short it was a document of debt which remained binding *per se* to prove the debt until payment of the debt had been proved either by writ or oath—*Robertson* v. *Robertson*, January 9, 1858, 23 D. 693; *Bowe* v. *Hutchison*, March 19, 1868, 6 Macph. 642, opinion of Lord Deas 646; *Williamson*, *supra*, 9 R., opinion of Lord President Inglis, 864. *Robertson* v. *Robertson*, January 9, 1858, 20 D. 391, was on all fours with the present case, except that "I acknowledge the receipt of" was there substituted for I O U. Beyond proving the handwriting and the fact of delivery, which in this case were both admitted, parole proof was utterly incompetent — *Haldane* v. *Speirs*, March 7, 1872, 10 Macph., opinion of Lord President Inglis, 541. On the matter of admission of liability there was no distinction between the laws of England and Scotland with regard to I O Us, except that in Scotland proof of want of consideration did not invalidate the I O U, while in England the I O U might be impeached by proof of want of consideration. In short, an I O U was treated in England on the matter of proof required in the same manner as a promissory-note not in the hands of an onerous third party—*Lawrence* v. *Elliot*, 1861, 30 L.J., Exch. 350; *Hinton* v. *Sparkes*, 1868, L.R., 3 C.P., 161, opinion of Bovill, C.-J., 164. An I O U in Scotland was in the same position as a bill before the passing of the Bill of Exchange Act; non-onerosity was not a good defence —*Law* v. *Humphrey*, July 20, 1876, 3 R. 1192, opinion of Lord President Inglis, 1193, founding on Stair, i. 11, 7. As liability on a holograph I O U could only be restricted by a discharge proved by writ or oath, the parole proof allowed in the Sheriff Court was incompetent, but even on the facts brought out in evidence there was no proof that the debt had been discharged.

At advising—

LORD JUSTICE-CLERK—After the death of Mr Thiem, whose trustees are the pursuers, there was found in his repositories an I O U for £225, which it is not disputed is holograph of the defender. Mr Thiem's trustees therefore hold a document under the defender's hand acknowledging that he is indebted in that sum to the deceased. It seems to me to be of no consequence whether the defender can resist effect being given to his admission of loan unless the qualification be taken along with it. It does not matter whether it was for an advance of money or not. Such an acknowledgment might not be in respect of a loan of money. Such an I O U might be granted for a cause not implying a loan. It might be granted to close an accounting between parties in a matter not involving loan; it might be to settle a claim of damages, or to provide a fund of credit, or to induce another to delay and waive exacting some right in which no question of money was involved. But on the face of it it bears to be, under the granter's hand, an admission that the grantee has a right to be paid by him the sum which it bears upon its face. But I am of opinion that there is no obligation on the pursuers to prove for what cause the acknowledgment of indebtedness was granted. The question is, whether the pursuers, by founding on the I O U as a document constituting the debt, or only as evidence to prove debt, can enforce their claim for payment. The question as between constitution of debt and evidence of debt seems to me to be in this case of no practical importance. For even if the case be taken on the latter alternative, the fact that the document is proved and admitted to be holograph of the granter makes it sufficient evidence. The document, if probative, is evidence of indebtedness, and being in the repositories of the deceased, the defender must, on the face of the written evidence under his own hand, either meet it by evidence of the debt having been paid or pay the debt. But I adopt the language of the late Lord President in *Haldane* v. *Speirs* as regards the effect to be given to such a document.

There being then this acknowledgment of indebtedness, what is the evidence by which it is proposed to get over it? Only parole evidence of the debtor and others, which if it can be received as competent tends to show that the sum in the I O U being in fact for a loan had been paid. But such evidence is not competent. The question being one of direct payment of sums of money above the parole limit, they cannot be proved otherwise than by writ or oath. Oath is, of course, in this case not available, the party directly in right of the document of debt being dead, and evidence of what he may have said during life being plainly not equivalent to his oath affirmative of the reference. Is there, then, anything, to use the Sheriff-Substitute's phrase, "equivalent to Mr Thiem's writ evidencing payment." I can find nothing. In this case it is not a question of whether informal writings may be held sufficient to prove payment. There are no such writings at all that can be so connected with Mr Thiem as that it can even plausibly be suggested that they may be held to be his writ.

The evidence—incompetent as I hold—which the Sheriff-Substitute took before answer, and of the truth of which he expresses his belief, might cause doubt on the fact, and lead to regret at the legal result which must follow the defenders' failure to act in a business-like manner, but it cannot prevent that result, for it cannot be competently looked at. I can well understand that had these pursuers been dealing with their own personal interests, and had all Mr Thiem's family been grown up and able to act for themselves, there might have been a general consensus not to stand on legal right. But plainly the trustees here, having to protect interests of persons not able to transact, could only proceed in strict conformity with their duty to protect the estate committed to them. The result, on the supposition I have stated, is to be regretted, but is in my opinion unavoidable, and I must move your Lordships to adhere to the decision pronounced in the Court below.

LORD YOUNG—This is an action for money lent (as alleged) on 16th September 1886, raised in March 1898 by the executors of the lender, who died in January 1897. The only writ founded on by the pursuers is the I O U referred to in Cond. 2. The defender admits the loan and the I O U, but avers payment in full by five instalments, the last being in January 1889, eight years prior to the lender's death.

The Sheriff (Mr Guthrie) allowed a proof, pointing out that the defender's judicial admission of the loan must be taken with the accompanying and qualifying averment of payment, so that the pursuer must either prove the loan irrespective of the admission, or taking the admission disprove the qualification.

The evidence given by the defender as a witness is in accord with his admission and qualifying averment on record, and this *plus* the fact that the I O U produced was found in the deceased's repositories is the evidence on which the pursuers rely. They have no other. Their contention is that the I O U is a document of debt, and that its genuineness being admitted by the defender, the debtor on the face of it, he must pay the amount with interest, his averment of payment without a receipt or discharge in writing being worthless.

The defender disputes the proposition that an I O U is a document of debt, or other than an item of evidence of more or less weight and value according to circumstances to show that at the date of it the granter owed so much to the grantee or holder.

In the view contended for by the pursuers that an I O U admitted or proved to be genuine is a document of debt equivalent to a bond of the same date and amount, the defender has no good answer to the action, and it would be idle to refer to the parole evidence of payment, or of facts and circumstances tending to show

that it would be against reason and probability to hold that the debtor or creditor balance between him and the late Mr Thiem on their money transactions and accounts was the same at the latter's death in 1897 as at the date of the I O U in 1886. On the other hand, if the defender's view that an I O U is no more than an item of evidence of the same legal character as a letter acknowledging a sum due, be correct, as I think it is, the whole proof led must be attended to.

In addition to the defender's testimony that he got the money on loan and repaid it, the evidence amounts in substance to this—that the granter and holder of the I O U were intimate friends, tradesmen in the same town, the former (Collie) a tailor and clothier, and the latter (Thiem) a restaurateur; that Thiem sold spirits, wine, and cigars to Collie, while Collie supplied clothes to Thiem, each paying regularly for what he got from the other; that Collie's clothes accounts against Thiem during the eight years from January 1889, when he avers that the loan now sued for was fully repaid, and January 1897, when Thiem died, amounted to £247, 13s., and were rendered and paid every year as incurred; that there is no indication or indeed suggestion of a demand having been made by Thiem during these eight years for any payment connected with the I O U or loan in question.

The impression made on the Sheriff (Mr Fyfe) by the evidence is expressed by him in his note, thus—"I am quite satisfied upon the proof that defender's surprise expressed when this I O U was presented to him after twelve years was genuine, and he has consistently since adhered to the position that the loan was repaid. Mr Albert Thiem thinks it unlikely that his brother would have let the loan lie for twelve years, and Mr Craig, one of the pursuers (who was a personal friend of both the parties), seems to entertain the like opinion, and is anxious to have it understood that this action has been brought, not because he personally would not willingly accept defender's assurance, but because, as trustees, he and his partner have a responsibility to minor beneficiaries which constrains them to obtain a judgment of the Court. "Having seen the witnesses and considered all the circumstances I must confess that I should personally have little hesitation in concurring with these others that all the indications are against this loan being still outstanding. But I am, of course, bound to consider the case in the light of the legal rules which are applicable." But being of opinion that the I O U is a document of debt he (the Sheriff) felt himself compelled to pronounce a judgment against what he thought the truth of the case in point of fact.

I have already said that I assent to the defender's contention regarding the character of an I O U, adhering to the opinion which I expressed on the subject in the case of *Paterson*, 25 R. 162—"With respect to the opinion which has been judicially expressed, although only *obiter*, that an I O U is an absolute receipt for money, and therefore in the absence of explanatory evidence really equivalent to a bond, I desire to say that I cannot concur in it. I think a receipt for money, however absolute, imports no obligation. The purpose of a receipt is discharge, not obligation. The money, receipt of which is acknowledged, may have been given on any imaginable contract or trust, but the particular contract or trust must be averred and proved as the law requires having regard to its character. The receipt which is silent on the subject, and without even a suggestion of what it is, cannot prove it But an I O U is not even a receipt. If it were, it would require a receipt stamp. Neither is it a bond for money. If it were, it would require a bond for money stamp. An I O U is an exotic, and the law regarding it of the country whence we imported it may usefully be looked at. Byles on Bills, p. 33, may be consulted, and the case of *Fesenmayer* (1847). In that case Baron Parke says—'An I O U is no more proof of money lent by the party holding it to the party sought to be charged with it than of goods sold and delivered by the one to the other. And unless it is evidence of an account having been stated between them it proves nothing at all.' I suppose that I O Us are sometimes holograph and sometimes not, and the English authorities, so far as I know, do not suggest that it signifies whether or not. With respect to our own law I cannot think that such a writ, consisting of three letters, may be regarded as coming within the scope of the reasons assigned and very intelligibly explained by all our text writers why holograph writs were from a remote date received, and still continue to be received, as privileged and exceptional in cases where our law requires probative writing."

The case of *Fesenmayer* in 1847, I believe is now, and since its date has been, regarded as the standing authority on the common law of England regarding I O Us. The decision in the case of *Douglas* v. *Holme* in 1840 (12 Ad. & E. 641) had been thought to imply that an I O U (although not addressed) was *prima facie* evidence of a loan by the holder to the person whose signature it bore, and Addison in the earlier editions of his work on Contracts refers to it accordingly. In the 4th edition he corrects this by saying—"The Court of Exchequer, however, has recently holden that an I O U is not evidence of a loan but of an account stated," referring to the case of *Fesenmayer* —See Addison on Contracts, 4th ed., p. 57. The law is so stated by Mr Taylor in his work on Evidence, vol. i., p, 128, where the case of *Fesenmayer* is cited as correcting *Douglas* v. *Holme* on the point of *prima facie* evidence of loan, for in the later case there was no question about want of address, which was the leading and conspicuous question in the earlier.

We were referred to *obiter dicta* of Lord President Inglis and other Judges to the effect that an I O U is a document of debt, and as good as a bond, or indeed a judgment, for the amount. I asked the learned counsel

who referred to these *dicta* whether any authority which warranted them was cited by the Judges, and got a negative answer, and a similar answer to the question whether he had found any. It is certainly not long since I O Us became known on this side of the border. I asked the learned counsel who opened the case for the pursuers whether he could refer us to the earliest reported case in a Scotch Court in which an I O U was mentioned, and was informed by him that on a research the earliest case found was *Woodrow* v. *Wright*, November 16, 1861 (24 D. 31). There has therefore been but a short time for the growth of rules of our common law regarding this, on the face of it, singular exotic. I could not on any evidence I am acquainted with, such as would warrant the affirmance of a rule of the common law, venture to say that I O Us must be holograph or dated or addressed. I doubt if they are or ever were in Scotland customarily used in matters of serious business. If two friends who have been travelling together find on parting that one has paid in excess of his share of the expenses (fares, hotel-bills, and sight-seeing) he may get an I O U from the other as record of the fact, and so also in the case of one paying a friend's share of a dinner-bill, or his losses at cards or billiards beyond the money then in his purse. I am not prepared to affirm that by the common law of Scotland these are bonds or equivalent to bonds. As an item of evidence that two parties had agreed as to the state and balance of the account between them I am not of opinion that an I O U need be holograph any more than an adjusted and docqueted account or a letter admitting a balance due by the writer need be holograph or tested. But that the three letters I O U with a sum annexed in figures when subscribed become by the common law in Scotland a bond, or (which is the same thing) equivalent to a bond, is a proposition which I cannot assent to. I asked the learned counsel for the pursuers when maintaining that this very singular and recent import (an I O U) was thus regarded by our common law and usage—whether the same law and usage imposed any limit to amount or endurance, and received a negative answer, with this qualification only, that if it required to be holograph it would prescribe in twenty years.

I have already stated the import in substance of the evidence which I agree with both Sheriffs in thinking it was proper to allow, and also that it made the same impression on me, or rather produced the same conviction in my mind, as to the truth in point of fact of the defence which it did upon the mind of the Sheriff (Mr Fyfe), who, however, found an insuperable (as he thought) legal difficulty in the way of acting on it. That difficulty was, of course, that the I O U produced is, in his opinion, a document of debt, and that no written discharge is produced or alleged to exist. In this view there was no occasion for proof, and the pursuers' appeal against Mr Guthrie's interlocutor allowing it ought to have been sustained.

The issue of fact on which proof was allowed and taken was in substance this—"Whether on 16th September 1886 the defender received from the deceased E. W. Thiem £225 sterling on loan, to be repaid with interest at 4 per cent. per annum; and whether at the death of the said E. W. Thiem on 7th January 1897 the said loan, with the interest thereon from 16th September 1886, was outstanding unpaid, and is now due and owing to the pursuers by the defender?" It could be no other, for the record raises no other.

I have assumed, and shall in what I have yet to say continue to assume, that all the evidence now before us was properly admitted, and is therefore to be considered by us in answering the issue. I have expressed my view of the law which I think applicable, and (having regard to it) my conviction in fact produced by the evidence.

I wish, however, to point out not merely that the I O U before us gives no information regarding occasion or consideration for granting—in which respect it is like any other I O U which I have seen—but that the pursuers have not and never had any knowledge on the subject except what they got from the defender—first, in his answer to their private inquiry made on finding the I O U; second, in his statement on record; and third, in his evidence. The I O U does not itself prove a loan of money any more than a sale of wines, cigars, and diamond rings, or a balance due when the accounts of the parties who dealt with each other were stated and adjusted between them. Nor is there any evidence now before us on the subject except the testimony of the defender. But if his testimony was properly admitted, and is not now to be rejected or disregarded as superfluous or immaterial, it must be taken as a whole, unless indeed there is good reason for treating it as unworthy of belief. If it was necessary for the pursuers to adduce some evidence beside and beyond the I O U itself to show that it was given for money lent—and the only evidence adduced by them is that of a witness, who while he swears that he saw the borrower receive the money from the lender, also swears that he saw him repay it to the lender with interest—I am of opinion that such evidence must be taken as a whole, unless, as I have said, there is good reason for discrediting part of it. If the borrower is the witness, there may be suspicion of his veracity in swearing to payment, but in this case there is admittedly no ground for such suspicion. There is on the evidence no reasonable doubt as to the truth of the case in point of fact. The Sheriff had no doubt that the truth is with the defender, and I infer from your Lordship's expression of regret for the decision against him which you think the law compels, that you have none. This conviction is necessarily produced by the evidence, for we have no other knowledge than it gives us. The legal question would have been the same had the giver of the I O U been dead as well as the holder, and the only evidence explanatory of it had been the oral testimony of one, or two, or indeed any number, of credible

witnesses that they witnessed both the loan and the repayment of it, and of the fact that the holder survived the repayment so witnessed for any number of years without making a demand or withholding payment of accounts annually incurred by him to the granter during these years.

The legal question for our decision therefore is—whether an I O U for any sum is by the common law, *i.e.*, the customary law of Scotland, a bond or equivalent to a bond or to a judgment for that sum. If we answer that question in the affirmative the pursuers must prevail. If otherwise—and we take the same view as the Sheriff as to the import of the evidence—our judgment must, in my opinion, be for the defender.

If it should be held that an I O U is a document of debt, could we thereafter consistently hold that a letter in which the writer acknowledges that he owes say £100 to the person to whom it is addressed (or given without any address, or sent in an addressed envelope) is not a document of debt? Then what about transference? Is an I O U, or such a letter as I have suggested, transferable, and if so, how? Is it negotiable and transferred by delivery, with or without indorsation, or is assignation essential but operative? Let me further for illustration put the case that A in 1886 received from B an I O U or letter of that date acknowledging that he owes him £100, and in 1887 a similar document or letter of that date for £50, and that both of them are in A's possession or found in his repositories on his death. What is the correct legal view of the situation? If the I O Us or letters are documents of debt, it follows that B is debtor on both of them to A or to his executor. If, on the other hand, they are only items of evidence, the result is that they show or tend to show that while at the date of the first B's debt to A was £100, it was at the date of the second only £50. Extend the case by supposing that in a subsequent year B receives A's I O U or letter for £200, the prior I O U or letters remaining in A's possession, is it not clear that the state of their accounts would, *prima facie*, be taken to be a balance of £200 due to B.

Again, I venture to suggest as a question deserving of consideration whether it is possible, consistently with legal principle and practice, to regard any writ as being a document of debt or not according to circumstances—that is to say, according to what may be proved to have been the occasion or consideration of its origin. Such a view has certainly not been taken hitherto with respect to any writ. In dealing with a document of debt and the rights of the holder, the Court takes no account of the debt for which it was granted, or of the occasion, consideration, or cause of granting, unless indeed the document is impeached on some proper ground of reduction. It follows, in my opinion, that if an I O U is to be regarded as a document of debt if proved by parole to have been received for money lent, it must also be so regarded although received only as an acknowledgment of the balance then standing against the giver on adjustment of his account with the receiver, and this whether the account is a business or only a social and festive account. But I have said enough, and more than enough, to show how I understand and, if I rightly understand, appreciate the way in which I O Us are regarded and treated in England, and why I think it is in every view undesirable to regard and treat them otherwise in Scotland if that can be avoided.

Lord Trayner—This is an action for payment of £225 lent, as the pursuers aver, by the late Mr Thiem (whose executors they are) to the defender on 16th September 1886. For this sum, and of that date, the defender granted his I O U to Mr Thiem. The I O U which was found in Mr Thiem's repositories after his death is produced, and it is admittedly holograph of the defender. The defender pleads in answer to the pursuers' claim that he repaid the loan in four instalments of £50 each and one of £25 between the months of March 1887 and January 1889. He also pleads that the I O U does not *per se* prove the alleged loan, and that his admission that the loan was given cannot be founded on by the pursuers without giving effect at same time to the qualification stated that the loan was repaid.

The Sheriff-Substitute, giving effect in some measure to the defence I have last mentioned, allowed the parties a proof of their averments, and referred to certain cases in which the doctrine had been applied, that one party to an action can only found upon the judicial admission of his adversary subject to any qualification which is attached to the admission. I think the Sheriff-Substitute was wrong in allowing such a proof, the only proof admissible in the case in my opinion being a proof that the debt had been paid. The rule or doctrine on which the Sheriff-Substitute proceeded is not applicable to a case like the present. The pursuers are not founding on the qualified judicial admission by the defender, but on the unqualified admission of his indebtedness contained in the I O U founded on. That writ, admittedly genuine, needed nothing to support it; on production of it the pursuers' case was proved. In the case of *Haldane* v. *Speirs* (10 Macph. 541) the Lord President said—"Simple acknowledgments or I O Us are very frequent between parties who do not wish to use a negotiable document, and prefer a more simple way of evidencing the loan; and the Court has very properly given effect to that class of documents. But they are not taken as part of the evidence, but as themselves proving the loan. No doubt you may require to set them up in this sense, that it may be necessary to prove the handwriting or the fact of delivery, but beyond that parole evidence is utterly incompetent." So also the same learned Judge said in the case of *Williamson* v. *Allan* (9 R. 864) that an I O U not in itself open to valid objection "is a perfectly good writ to instruct a loan;" and Lord Colonsay in the earlier case

of *Hamilton's Executors* v. *Struthers* (21 D. 57), dealing with I O Us which were not holograph, said—"The terms of these acknowledgments as for borrowed money would have been conclusive if we could look at them." There are other *dicta* in reported cases, referred to in the course of the discussion, to the same effect. I am of opinion that they set forth the law of Scotland as to the value and effect of an I O U which is admittedly genuine. The I O U in question is not objected to by the defender on any ground; and that being so I regard it as conclusive evidence of his indebtedness in the amount which he there admits to be owing to Mr Thiem. The next question is, has the defender proved that the debt for which the I O U was granted has been paid? and that question must be answered in the negative. The only mode, according to the law of Scotland as it at present stands, of proving the payment alleged by the defender, is by the writ or oath of his creditor. Mr Thiem's oath is not now available, and there is no writ by him instructing payment. I decline to look at the parole evidence on this subject, or to offer any opinion as to its effect. It is incompetent and should never have been taken. The result therefore is that the pursuers have proved their claim, and the defender has failed to prove that it has been discharged. The pursuers are therefore entitled to decree.

Although the whole case is thus, according to my opinion, disposed of, it is right that I should advert to some views which were in the course of the discussion put forward in support of the defender's contention, and in which I am unable to concur.

It was urged that an I O U, while it may be an item of evidence in support of a claim, is not conclusive evidence, and is not a document of debt sufficient in itself to found an action. I regard the distinction thus drawn as immaterial, and indeed as a distinction which exists merely in expression. It is immaterial, because whether the I O U be regarded as a document of debt or merely as conclusive evidence of a debt, its effect is the same in result in the action in which it is produced. That it is conclusive evidence is the opinion of Lord President Colonsay, Lord President Inglis, and other judges. I do not see how it could be otherwise regarded. What better or more conclusive evidence of a debt could be desired or procured than the unqualified admission of the debtor? Then if it is conclusive evidence of the creditor's claim, decree must follow in the creditor's favour. On the other hand, that it is in itself a document of debt sufficient to found an action appears obvious from a consideration of what it is, and what it by legal inference imports. In itself it consists of the statement that the granter of it is indebted to the grantee. The law infers from that the obligation on the part of the granter to make payment of the admitted debt. But if it imports an obligation to pay, then an obligation to pay is a good ground of action. No one doubts that if a debtor grants an obligation to pay, such obligation is a document of debt which will sustain an action for enforcement of the obligation. But an obligation which the law infers is as good to all intents and purposes as an obligation which is expressed. The conclusion is that an I O U is in law an obligation which will sustain an action. As I have said, it does not appear to me material which view is taken, for the result is the same. There have been actions raised and claims maintained in our Courts founded upon I O Us, and none has ever been dismissed, so far as I know, on the ground that an action could not be founded on such a document of debt.

Further, it is said that the law of England differs from the views expressed by the Judges of our own Court to which I have already made reference. If it were so, I should follow the opinions which I think express the Scotch law rather than the law of England, for it is the Scotch law we have to administer. But on consideration of the English authorities to which we have been referred, I am disposed to think that the difference which is said to exist is more seeming than real.

I find the law of England stated thus in Addison on Contracts, 8th ed. p. 1048—"An I O U being a distinct admission of a sum due, is *prima facie* evidence of an account stated, and of a promise to pay the amount to the person who is in possession of the document; but the effect of it may be got rid of where it is the only item of evidence of account, by showing that there was no debt and no demand which could be enforced by virtue of it." There is not any material difference in principle between that statement and the law of Scotland. I shall notice hereafter what is meant by an "account stated," but assuming in the meantime that it is equivalent to an adjusted balance, or an amount ascertained and fixed between debtor and creditor, then the I O U granted for such balance or ascertained debt is according to English law *prima facie* evidence of the indebtedness of the granter of the I O U in that sum. If the debtor cannot rebut the presumption (involved in the idea of *prima facie* evidence), the evidence afforded by the I O U becomes conclusive. And although the Scotch authorities treat the evidence of an I O U as conclusive evidence, the law of Scotland does not any more than the law of England preclude the granter of the I O U from getting rid of its effect by showing that there is "no debt or demand which could be enforced by virtue of it." The grounds on which this may be done and the mode of establishing these grounds may, and in some respects do, differ in the two countries. But the I O U in its radical effect is the same in both. It is an admission of debt involving a promise or obligation to pay, which may be enforced against the granter unless he can, *habili modo*, show reason to the contrary. The authority most urged upon us by the defender was the opinion of Baron Parke in the case of *Fesenmayer* v. *Adcock* (16 M. & W. 449),

who said—"An I O U is no more proof of money lent by the party holding it to the party sought to be charged by it, than of goods sold and delivered by one to the other. And unless it is evidence of an account having been stated between them it proves nothing at all." Now, I agree, that, speaking strictly, an I O U does not *per se* prove that money has been lent any more than it proves goods sold and delivered. It proves one thing only, and that is the admission of the granter that he is indebted to the grantee in a stated amount. But if that indebtedness arose out of a contract of loan or a contract of sale, it is not very inaccurate to say that it proves the contract, so far as it needs to be proved, out of which the indebtedness arose. In England, I believe, the defender sued on an I O U would be allowed to dispute his liability under it, on the ground that it was granted without consideration, and he would equally be entitled to do that if the claim was founded on a bill or promissory-note. But this would not be a relevant defence in Scotland, where gratuitous obligations may be enforced. The one question with us where the I O U is admitted or proved to be genuine is this—Has it been paid or discharged? If not, the granter will be decerned to pay it, without any consideration being had as to the contract or the circumstances under which it had been granted. I had some difficulty at first in understanding how Baron Parke could hold that an I O U would not be evidence of a loan, or of goods sold and delivered, and yet be evidence of an "account stated," because the I O U refers no more to an "account stated" than it does to a loan or a sale of goods. But I find that the words "account stated" are technical words in English practice, and in Wharton's Law Lexicon they are thus defined or explained—"This was a common count in a declaration upon a contract under which the plaintiff might prove an absolute acknowledgment by the defendant of a liquidated demand of a fixed amount, which implies a promise to pay on request." Now, a "count in a declaration" is, I take it, just what we would call an article in a condescendence. It is the statement of the pursuer's claim; and what I understand the foregoing quotation to mean is, that where two parties have agreed upon a sum as due by the one to the other, arising out of one or out of many transactions, that statement or "count" may be proved by the production of an I O U (which is "an absolute ackowledgment") which sets forth the ackowledged debt. An "account stated" is not necessarily the balance brought out on a regular debtor and creditor account made out and adjusted by the parties. There need be no account of that kind, but the parties must have agreed, as I have said, that on one or more transactions between them, which do not require to be specified, there arises a balance or a sum due by the one to the other, which the party indebted in it acknowledges to be due. It will be noted that in the quotation which I have given from Wharton, the plaintiff suing upon the "count" of "account stated" has to prove the debtor's acknowledgment of indebtedness in order to obtain judgment, but it is not suggested that he must also prove the contract or contracts out of which the acknowledged debt arose. This appears to be in accordance with the authorities; for in several cases which I have consulted I find that the I O U founded on by the plaintiff has been itself regarded as direct and sufficient evidence of the debt sued for. Thus in the case of *Curtis* v. *Richards* (1 M. & G. 46) the plaintiff sued the defendant, *inter alia*, for £20 contained in an I O U, which was not addressed to, although held and produced by the plaintiff. The verdict was for the pursuer. A new trial was moved for on the ground "that the summing up of the learned Judge (Justice Maule) whereby he intimated to the jury that they might find their verdict for the plaintiff in respect of the £20 without any further evidence (*i.e.*, than the I O U itself) was in effect a misdirection. The memorandum (*i.e.*, again the I O U) not being an account stated on the face of it, something more than mere production is required to bring it within the last count of the declaration." That motion for a new trial was refused, and the direction complained of accordingly not disapproved. Again, in the case of *Graves* v. *Cook* (Jur., N.S., ii. 475, Excheq.) several persons having each given their I O U to the plaintiff for £100, this action (as the report bears) "was brought on that given by the defendant" as on an account stated. The jury (before Baron Martin) found for the plaintiff. A new trial was moved for on the ground that "here was no evidence of a debt from the defendant to the plaintiff." The motion was refused. Not to multiply examples of the same kind, I refer lastly to the case of *Buck* v. *Hurst* (L.R., 1 C.P. 297), in which the plaintiff sued the defendant "for money lent and money found due upon accounts stated." The I O U was put in, and the verdict was for the plaintiff. A new trial was moved for on the ground that there was no evidence to go to the jury against the defendant. The motion was refused, Mr Justice Keating remarking—"The plaintiff would be entitled to recover on the mere proof of the defendant's handwriting to the I O U"—a remark very similar to that made by Lord President Inglis in *Haldane* v. *Speirs*. It therefore appears to me that making allowance for the difference of the technicalities of practice, and the right to challenge a document not under seal on the ground of want of consideration, the law of England and Scotland do not differ in the views they take of the import and value of an I O U, either as evidence of indebtedness on the part of the granter, or as to its affording a sufficient ground of action.

Lastly, it was suggested that the I O U should be stamped either as a receipt, a bond, a promissory-note, or an agreement. This was not seriously pressed, but must be noticed, as it is *pars judicis* to take care that the stamp laws are observed in the

interest of the Revenue. It has been decided more than once both in England and Scotland that an I O U does not need a stamp, and I think it does not. It is not a receipt, for it does not acknowledge the receipt of any money, nor does its language necessarily imply the receipt of any. It is not a bond, for it contains no word of obligation, although the law implies obligation from its terms. It is not a promissory-note or bill because it contains no promise to pay or fixed date for payment. It is not an agreement, for there must be two parties to an agreement, while an I O U is unilateral. The definition of agreement given in the Stamp Act of 1870 covers only such a writ as may be "evidence of a contract or obligatory upon the parties" to it.

On the whole matter I am of opinion that the pursuers are entitled to our judgment, and that this appeal should therefore be dismissed.

I said in an early part of my opinion that I declined to look at the parole evidence in this case, and I am therefore not to offer any opinion now on the question whether the defender would have been in a more favourable position had the law of Scotland allowed payment of a debt like that sued for to be proved by parole. But I cannot help saying that the restriction long ago imposed by our common law upon the mode of proving either a loan or payment of a loan should now be altered as quite inconsistent with modern ideas on the subject of probation. It does seem anomalous that a loan of £20 or the payment of such a loan should be proveable only by writ or oath. while a contract under which liability for thousands of pounds may arise can be proved by witnesses. A loan, or payment of a loan, is after all only a fact, and should be proveable like any other fact by the persons who knew about it. The rule may have been suitable at a time when an obligation for one hundred pounds Scots was regarded as a deed "of great importance," and payment of such a sum required on account of its importance to be proved by writing. But the sum of £100 Scots, or a transaction of any kind involving no more than that can scarcely be now regarded by anyone as a matter of "great importance."

Lord Moncreiff—It is important to note at the outset that the constitution of the debt, repayment of which is now sought, is not impugned, and no question is raised in regard to it apart from the contention, which I hold to be untenable, that it lies on the pursuer to prove the footing on which the I O U sued on was granted by the defender.

The only defence on the merits is that the loan sued for was repaid in full with interest by the defender to the late Mr Thiem ten years ago. The defender does not dispute the genuineness of the I O U upon which the pursuers found. It is complete in all essentials, and is holograph of the defender, and after the death of Mr Thiem in 1897 it was found in his repositories put up along with a number of documents of debt granted by other persons, including several I O Us, all of which were admittedly due and unpaid. In short, the defender does not impugn the constitution of the debt; his defence is payment, and this being so, it does not matter on what footing the acknowledgment of debt was given. But the defender does not produce any receipts for principal or interest, nor any writing whatever under the hand of the creditor tending to instruct payment.

I agree with the Sheriff-Substitute that the defender has failed to prove that the loan was repaid, and that it must be held to be still resting-owing. But I must add that in my opinion the bulk of the evidence which the Sheriff-Substitute has so anxiously analysed is absolutely incompetent, and should not have been allowed; and that such of the evidence as is competent is insufficient to instruct payment.

1. We heard a full argument on the question whether an I O U is a document of debt forming *per se* a substantive ground of action, or merely an adminicle of evidence. It does not seem to me to be material for the decision of this case to decide which is its true character; because even if it be regarded as merely an adminicle of evidence it must prevail, as it is at least *prima facie* evidence of debt, and there is no competent or sufficient evidence to instruct payment. But as the question has been argued, I may say that I am of opinion with the majority of your Lordships that an I O U is a document of debt sufficient in itself to instruct the constitution and resting-owing of the debt. As Lord President Inglis said in *Haldane* v. *Speirs* (10 Macph. 541)—"But it is necessary carefully to distinguish between such a document as this"—a cheque—"and documents held to constitute proof of loan—I mean acknowledgment of receipt of money. Many such cases have occurred in which the alleged loan was held as proved where the acknowledgment was held as constituting the lender's document of debt. But I am not aware of any case where a document not in the hands of the lender was held to prove a loan. It is its being in the hands of the lender that gives point and meaning to the document. I refer to that class of documents known as I O Us where the writer states in his own handwriting and under his own signature that he has received so much money, and gives that document to the lender as his writ. That is held to constitute a loan. Such a document requires no evidence to support or explain it. The words are sufficient, and the Court construes it as not only a receipt of money but an implied obligation to repay." See also *Smith* v. *Smith*, 8 Macph., *per* Lord Deas, p. 241. This is in accordance with the terms and character of the document. Even a bare receipt for money—a document more appropriate to the discharge than to the constitution of a debt—imports, *prima facie*, an obligation to repay, and payment can only be proved by writ or oath—*Allan* v. *Murray*, 11 Sh. 1130; *Robertson* v. *Robertson*, 20 D. 371; *Thomson* v. *Geikie*, 23 D. 693.

An I O U is more than a bare receipt; it

is an unqualified acknowledgment of indebtedness in the debtor's handwriting and under his own signature, and necessarily imports an obligation to repay.

It is said that according to the law of England an I O U is merely evidence of an account stated. Even if we have borrowed I O Us from England it does not follow that we have adopted the law of England in regard to their effect any more than we have adopted English rules of evidence in regard to the proof of loan and payment of money. But be it that an I O U is merely evidence of an account stated, even according to the law of England, I understand an I O U is *prima facie* evidence of a promise to pay, and the burden is on the granter to show by competent evidence that nothing is due under it.

Again, it is said that an I O U does not require to be stamped—from which it is sought to be inferred that it is not a document of debt. I think this is fallacious. Rightly or wrongly, I O Us from a very early period have been treated as exempt from stamping, because they do not in terms fall under any of the categories or statutory definitions of documents which require to be stamped. An I O U does not satisfy the statutory definition of a "receipt," and in its terms it is neither a promissory-note nor a bond for want of words of promise or obligation. Being unilateral it has been held not to be an agreement. The exemption from stamping is no reason why our law, from the acknowledgment of indebtedness contained in this document, should not as a necessary consequence infer an obligation to repay. According to general understanding, I O Us are regarded as sufficient vouchers of debt; and they are constantly taken and relied on by lenders of money as their only vouchers. Mr Thiem apparently often took them. As loan can only be proved by writ or oath, and as an I O U usually constitutes the creditor's only written evidence of debt, it would be a serious thing if the sufficiency of I O Us were doubted.

2. I do not pursue this subject, because even if an I O U is to be held as merely a piece of evidence, it is a piece of written evidence—"it is *prima facie* evidence of a debt due by the party granting it to the party to whom it is granted," and especially where the constitution of the debt is not challenged, its effect cannot be taken off except by competent evidence of discharge or compensation. Here the debt is said to have been discharged by payment. The parole evidence which has been allowed and led to instruct payment directly is, in my opinion, absolutely incompetent. If such evidence were tendered in proof of loan it would at once be rejected, and the rule as to proof of payment is equally strict. That being so, I prefer not to criticise the evidence which was admitted as to alleged payments and conversations in regard to them in detail.

The only evidence adduced which can be regarded as competent is that which was led in regard to the alleged course of dealing between the creditor and the debtor in regard to other debts due by the creditor to the debtor and *vice versa*, from which, taken in connection with the lapse of time, payment is said to be presumed. Whether a loan has been constituted by writing or not, discharge of the obligation may be inferred from circumstances; but circumstantial proof can only be sustained where no reasonable doubt remains that the debt has been paid. The mere lapse of time, short of the years of long prescription, is not of itself enough, and in general it is necessary that there should be evidence of some transaction or settlement between the creditor and the debtor subsequent to the contraction of the debt which necessarily leads to the conclusion that the debt was discharged. This is shown very clearly by comparing the case of *Cunningham* v. *Boswell*, 6 Macph. 890, with the case of *Neilson's Trustees* v. *Neilson*, 11 R. 119. In the former case a receipt for £2000 of lent money granted by a nephew to an aunt was held binding upon the nephew's executor, although no demand for principal or interest was made against the nephew or his representatives for more than 34 years. There was, however, no evidence of transaction or settlement during that period.

In *Neilson's Trustees* the demand for payment was not made until 1882, 39 years after the acknowledgment of debt was granted in 1843. The acknowledgment was held not to be sufficient evidence of the subsistence of the debt in 1882. But it appeared that in 1852, nine years after the acknowledgment was granted, the father and son, the creditor and the debtor, entered into a general settlement of the affairs of the Mossend Iron Company, of which they were then partners, under which a sum of £417 was held to be payable to the son, the debtor in the acknowledgment. In these circumstances it was held that the original debt which had been contracted in connection with the interests of father and son in the old business of which they had been partners, and which was made over to the Mossend Iron Company in 1843, had been discharged.

An examination of the evidence in the present case shows at once how far short it falls of the latter case. The time that elapsed between the date of the I O U and Mr Thiem's death was little over ten years. He was an intimate friend of the defender. The loan was given for a special purpose, presumably not to be quickly called up; and it carried interest at 4 per cent., which for all we know may have been paid regularly to Mr Thiem. The defender founds upon the fact that subsequently to the date of the I O U Thiem incurred accounts to the defender (who was his tailor) which he regularly paid. While that is a matter to be taken into consideration, it falls far short of what is requisite in order to infer payment, because even according to the defender's own evidence the loan and the other transactions between Thiem and the defender were kept entirely separate. It is important to observe on the other hand that this I O U, which it is said should have been delivered up or destroyed in 1889, was

found in Thiem's repositories in 1897 in company with documents of debt of comparatively recent date, which admittedly had not been paid. There is therefore nothing to indicate that Thiem had lost sight of the I O U, or that he intended to cancel it, and on this part of the case I am satisfied that the evidence is not sufficient to instruct payment.

The Court pronounced this interlocutor:—

"Recal the interlocutor appealed against: Find (1) that the pursuers are the surviving and accepting trustees of the late Ernest William Thiem, who died on 7th January 1897; (2) that on 16th September 1886 the said Ernest William Thiem lent the defender Alexander Collie the sum of £225 stg.; (3) that the defender granted and delivered to the said Ernest William Thiem the I O U which was found in the said Ernest William Thiem's repositories, and which is holograph of the defender; (4) that the defender avers but has failed to prove that the said loan was repaid; (5) that at the date of the death of the said Ernest William Thiem the defender was indebted and resting-owing to him the said sum of £225 stg., which sum he is bound to pay to the pursuers as trustees foresaid: Therefore decern against the defender for payment to the pursuers of the sum of £225 stg. with interest thereon at 4 per centum per annum from 9th December 1898."

Counsel for the Pursuers—Campbell, Q.C. —Galbraith Miller. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Defender—C. N. Johnstone —Hunter. Agents—T. & W. A. M'Laren, S.S.C.

Thursday, March 16.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'LAY (M'QUEEN'S TRUSTEE) *v.* M'QUEEN AND OTHERS.

Bankruptcy—Fraudulent Alienation—Act 1621, *cap.* 18—*Marriage-Contract—Reduction quoad excessum.*

The trustee in a sequestration raised an action to reduce an antenuptial marriage-contract entered into by a bankrupt three months before the date of sequestration, whereby he conveyed his heritable property to trustees for behoof of his wife and children. Before entering into the said marriage-contract the bankrupt was solvent, but by doing so he became insolvent. It was not proved that his wife was party to any collusive scheme for defrauding the bankrupt's creditors.

Held (*aff.* the judgment of the Lord Ordinary) that the pursuer had failed to establish a ground of reduction either under the Statute 1621, cap. 18, or at common law.

Opinion reserved (by Lord Adam and Lord Kincairney) whether a reduction of a marriage-contract *quoad excessum* is competent.

By antenuptial marriage-contract dated 26th October 1896 Robert M'Queen, grocer, Milngavie, conveyed to trustees certain heritable properties for certain trust purposes. He directed the trustees, *inter alia*, to hold the same for the liferent use of his intended wife, Annie Mellon, school teacher, Johnstone, to make over to her if she survived him his whole household furniture and plenishing, and to provide that after her death the said subjects should belong to the children of the marriage. These provisions the said Annie Mellon (who brought no goods into the communion and undertook no counter-obligations) accepted in full satisfaction of her legal rights, and the children's right to legitim was also discharged.

Robert M'Queen was sequestrated by the Court of Session on 8th January 1897, and James M'Lay, C.A., Glasgow, was thereafter confirmed as trustee on his sequestrated estate. As at 5th January 1897 the bankrupt's affairs showed a dividend of 3s. 7½d. in the £, subject to expenses, the amount of the deficiency being £785.

On 18th May 1897 Mr M'Lay raised an action against Mr and Mrs M'Queen and the trustees under their marriage-contract, concluding for reduction of that deed.

The pursuer averred—"The said pretended antenuptial contract of marriage was intended to set apart for the use of the bankrupt a substantial part of his estate, and fraudulently to remove same from the diligence of his creditors. The bankrupt was then insolvent, and the said provisions in favour of his wife and children were made and granted by him in favour of persons conjunct and confident with him, and without any true, just, or necessary cause, and without any value being given therefor, with a view to defraud his lawful prior creditors represented by the pursuer. His said wife was aware of his insolvency at the date of the said pretended antenuptial contract of marriage, and the parties formed a collusive design to defraud the bankrupt's creditors. In any event, the value of the property conveyed by the bankrupt as a provision for his said wife and children in said antenuptial contract of marriage was, in view of the station of the parties and the insolvency of the bankrupt, in excess of a reasonable provision."

The defenders denied this averment.

The pursuer pleaded, *inter alia*—"(1) The provisions in question having been granted by the bankrupt in favour of conjunct and confident persons, and when in insolvent circumstances, without any value, and to the prejudice of prior creditors, the said antenuptial contract of marriage ought to be set aside. (2) The said writ sought to be reduced having been granted by the said Robert M'Queen after insolvency and without consideration therefor, and also with intent to defraud his just and lawful credi-