Thursday, January 11.

FIRST DIVISION.

[Lord Pearson, Ordinary.

CHRYSTAL *v.* CHRYSTAL.

Loan — Proof of Loan — Resting-Owing — Implied Discharge — Mora and Taciturnity.

Held that a document in the following terms—"*Glasgow, 27th June* 1879. Received from Mrs Marion Irvine Mackie or Chrystal the sum of five hundred and eleven pounds 3/ sterling, being loan to me, and on which I agree to pay 4 per cent. per annum.—WILLIAM CHRYSTAL—£511, 3/," was, in the absence of proof of discharge or payment, sufficient evidence of the existence of the debt in 1899.

Circumstances which *held* not to import a good defence on the ground of implied discharge or of *mora* and taciturnity.

Proof—Payment of Debt—Writ of Creditor—Admissions on Record — Reference to Oath.

In an action at the instance of a creditor for payment of a debt, founded upon an acknowledgment of debt granted by the defender in 1879, the defender contended that he could prove payment of the debt by the writ of the pursuer, and produced in support of his contention certain extracts from a cash-book kept by the pursuer containing notes of certain payments to her which had been made by the defender, but which were by her attributed towards payment of interest on another debt which she alleged existed between the parties, but which the defender, on a reference to his oath, had sworn did not exist. The defender further founded upon certain admissions made by the pursuer on record, in which she made averments as to payments made to her by the defender corresponding with the entries in her cash-book. *Held* that the defender was not entitled to take advantage of the pursuer's admissions as to the payments received by her without also taking into account the qualification that they were made on account of a different debt, and that the fact that he denied the existence of that debt in the reference to his oath did not modify or affect the qualification.

This was an action at the instance of Mrs Chrystal, 3 Teviot Terrace, Glasgow, against her son Robert Chrystal. The summons concluded for payment to the pursuer of "(*First*) the sum of £511, 3s. borrowed by the defender from the pursuer, conform to acknowledgment by him dated 27th June 1879, with interest thereon at the rate of £4 per centum per annum from the said 27th June 1879 till payment; and (*Second*) the further sum of £2000 sterling, with interest thereon at the rate of five per cent. per annum from the 26th day of May 1887 until payment."

The pursuer averred that the defender on 27th June 1879 borrowed from her the sum named in the first conclusion, that he had granted an acknowledgment in the following terms—"*Glasgow, 27th June* 1879.—Received from Mrs Marion Irvine Mackie or Chrystal, 2 Charing Cross, Glasgow, the sum of Five hundred and eleven pounds, 3/- sterling, being loan to me, and on which I agree to pay 4% per annum. 27/6/79. £511, 3/.—WILLIAM CHRYSTAL"—and that no part of the principal or interest had been paid.

She further averred that in 1879-80 the defender had borrowed from her the sum of £2000 to enable him to become a member of the Glasgow Stock Exchange, that he had paid her the interest on this sum regularly up to 1884, that "(Cond. 3) . . . On 5th October 1885 he paid to her a sum of £55, which covered the balance of interest due to the previous Martinmas. Thereafter he continued to make to her, or on her behalf and at her request, payments of various small sums, which the pursuer at the time imputed towards extinction of the interest on said loan. Between October 1885 and 25th June 1888 he paid in such small sums the amount due as interest down to Martinmas 1887. During the next eighteen months she received from him various sums amounting to £81, 17s. 6d., and for these credit falls to be given to the defender as against the interest which has since accrued. Since 3rd December 1889 he has made no further payments, and the principal sum is still due and resting-owing."

In answer to a statement of the defenders the pursuer further averred—"Ans. 7. . . . Under reference to article 3 of the condescendence, admitted that defender paid to pursuer and on her behalf sums for various purposes. This he did, not on account of any inability on the pursuer's part, or on that of his father's trustees, to find any money necessary, but upon the express request of pursuer, who found that the best way of obtaining from him the interest on the sums due to her was by getting from him small sums from time to time as she required them and as it was convenient for him to pay. The pursuer has given defender credit, as shown in condescendence 3, for the whole sums so paid to her."

The defender denied that he had received any advances from the pursuer, and averred that even if he had received any he had paid to and on behalf of the pursuer a larger sum than any received by him from her. He further averred that he had in 1890 granted a trust-deed on behoof of his creditors, and that the pursuer had lodged no claim.

He pleaded—"(4) The pursuer is barred from insisting in the present action by *mora* and taciturnity. (5) The defender not being due the pursuer any money, the defender is entitled to be assoilzied. (6) The said advances can be proved by the defender's writ or oath only. (7) Discharge. (8) Compensation."

The Lord Ordinary (PEARSON) on 22nd February 1899 allowed the parties, before

answer, a proof of their averments.

There being no writ of the defender available to instruct the alleged loan of £2000, the pursuer lodged a minute referring that part of the case to the defender's oath, and the Lord Ordinary, on the oath being taken, found it negative of the reference.

It is unnecessary to refer to the evidence, parole and documentary, upon the other branch of the case, as it appears sufficiently in the opinions of the Court.

The Lord Ordinary (PEARSON) on 10th August 1899 pronounced the following interlocutor:—"Decerns and ordains the defender to make payment to the pursuer of the sum of £511, 3s. sterling, borrowed by the defender from the pursuer, conform to acknowledgment by him dated 27th June 1879, with interest thereon at the rate of 4 per cent. per annum from the said 27th June 1879 till payment: Assoilzies the defender from the second conclusion of the summons and decerns: Finds the pursuer liable to the defender in the expenses of and incident to the Minute of Reference to Oath, and the procedure thereon: *Quoad ultra* finds the defender liable to the pursuers in expenses so far as not already disposed of, &c."

Opinion.—"The pursuer in this action sues her son, who is a stockbroker, for repayment of two sums of money alleged to have been borrowed by him from the pursuer in the year 1879. I allowed a proof *habili modo*, but as it appeared that there was no writ of the defender available to instruct the larger of the two alleged loans (that for £2000), the pursuer lodged a minute referring that part of the case to the defender's oath, On the oath being taken I found it negative of the reference; and the defender is consequently entitled to be assoilzied from that conclusion.

"In support of the other alleged loan the pursuer produces and founds upon a document holograph of the defender in the following terms:—'*Glasgow, 27th June* 1879. — Received from Mrs Marion Irvine Mackie or Chrystal, 2 Charing Cross, Glasgow, the sum of five hundred and eleven pounds 3s. sterling, being loan to me, and on which I agree to pay 4 per cent. per annum.—WILLIAM CHRYSTAL.—£511, 3s.' The document bore a penny stamp, and the defender objected to this as insufficient. This plea has been obviated by the addition of an impressed sixpenny stamp; and the document is now adjudged duly stamped.

"Notwithstanding the defender's plea that in such a case it rests upon the pursuer to prove that the debt is resting-owing, it is clear on the authorities that as this is an explicit holograph writ of a loan of money, the pursuer is entitled to decree, unless the defender can prove payment or discharge.

"Now repayment of the loan, in the strict sense, that is to say, the passing of money for the purpose and with the effect of discharging that debt, cannot be proved otherwise than by the writ or oath of the creditor. Accordingly, the defender maintains that he has proved repayment of this loan by the writ of the pursuer. To this purpose he founds (1) upon her admissions on record, and especially upon Art. 3. of her condescendence, and her 7th answer to the defender's statement; (2) upon certain entries in her cash-book, and (3) upon payments made by him to or on behalf of the pursuer, as instructed by vouchers produced, and set forth in the state No. 55 of process. I dismiss this third head as being in no view that I can discover writ of the pursuer. As to the entries at the end of the cash-book, on the pages marked A and B, these are headed—'Receipt of interest of 5 per cent. on £2000 lent to my son, Wm. Chrystal, in 1879 and 80. I have received it in instalments every year regularly until 1885.—M. I. CHRYSTAL.' Then follow entries in her handwriting of various payments of cash, covering the period from November 1884 to December 1889. The entries are all general except four, one of which is 'for boat, £10,' while two are for rent of Beechwood, a house at Dunoon occupied by the pursuer. I may say that although the defender criticised the heading as having the appearance of being inserted later, I see no reason for suspicion on that head. And this being so, it turns out that the 'writ' will not serve the defender on the plea which I am now considering, for it does not show any repayments towards the debt now in question. But the defender replies that the loan of £2000, to the interest of which these payments are there attributed, is the very loan which has been negatived by his oath on reference; and that it is therefore now open to him to attribute all these entries towards payment and extinction of the loan of £511, 3s. He maintains that these entries admit the payment by him of over £400 in cash, over and above the admission of five years' previous payment of interest, and that he is entitled to disregard the qualification that it was in name of interest on a debt which must be taken as never having existed. But I think the pursuer's reply is well founded, namely, that this is to attribute much too wide an effect to the oath on reference. The oath being negative of the reference, the action for the debt fails; but I do not see that this entitles the defender to read out all reference to that loan in the documents on which he relies, and either to read in some other debt, or to hold the cash entries as open to be allocated at his own pleasure. We are not here in an accounting, but in a question of proving repayment of a particular loan by writ; and I think the writ must be taken with its qualification, or rather it must be taken as a whole.

"I now come to the pursuer's admissions on record. In condescendence 3 she makes averments relative to the payment of interest on the alleged £2000 loan, which, as I understand, exactly square with the entries in her cash-book to which I have referred. They amount to this, that she received from him the interest on the £2000 by pretty regular instalments down to Martinmas 1884; that thereafter the defender paid various small sums to her or on her behalf, which she at the time imputed towards

that interest, and that eight years' interest were thus paid by him, amounting to £800; and that he has since paid her £81, 17s. 6d. in small sums (as shown in the last six entries on page B of the cash-book) which fall to be credited against the interest. The defender now seeks to discard the reference to the alleged £2000 loan, and to claim the £881, 17s. 6d. as an admitted credit, thus nearly wiping out the loan of £511, 3s. with interest. So far, I think the pursuer's reply, which I have already sustained as to the cash-book entries, holds good here also. The question is narrower when we come to the pursuer's 7th answer. She there admits that the defender paid to her and on her behalf sums for various purposes; and she explains he did so by her express request, as 'she found that the best way of obtaining from him the interest on the sums due to her was by getting from him small sums from time to time as she required them, and as it was convenient for him to pay.' Here the 'interest on the sum due to her' must include interest on the loan of £511, 3s.; and if it had stood there I should probably have held that the sums ackowledged as paid to her must be attributed either in the first instance or rateably in payment of interest on that loan. But, as the pursuer pointed out, the admission is expressly made 'under reference to article 3 of the condescendence'; and she adds 'The pursuer has given the defender credit, as shown in condescendence 3, for the whole sums so paid to her.' This being so, I hold that the 7th answer does not carry the admission any higher in the defender's favour.

"But the defender maintains, alternatively, that in the circumstances proved it is to be presumed that the loan was paid, compensated, or discharged. The doctrine to which he appeals, and the limits of it, are thus expressed by Lord Moncreiff in the recent case of *Thiem's Trustees* (1899, 36 S.L.R., p. 567)—'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.' The cases on which the defender mainly relied are *Thomson*, 12 S. 842; *Mackie*, 16 S. 73; *Ryrie*, 2 D. 1210; *Neilson's Trustees*, 11 R. 119. The passage which I have cited from Lord Moncreiff's opinion seems to me to be an accurate summary of the result of these cases; and the question is, whether the defender succeeds in bringing the present case within the rule.

"The defender points to the relations of the parties, and to their pecuniary position, and also to the course of dealing between them in money matters. The defender was at the time of the alleged loan either living with his mother or had just left home, and from that time he had admittedly a comfortable income of his own until 1890. In that year he granted a private trust-deed for creditors and went to South America. The pursuer, along with other trustees of her husband, carried on her husband's business, but in 1888 they became embarrassed and granted a trust for creditors. Yet although the defender was then and for two years afterwards quite able to pay the debt the pursuer did not give it up in her state of affairs, nor did she by herself or through her trustee make any claim upon the defender. Two years later, when the defender became insolvent, still no such claim was made upon his estate, and this although his estate was a creditor of the firm in their books for a sum of £71, for which his trustee ranked and drew a dividend. Further, no interest was ever paid on the debt, nor (so far as appears) was payment of interest or principal ever demanded until quite recently. This debt is not alluded to in the pursuer's cash-book, and the pursuer does not tender her evidence in explanation of the circumstances. Then the course of the pecuniary dealings between the parties shows that from time to time payments were made to or on behalf of the pursuer by the defender to an amount (taking the cash-book and the separate vouchers together) much exceeding their loan of £511, 3s. and interest. It is further urged that the pursuer had no money at her command to enable her to advance such an amount out of her own funds; but I think this is not proved; and, besides, it appears to me to be irrelevant. The other circumstances, however, are matters to be taken into consideration on the question of presumed payment or discharge, and on the whole they point in that direction. But in my opinion they do not amount to such proof as the principle of law requires. They do not necessarily lead to the conclusion that this debt was discharged. It is not enough to show receipt of moneys sufficient to discharge it, nor to show failure to claim upon it in insolvency, or failure to plead it in compensation of a counter claim. All these may be accounted for on quite other grounds. So the omission of it from the cash-book, or rather from the fragmentary states entered at the end of the book, is really immaterial, when it is seen that the book does not profess to enter or to tabulate items in such a way as to show a complete state of affairs. Indeed, the defect in this part of the defender's case is just the absence of anything approaching to transaction or settlement or stated account as between the creditor and the debtor either in the creditor's books or anywhere else.

"The defender further pleads *mora* and taciturnity. But I think he can hardly succeed on that ground if he fails on the other points. There seems to me to be no ground for it in fact, and implied abandonment or discharge on the head of *mora* and taciturnity is peculiarly difficult of application to the case of a loan evidenced

by written acknowledgment (see per L. J. C. Patton in *Cuninghame* v. *Boswell*, 1868, 6 Macph. 893).

"I therefore think that the pursuer is entitled to decree for the sum first concluded for. I have felt some doubt whether interest should be decerned for, partly owing to the form of her admission in her 7th answer, and partly because of the complete silence of the pursuer on the subject. But this is a case where the acknowledgment of loan bears an express agreement to pay 4 per cent. per annum upon the amount, and where therefore it cannot be pleaded that there was no intention that interest should run on the debt, or that the failure to claim payment infers a departure from the claim for interest. I think it must follow the principal debt."

The defender reclaimed, and argued—(1) In a debt said to have been constituted so long ago the mere production of this document was not enough, but it was for the pursuer to show that the debt was still resting-owing — *Neilson's Trustees* v. *Neilson's Trustees*, November 17, 1883, 11 R. 119. (2) But in any case the defender had proved repayment of the loan. This appeared from the entries in the pursuer's cash-book. There had been no intimation to the defender that the pursuer was appropriating these sums paid by him to the debt of £2000, the existence of which he denied, and which on the reference to his oath had been proved to be non-existent. These entries must accordingly be held applicable to repayment of the loan of £511 —Bell's Prin. sec. 563; *Spence* v. *Paterson's Trustees*, October 24, 1873, 1 R. 46, at 60; *Jackson* v. *Nicoll*, 1870, 8 Macph. 408. There was further proof of repayment to be found in the pursuer's admission on record which might be quite legitimately used for that purpose—*Picken* v. *Arndale & Co.*, July 19, 1872, 10 Macph. 987; *Milne* v. *Donaldson*, June 10, 1852, 14 D. 849. (3) The circumstances of the case were such that payment must be presumed—*Ryrie* v. *Ryrie*, June 26, 1840, 2 D. 1210; *Mackie* v. *Watson*, November 16, 1837, 16 S. 73; *Thomson's Trustees* v. *Monteith's Trustees*, June 27, 1834, 12 S. 842. In the case of *Thiem's Trustees* v. *Collie*, March 15, 1899, 1 F. 764, the circumstances were entirely different. (4) The debt was in any case extinguished by *mora* and taciturnity—*Spence* v. *Paterson's Trustees*, *supra*.

Counsel for respondent were not called upon.

LORD PRESIDENT—The pursuer sues for payment of the sum of £511, 3s. alleged to be due under a written acknowledgment granted to her by the defender for the sum of £511, 3s., "being loan to me, and on which I agree to pay 4% per annum." The document is in effect a liquid document of debt, both as to principal and interest, and when such a document is sued upon by the creditor in it, it is very difficult for the debtor to escape liability unless he can produce a discharge or something equivalent to a discharge.

The defender argued in the first place that production of the document was not sufficient to prove resting-owing, because it does not in words express any obligation to repay. It is true that the document does not contain the words usually employed in a bond of a bill, but the acknowledgment of a loan coupled with an obligation to pay interest upon it comes very near to expressing, and clearly implies, the obligation to repay the principal. I am therefore of opinion that the defender's first argument does not displace the grounds of the Lord Ordinary's judgment.

The defender in the second place maintained that he has produced a pass-book which proves *scripto* of the pursuer that moneys have been paid by him to her in excess of the amount acknowledged in the document sued on. It is true that the entries in the pass-book are admissions by the pursuer of payments to her by the defender, but they are not admissions of payment of either principal or interest of the debt sued for, nor is there any principle of law which would entitle the defender now to attribute them to payment of that debt. The entries in the pass-book bear to apply to another debt altogether, namely, one of £2000. But the defender says that on a reference to his oath it was proved that there was no debt of £2000 owing by him to the pursuer, and that it is therefore open to him to ascribe the entries in the pass-book to payment of the debt of £511, 3s. It is not quite correct to say that it was proved affirmatively that the debt of £2000 never existed. All that can be said is that the pursuer having no written evidence of that debt, referred the question to the oath of the defender, and that his oath was negative of the reference. But the fact that the defender denied on oath the debt of £2000 — I have not seen his deposition, but I assume that he denied both the constitution and resting-owing—cannot lead to the conclusion that the entries in the passbook are to be referred to the debt of £511, 3s. The writ contained in the pass-book must be taken as a whole, and it not only does not bear that any of the money was paid towards the debt of £511, 3s., but it bears that the payments were towards another debt altogether. I therefore agree with the Lord Ordinary in thinking that the defender's argument on this point is unsound.

It was next argued by the defender that the pursuer had made admissions on record which in effect prove payment of £511, 3s. This would be surprising if true, but it appears to me that any admissions which the pursuer has made on record are open to the same observation as the entries in the pass-book. The defender maintained that he could accept the pursuer's admissions in part and reject them in part. I do not say that no case has occurred in which a statement or admission in judicial proceedings has been separated, and something which was not a proper qualification of the leading statement or admission has been rejected. It appears to me, however, that this is not the nature of the pleadings in the present case, and that the pursuer's

statements cannot be separated so as to enable the defender to take the benefit of an admission that payments were made, and reject the qualification that they were made on account of a different debt altogether.

The defender further argued that the circumstances were such as to lead to a presumption of payment. No doubt there are circumstances in which such a presumption may arise, which is very much the same as saying that the circumstances infer or prove payment. Such cases, however, do not usually begin with the production of a liquid document by the creditor, but turn on a course of dealing or of transactions between the parties from which payment may be more easily inferred. Lord Moncreiff, in the passage quoted by the Lord Ordinary, states the law thus—"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 debt which necessarily leads to the conclusion that the debt was discharged"—that is to say, a fitting of accounts or something of that nature; but that statement of the law, in which I concur, has no application to such a case as the present.

Lastly, the defender contended that the debt was extinguished by *mora* and taciturnity. It is however very difficult to prove the discharge of a debt by mere lapse of time unless some one of the known prescriptions applies to it, and in a case like the present no lapse of time short of forty years would imply a discharge. Upon the whole, therefore, it appears to me that the judgment of the Lord Ordinary is well founded.

LORD M'LAREN—I think that the grounds of judgment stated by the Lord Ordinary have not been displaced hy the reclaimer's arguments.

There are two main points which Mr Watt put forward. The first is that he is entitled in reading the evidence on this branch of the case to take account of the result of the previous reference to the defender's oath, and the second is the question of implied discharge.

Upon the first point I have only to say that it is no more competent to use the deposition in the reference to qualify or add to the evidence in this branch of the case, than it would be to use that evidence to supply the deficiencies of the oath.

On the question of implied discharge, we begin with a clear holograph acknowledgment of debt, and while that debt is capable of being extinguished in various ways, if it is said to be extinguished by payment, the proper evidence of such payment would be a receipt under the hand of the creditor. There are cases where payment is presumed or implied from subsequent transactions, but "implied discharge" does not mean proof of payment by evidence less than is required by law. It means that payment or discharge may be inferred from a subsequent transaction or a state of facts capable of being proved by parole evidence which is inconsistent with the continued subsistence of the debt. My view on this question is supported by the opinion expressed by Lord Moncreiff in *Thiem's Trustees*, to which I give my entire adherence. It does not appear that the facts of this case amount to anything of the nature of a subsequent transaction of this kind. There is nothing more than what I may call the moral impression to be deduced from the relationship of the parties, the insolvency of the defender, and the fact that no claim was made by the pursuer in that insolvency.

LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—A. J. Young—Christie. Agents—R. & R. Denholm & Kerr, W.S.

Counsel for the Defender—J. C. Watt. Agent—John Martin, L.A.

Thursday, January 11.

FIRST DIVISION.

TEACHER'S TRUSTEES *v.* CALDER.

(*Ante*, July 24th 1899, 36 S.L.R. 949, 1 F. 51.)

Expenses — Divided Success — Petition to Apply Judgment of House of Lords.

A petition was presented to apply the judgment of the House of Lords by the appellant in a case in which there was divided success, the order of the House of Lords being that "neither of the parties is entitled to decree for the expenses of process incurred in the Court of Session." The appellant, however, was found entitled to the expenses of the appeal to the House of Lords. In a question as to the expenses of the present application, the Court *allowed* no expenses to either party.

This case is reported *ante, ut supra.*

On 10th March 1896 an action was raised at the instance of Adam Teacher, wine merchant, Glasgow, against James Calder, timber merchant, Glasgow, concluding for an accounting as to the business of Calder & Company, for payment to the pursuer of two sums of £10,000 and £15,000, and for reduction of certain certificates granted by Mr Gairdner, C.A., as auditor of the books of the firm.

The Lord Ordinary (LOW) on 28th May 1897 dismissed the action.

The First Division on 25th February 1898 recalled the Lord Ordinary's interlocutor, and decerned against the defender for payment of £250 of damages, and *quoad ultra* dismissed the action.

The petitioner appealed to the House of Lords, who on 24th July 1899 made the following order:—"That the said interlocutor of the Lords of Session in Scotland of the First Division of the 25th of February 1898,