of property while at large, and when "found," in the sense of killed or captured, they become the property of the finder, and I should have thought the *prima facie* meaning of the words in question was that the property of deer taken on the pursuer's lands should be yielded up by him to the superior of the lands. This, which is very different from a franchise of hunting deer on the lands, is quite intelligible, and may possibly be valuable, though no doubt of less value than the franchise. Such a right reserved to the superior of the Athole estates—whether the Crown or a subject—would no doubt be of considerable value. It would, indeed, be the exact value of the deer "found"—that is, taken—on the estates by the defender, or others having right to hunt them. In the case of Glasschorrie and Riechal it may be possibly worthless, and indeed so it has proved to be for the century and a half during which it has existed. I am not on that account disposed now to interpret it as importing a franchise of hunting, which might and, if the Lord Ordinary's view is sound, would imply a severe restriction upon the owner in the use of his property. The Lord Ordinary says distinctly that it follows from his judgment that the pursuer "must understand that he cannot do anything which will interfere with a right to stalk the deer"—in other words, must keep his property as a hunting ground for his superior. I am unable to assent to this as according to the *prima facie* meaning of the reservation.

The Lord Ordinary appears to have been impressed by the association, as he regarded it, of the reservation in question with the familiar reservation of mines and minerals. But they seem to me to be in rather striking contrast. The reservation of mines and minerals, with right and liberty to work them, is expressed in the usual and familiar language of such a reservation, and that in the dispositive clause, and as a limitation of it. The reservation in question is not in the dispositive clause at all, but a parenthesis of the obligation to infeft, and in such words as it was admitted were never before used to express a right of hunting.

What I have said is sufficient for the decision, and I am accordingly of opinion that the interlocutor ought to be reversed.

We had an argument on the question whether a mere estate of superiority could sustain a franchise of hunting on the vassal's lands. The question has not previously occurred, and as it does not arise here according to the meaning of the reservation as I construe it, I reserve my opinion upon it.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against Lord Fraser's interlocutor of 21st June last, Recal the said interlocutor, and find, declare, and decern in terms of the declaratory conclusion of the action: Find the pursuer entitled to expenses," &c.

Counsel for Reclaimer—Gloag—A. J. Young. Agents—J. & J. Galletly, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, November 16.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MAIN AND OTHERS (KERR'S TRUSTEES) *v.* STORRAR AND ANOTHER (MRS KERR'S TRUSTEES).

Loan—Proof of Loan—Promissory-Note—Evidence—Sexennial Prescription of Bills and Notes.

In a multiplepoinding a claim was made which was founded upon an indorsation of a promissory-note, and on a decree in absence for the amount of the debt contained therein obtained after the note was prescribed. The debtor under the note, who was a competing claimant, admitted the granting of the note, but explained that the payee in the note had abandoned all claim under it, and that the indorsation was made after the bill was prescribed. The Lord Ordinary allowed a proof *prout de jure*, and thereafter sustained the claim of the granter of the note. *Held* that the proof ought to have been only by writ or oath of the granter of the note, but that proof at large having been taken without objection, it must be given effect to, and (on the evidence) that the assignee of the note had acquired it after it had prescribed, and that the alleged resting-owing of the debt had not been proved.

The deceased John Kerr, who was a banker in Stranraer, died in 1863, leaving a settlement by which he conveyed his estate to trustees for certain purposes. He was survived by a widow, Mrs Eleanor Grundy or Kerr, and three children by his first marriage, one of whom, Thomas Ker, need only be here mentioned. Mrs Kerr died in 1878, and the estate of her husband fell to be wound up after her death. Mrs Kerr left a trust-disposition under which Alexander Storrar and others were trustees.

Thomas Ker went to Canada prior to the year 1859, and embarked in business there. On 9th January 1856, before going abroad, he had granted to Miss Agnes Morland, a relative of his father, whom his father was in use to assist in matters of business, a promissory-note for £700 for value received, he having received a loan of that amount from her. Three successive payments only of interest on this note were made by Thomas Ker. Miss Morland died shortly after Mr Kerr.

In 1870 Mrs Kerr raised in the Court of Session an action against Thomas Ker for £700, with interest from 9th January 1859, using arrestments to found jurisdiction. In this action Mrs Kerr, after setting forth the borrowing by Thomas Ker of the £700, and the granting of the note, averred that Miss Morland had assigned the debt of £700 to her, with interest accrued and to accrue from 9th January 1859. She pleaded that Thomas Ker was indebted and resting-owing to her the sum of £700 with interest. The action (the summons in which was served edictally) was undefended, and decree in absence passed against Thomas Ker.

Following on this decree Mrs Kerr used arrest-

ments in the hands of Mr Kerr's trustees, who held a sum due to Thomas Ker out of his father's trust. In 1880 Mrs Kerr's trustees used further arrestments in the hands of Mr Kerr's trustees.

The amount due to Thomas Ker out of his father's trust was £1089, 9s. 7d.

This was a multiplepoinding raised by Mrs Kerr's trustees, in the name of Mr Kerr's trustees, to settle the right to that sum, which was less than Mrs Kerr's trustees claimed as the amount of the note with interest.

Claims were lodged (1) by Mrs Kerr's trustees, the real raisers, and (2) by Thomas Ker (who was still abroad), and J. M. Rankin as his factor and commissioner.

Mrs Kerr's trustees averred that Miss Morland had assigned the promissory-note to Mrs Kerr at or about 13th June 1859 (up to which date it had remained in Mr Kerr's keeping on Miss Morland's behalf), by making an endorsation thereon in these terms—"Pay to Mrs Eleanor Grundy or Kerr or order.—A. MORLAND;" that Mr Kerr was aware of this endorsation, and intended to make a donation of the sum in the note to his wife, relinquishing his *jus mariti* over it, and allowing her to keep the note exclusive thereof; and that she kept the note in her own custody. Her trustees therefore claimed the whole fund *in medio* as being less than the amount of the note with interest.

Thomas Ker admitted the loan by Miss Morland and the granting of the note, but averred that Miss Morland departed from the debt, abandoned all claim against him under it, and declined to claim in his bankruptcy, which occurred in Canada in 1859; that this had been intimated to him by his father in 1861 on Miss Morland's behalf; that the note was prescribed in 1863 at the time his father died; that he (Thomas Ker) had never heard of the alleged endorsation or of the action in which Mrs Kerr obtained decree in absence; that the alleged endorsation must have been made by Mrs Kerr or someone else after Mr Kerr died, and after the bill was prescribed.

He claimed the whole fund *in medio*, and pleaded—"(3) The alleged endorsation of the bill having been made subsequently to the death of the said John Kerr, and long after the bill had been prescribed, nothing was carried thereby."

A proof *prout de jure* was led. From the cash-book kept by Mr Kerr for Miss Morland it appeared that interest on the £700 had been paid down to May 1858. The note bore (as well as the endorsation already quoted) the same payments of interest initialed by Mr Kerr, and also a payment at 13th January 1860 initialed by Mrs Kerr. An excerpt from Mr Kerr's own business books showed payment of interest for Miss Morland by Thomas Ker down to January 1860. There were produced letters by John Kerr to Thomas Ker dated in 1861, and referred to by the Lord Ordinary *infra*, in which, in name of Miss Morland, he asked payment of the sum due to her; also two letters by Mrs Kerr to Thomas Ker in December 1861 and January 1862, saying that Miss Morland was inquiring about her interest, and very anxious to receive it.

At the proof, Mr Main, one of Mr Kerr's trustees, deponed—"As a trustee of John Kerr I was never informed that Mrs Kerr had held any fund exclusive of the *jus mariti* of her husband. It was never brought under my notice by Mr Ingram" [who had been agent for John Kerr's trustees] "or anyone else that there was a bill endorsed to Mrs Kerr by Miss Morland during her husband's life. After the death of old Miss Morland I was informed of that by Mr Ingram. He said that that bill had been endorsed over to Mrs Kerr. He said it had been endorsed over some short time before Miss Morland's death, but how long I cannot tell—certainly after Mr John Kerr's death." . . . "I distinctly understood Mr Ingram to say that the endorsation of the promissory-note by Miss Morland to Mrs Kerr was made after the death of Mr Kerr. Mr Ingram told me the endorsation came about in this way—After Mr Kerr's death we had intimation that the family were likely to dispute the settlement of John Kerr, and reduce it, because, as Miss Morland was alive and the liferentrix of the £3000, Mrs Kerr had no right to test on it; and old Miss Morland was very angry at that, and said that if the young man in America offered to join in the attempt to reduce the settlement she would give this document over as a protection to Mrs Kerr. That is what Mr Ingram said. I understood Miss Morland intended by the endorsation to assign the promissory-note to Mrs Kerr." Mr A. Rankin, another of Mr Kerr's trustees, deponed—"I heard of a bill that was said to be endorsed by Miss Morland to Mrs Kerr, but that was after Mr Kerr's death. I heard that at a meeting of the trustees of John Kerr. (Q) You never thought of making a claim for that bill, as you understood it was after Mr John Kerr's death?—(A) No. I think it was Mr Ingram or Captain Kennedy who referred to that bill at the meeting of trustees. What was said was that they had got Miss Morland to endorse this bill in order to be a hold over Thomas Ker, lest he should join his brother in endeavouring to upset the settlement which gave Mrs Kerr the liferent of £3000. The Rev. William Kerr [another son of John Kerr] had challenged the will through an agent in Glasgow."

The Lord Ordinary (FRASER) pronounced this interlocutor:—"Finds that on 9th January 1856 Thomas Ker granted to the now deceased Miss Agnes Morland a promissory-note for £700 for value received: Finds that three successive payments of interest were made upon said note: Finds that the said note was indorsed by the said Miss Agnes Morland to the deceased Mrs Eleanor Kerr in the year 1859, and that her husband renounced his *jus mariti* and made a donation of the said sum to his wife, and the same became her separate estate: Finds that the said note was prescribed in the year 1862: Finds that no action or diligence was raised upon the said note within six years after it became due, but that in 1870 Mrs Kerr raised an action against Thomas Ker, and obtained decree in absence against him for £700 with interest: Finds that the summons in said action was served edictally only against the said Thomas Ker: Finds that the deceased Mrs Kerr had a title to sue the said action, and that she was entitled to prove the debt contained in the bill by the debtor's writ or oath: Finds that the representatives of Mrs Kerr have failed to prove by the debtor's writ or oath the existence of the debt for which the promissory-note had been granted: Therefore dismisses the claim for Mrs Kerr's representatives: Sustains the claim of Thomas Ker and of John Marquis Rankin, his factor and commissioner, and decerns, &c.

"*Opinion.*—The Lord Ordinary is of opinion that the promissory-note, dated 9th January 1856, and payable one day after date, granted by Thomas Ker to Agnes Morland, was endorsed by her to Mrs Kerr in the year 1859; and that John Kerr renounced his *jus mariti* over the money, or, in other words, made a donation of it to his wife.

"As regards the period when the indorsation was made, the docquet dated 13th June 1859 in the cash-book kept by John Kerr in regard to Miss Morland's affairs, contains a significant sentence in the following terms:—'The voucher dated 18th January 1855, being bill by Thomas Ker p. £700, has been received up.' The error in the date here has been satisfactorily explained; and the document that was thus received up is completely identified with the promissory-note referred to on record. This note had been, up to this date, in the possession of John Kerr, who managed all Miss Morland's business; but was then received by herself for the purpose, as the Lord Ordinary holds, of endorsing it over to her friend Mrs Kerr, with whom she appears to have been upon the most intimate and affectionate terms. The note never again was in the possession of John Kerr, and was found, after the death both of him and of his wife, not among his papers, but among hers. Miss Morland must therefore have delivered it to her after the indorsation.

"This is made all the clearer when the jotting on the back of the note of the payment of interest is looked to. In Mr Kerr's handwriting the interest is noted as having been paid on two occasions, 22d April 1857 and 26th May 1858, and these jottings are initialed by him. But the interest for the year 1859, which was paid on 13th January 1860, is noted in the handwriting of Mrs Kerr, and initialed by her. Why she should have initialed this, as having received that interest, except upon the footing that she was then the indorsee, cannot be very well explained. Her husband undoubtedly got a bill of exchange on the 13th of January 1860 for £34 from his son Thomas, as is shown by the state in his handwriting; and out of that £34, as appears from that state, he paid £28 of interest. It is there entered as having been paid to Miss Morland, the reason for which will be considered immediately. But undoubtedly it was not credited to Miss Morland, for there is no entry of it in the cash-book, while there are such entries with reference to the two preceding payments of interest in the years 1857 and 1858. This leads to the inference that the husband just handed the £28 to his wife, and she having received the money acknowledged the receipt on the back of the promissory-note.

"There is another circumstance connected with the terms in which the indorsation is expressed that points very clearly to the intervention of the husband. It is in these terms—'Pay to Mrs Eleanor Grundy or Kerr, or order.' (Signed) 'A. Morland.' Now, this language is that which a man of business would employ, but it is not the language which a married lady would use in describing herself. It is not probable that she would introduce her maiden name into such a writing, nor are the words 'or order' such as would occur to any other than a banker or other man of business. It is very plain that this indorsation was dictated by John Kerr—himself a banker; and if he did so, this is very conclusive evidence that he intended his wife to have the money as her own separate estate.

"No doubt it may be inferred from certain documents in process that this indorsation in favour of Thomas Ker's stepmother was kept secret from him, and the reason for this may also be inferred from the letters of his father which have been put in evidence. The latter had lent money to his son or to his son's firm in Montreal, and he seems to have got vexed and angry at the debtors not repaying the advance. He accordingly wrote indignant letters to his son, complaining of his silence, and of his not sending a remittance; and in one of these he refers to his own claim and to the debt due to Miss Morland, thus: 'Was my preference claim set aside, and who is to pay it? What prospect have you of sending anything to Miss Morland? She is continually asking me the question, and I have but the one answer—I never hear from you. Let me not be obliged to say so much longer, but upon receipt of this write to me and reply to the above questions.' This letter is dated 1st February 1861. Then on 13th January 1862 Mrs Kerr herself wrote to Thomas a letter in which occurs this passage—'Miss Morland keeps quite well—never has an ailment. She was here this morning, and again asking most anxiously of her interest from you. Again and again she expresses herself most warmly at being kept so long out of her money.' Now, the Lord Ordinary thinks that the explanation of these letters is, that if Thomas Ker—who would not pay the debt due to his father, and would not answer his father's letters—knew that his stepmother had become the creditor in the promissory-note, there would be little chance of any interest being paid by him upon it. The last interest that had been paid was in January 1860, and Mrs Kerr uses the not unjustifiable ruse of using Miss Morland's name to stimulate his lagging disposition to pay up. This also is the explanation of the entry in the state sent to Thomas Ker by his father, showing how the £34 sent from Montreal had been applied by him.

"But then, although the Lord Ordinary has arrived at the conclusion that the promissory-note was indorsed to Mrs Kerr at a time when the bill had not suffered prescription, and that it was separate estate in Mrs Kerr, yet her representatives are met by a plea which must be held to negative their claim. The sexennial prescription began to run from January 1856. In the year 1862, then, this was a prescribed promissory-note. Nothing was done in the shape of diligence upon it until the year 1870, when an action was raised in the Court of Session, the summons in which is dated 29th December 1870. This summons set forth that Thomas Ker, 'previous to his leaving Scotland, and while in Stranraer, borrowed from the now deceased Agnes Morland, sometime residing in Stranraer, the sum of £700, for the purpose of enabling him to start in business in Canada, and came under an engagement to repay the same to her.' The granting of the promissory-note is then narrated, and it is next averred that 'thereafter the said Miss Agnes Morland assigned and made over to the pursuer, the said Mrs Eleanor Grundy or Kerr, the said sum of £700, and interest accrued and to accrue thereon, with all the said Miss Agnes Morland's

right and interest therein, and the pursuer is now in the said Miss Agnes Morland's right and place of the said debt and interest.' Decree in absence was obtained in this summons against Thomas Ker; and if the summons had been served upon him personally, there are authorities for holding that although the decree was in absence he was barred from challenging it after the death of Mrs Kerr, and after so long delay. But the citation was edictal; and the averment of Thomas Ker is that he never heard of the action. It must therefore be treated as an ordinary decree in absence, which may be opened up, and can be opened up, in this action of multiplepoinding without reduction.

"Miss Morland by the indorsation gave all right which she had in the promissory-note to her indorsee, and among others she gave to her the right to enforce payment of the debt if the promissory-note should be prescribed. The enactment in the Act 12 George III., cap. 72, section 39, is to the effect that 'it shall and may be lawful and competent at any time after the expiration of the said six years to prove the debts contained in the said bills and promissory-notes, and that the same are resting and owing by the oaths or writs of the debtor.' The debt contained in the promissory-note in question became by the indorsation the property of Mrs Kerr, and under this provision in the statute she was entitled, just as much as Miss Morland herself could have been, to have proved the debt otherwise than by the note. But then, unfortunately for Mrs Kerr's representatives, no proof by the debtor's writ has been adduced, and no reference is proposed to be made to his oath. The claim for these parties is rested simply upon the promissory-note; but that is not sufficient to prove the debt. The claim, therefore, of Mrs Kerr's representatives must be repelled, and the claim for Thomas Ker sustained."

Mrs Kerr's trustees reclaimed, and argued—The debt was still due and resting-owing by Thomas Ker; as there was no sufficient evidence of abandonment of the debt; an averment of discharge was irrelevant if no writ was produced.—*Simpson* v. *Stewart*, May 14, 1875, 2 R. 673. The allegations of Thomas Ker were irrelevant to open up a decree in absence though proceeded upon edictal citation; was in all respects a good decree. As to admissions on record with qualifications, it was competent to use the admission and disprove the qualification.—See Dickson on Evidence, sec. 1487; *Milne* v. *Donaldson*, June 10, 1852, 14 D. 849. It was too late now to plead prescription. Prescription may be waived, and here it was waived, by going to proof—Thomson on Bills, p. 467; *Dingwell* v. *Burns*, February 28, 1871, 9 Macph. 582; *Campbell* v. *M'Cartney*, June 23, 1843, 14 D. 1086.

Argued for Thomas Ker—There was no evidence of the debt but the note, and that was prescribed. The proof should have been confined to writ or oath as the bill was prescribed, but the debt might still be proved. The admission on record must be taken with its qualifications as qualified admissions. — See Thomson on Bills, 472, and case of *Webster* v. *M'Lellan*, July 2, 1852, 14 D. 932; *Cowbrough* v. *Robertson*, July 18, 1879, 6 R. 1301. There being no proof of donation here, Mrs Kerr had no title. The bill having prescribed before endorsation, nothing was carried by the endorsation. There was no proof that Mr Kerr renounced his *jus mariti*, and that being so, it fell upon his trustees to act, and not upon Mrs Kerr's trustees, who had no title. The debt was abandoned by Miss Morland, and no claim was made by her in Thomas Ker's bankruptcy.—12 Geo. III. cap. 52; Thomson on Bills, p. 174.

At advising—

Lord President—In this action of multiplepoinding the fund *in medio* consists of the share falling to Thomas Ker of the succession of his father John Kerr, who was a banker at Stranraer, and the only claimants on the fund are Thomas Ker on the one hand, and the trustees and executors of Mrs Eleanor Kerr, his stepmother, on the other. If Mrs Kerr's claim is not well founded, I understand that there is no dispute that Thomas Ker is entitled to be preferred to the whole fund *in medio*.

The trustees of Mrs Kerr say that about January 1855 Thomas Kerr received in loan from Miss Agnes Morland, Stranraer, the sum of £700, that in acknowledgment for the loan a promissory-note was granted by Thomas Ker, which promissory-note was subsequently assigned by Miss Morland to Mrs Kerr by endorsation in the following terms —"Pay to Mrs Eleanor Grundy or Kerr, or order. —A. Morland." They further allege that interest was paid on the said loan by Thomas Ker up to 13th January 1860, since which date, however, no interest has been paid, and also that the date of the endorsation was 13th June 1859, at which time Miss Morland delivered the said note to Mrs Kerr.

In 1870 Mrs Kerr raised an action in the Court of Session against Thomas Ker, who was at that time residing in Montreal, concluding for payment of the £700 contained in the promissory-note. Mrs Kerr obtained decree in absence in that action upon which she proceeded to use arrestments in the hands of the pursuers, and it is in that way that the present action has arisen.

Now, it appears that Mrs Kerr's action was not laid upon the promissory-note in question, which had prescribed, but upon the debt which it was alleged had been transferred to Mrs Kerr by endorsation before the bill prescribed, and that is also the nature of the claim made by Mrs Kerr's trustees in the present action. In these circumstances there was no necessity for the defender, even if he had appeared, to plead the sexennial prescription, seeing that the action was laid upon the debt, not on the bill. Now, the effect of this question being raised in the form of a multiplepoinding is, that Thomas Ker can challenge the decree in absence as effectually as if he had brought a reduction, and he can now state all the defences which it would have been competent for him to have stated in 1870.

Accordingly, while admitting that Miss Morland advanced to him the sum of £700 contained in the promissory-note, he now explains that she subsequently departed from her debt, and made no claim in respect of it in his subsequent bankruptcy. He further alleges that his father John Kerr, who died upon 15th January 1863 (by which time the promissory-note had prescribed) acted as Miss Morland's agent, and had intimated to him that no claim was to be made against him by Miss Morland in respect of the promis-

sory-note. There is thus an admission of the loan by Thomas Ker, but this admission is qualified by an allegation, first, that Miss Morland's claim was abandoned, and that no claim was made for the amount of the promissory-note in his subsequent bankruptcy; and second, that the endorsement to Mrs Kerr was made after the note had prescribed. Now, this last qualification is of very great importance, because if the promissory-note was endorsed before the sexennial prescription applied, then Mrs Kerr would come in the room of Miss Morland, while if after, then nothing was transferred by the endorsation. Now, if Mrs Kerr's trustees are to take the benefit of the admission made by Thomas Ker they must take it along with its qualifications, and it therefore falls upon them to prove not only the constitution of the debt, but also that it is still resting-owing. The only competent mode of proving this was clearly by the writ or oath of Thomas Ker; but apparently the parties did not seem to observe this, and instead both parties appeared to concur in asking the Lord Ordinary to allow a proof at large, which accordingly was taken. This puts the Court into rather an awkward position, but I do not see how we can do otherwise than follow the course which we adopted in the case of *Simpson*, November 24, 1874, 2 R. 129, and examine the proof to see whether it sustains the claim for Mr Kerr's trustees.

The Lord Ordinary, notwithstanding that he allowed a proof *prout de jure*, has found "that the representatives of Mrs Kerr have failed to prove by the debtor's writ or oath the existence of the debt for which the promissory-note was granted." I cannot agree with this. I thnk that we must look at the proof to see first if the constitution of the debt is proved, and second, if the debt be still resting-owing.

There can be no doubt, I think, that the £700 was originally granted in loan, and that raises another difficulty, for to constitute a loan there is no doubt that there should be writing, but there is no writ here to prove the constitution of the debt. But in the present case I do not think that that difficulty can stand in the way either, for the constitution of the loan was sent to proof like everything else. And in looking at the parole proof, the promissory-note must clearly be set aside and excluded, for it proves nothing.

There are no doubt certain entries in John Kerr's books which show that payments of interest were made upon the loan, but the payments appear to have been made in January 1860, and the docquets signed by Miss Morland do not bring it down to a later date. From this it appears that there is no proof that this debt is to be considered as resting-owing, or that it was not extinguished long ago. On the other hand, Thomas Ker brings two witnesses, both of whom were trustees of his father John Kerr, and were well acquainted with his affairs. Mr Main says—[*His Lordship read the passage quoted above*].

Now, the story so told seems to me to hold very well together, and fixes with considerable certainty the date of the indorsement, the object of which evidently was to afford Mrs Kerr some protection in the event of her husband's settlement being successfully challenged. Mr Rankin, the other witness I referred to, says—"I heard of a bill that was said to be endorsed by Miss Morland to Mrs Kerr, but that was after Mr Kerr's death. I heard that at a meeting of the trustees of John Kerr — (Q) You never thought of making a claim for that bill as you understood it was after Mr John Kerr's death? (A) No—I think it was Mr Ingram or Captain Kennedy who referred to that bill at the meeting of trustees. What was said was that they had got Miss Morland to endorse this bill in order to be a hold over Thomas Ker, lest he should join his brother in endeavouring to upset the settlement which gave Mrs Kerr the liferent of £3000. The Rev. William Kerr had challenged the will through an agent in Glasgow." Now, if we hold that the facts here spoken to are proved, they establish I think beyond all doubt that the promissory-note was not endorsed until the bill had already prescribed under the provisions of the sexennial limitation, and it is equally clear that nothing is carried by the endorsation of such a bill. Had the bill been endorsed during the currency of the prescriptive period, and while the debt subsisted, this could have been a matter of proof, and if proved it would have transferred both the debt and the document of debt to Mrs Kerr, but looking to the state of the evidence as we have it before us, I have come to be of opinion that Mrs Kerr's trustees have not proved that the debt is resting-owing, and I am not disposed to conclude that Mrs Kerr had any title to the promissory-note, because it had already prescribed under the sexennial limitation before indorsation by Miss Morland. In these circumcumstances I am for repelling the claim for Mrs Kerr's trustees, and for sustaining Thomas Ker's claim.

Lord Mure—I am of the same opinion, and I quite agree with what your Lordship has said as to the nature of the proof which should have taken place in this case. As, however, a proof at large has been allowed without objection, apparently, having been taken on either side, we must look at the proof so led, and see whether there is evidence of the existence of the debt. The £700, which was admittedly advanced, is said to have been a loan, but the constitution of such a loan requires proof in writing.

We have on record a distinct admission of the loan by Thomas Ker, but it is coupled with the qualification to which your Lordship has already referred. Now, clearly these two must be taken together, and no advantage can be taken of the admission apart from the qualification, except in so far as the qualification may have been disproved. I think therefore we must consider whether or how far the qualification is disproved. Now, it is said by Thomas Ker that Miss Morland abandoned her debt, and made no claim against him for its payment. I do not think it can be said that there is evidence of this intention up to January 1859, up to which date regular payments of interest were made upon the debt, but these payments stop there, and no claim seems to have been made by Miss Morland in Thomas Ker's bankruptcy, which occurred not long after. In these circumstances I have come to be of opinion that this claim was waived by Miss Morland, and that any intention on her part to demand repayment of the advance was abandoned.

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

LORD DEAS was absent.

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

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

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

Saturday, November 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

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

Loan—Acknowledgment of Debt—Implied Discharge.

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

Loan—Presumption.

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

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

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

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