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,

except in so far as recals the interlocutor of the Lord Ordinary dated 28th May 1897, and decerns against the defender for payment to the pursuer of £250 sterling of damages, be and the same is hereby reversed, and this House finds, and it is hereby declared, that the audits made by Mr Charles D. Gairdner for the years ending upon the 30th day of April in the years 1890, 1891, 1892, and 1893, and the relative certificates granted by his firm, were not made or granted in accordance with the terms of the minute of agreement dated 11th April 1889: And it is further ordered that subject to the said finding and declaration, the cause shall be and the same is hereby remitted back to the Court of Session in Scotland, with directions (1) to take an account in terms of the said minute of agreement of the nett profits of the firm of Calder & Company for the year ending 30th April 1890, and for the four following years; and (2) to assoilzie the respondent (defender) from the whole conclusions of the summons, in so far as the same are founded upon the alleged fraud or fraudulent misrepresentation of the respondent; and it is further declared that neither of the parties is entitled to decree for the expenses incurred in the Court of Session; and it is further ordered that the said respondent do pay or cause to be paid to the said appellants by revivor the costs incurred by them in respect of the said appeal to this House."

The pursuers applied to the First Division to apply the judgment of the House of Lords, and craved the Court to find them entitled to the expenses of the present application.

The respondents contended that as this was a case of divided success, no expenses should be allowed.

LORD M'LAREN—I think the key to the solution of this question of the expenses of the petition to apply the judgment, is to be found in the judgment itself. According to this test, the case is shown to be one of divided success, because the order is that "neither of the parties is entitled to decree for the expenses of process incurred in the Court of Session." Now, it is necessary that one of the parties should present a petition to apply the judgment of the House of Lords, and that the other should appear in order to see that everything is in order. No doubt the former will be subjected to the small extra expense of printing the petition, but I think that this is a proper case for allowing no expenses to either party.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Apply the said judgment of the House of Lords, and (1) remit the cause to the Lord Ordinary to take an account, in terms of the minute of agreement set forth in the petition, of the net profits of the firm of Calder & Company for the year ending 30th April 1890, and for the four following years, and (2) assoilzie the defender from the whole conclusions of the summons in so far as the same are founded upon the alleged fraud or fraudulent misrepresentation of the defender, and decern: Find neither party entitled to the expenses of the petition."

Counsel for Petitioners—Cullen. Agents—Carmichael & Miller, W.S.

Counsel for Respondent—Salvesen, Q.C. Agents—Alexander Morison & Co., W.S.

Friday, January 12.

FIRST DIVISION.

[Sheriff of Ayr.

MORRISON *v.* MORRISON.

Sale—Sale of Business—Whether Business Books Carried to Purchaser.

In the sale of a retail business, in the absence of any express restriction or limitation, the business books and documents are carried to the purchaser.

A sold his business as tailor and clothier to B on terms embodied in a minute of agreement, which stipulated that A should retain right to all the book debts due to the business, and that B should collect these for him. The minute of agreement contained no reference to the business books. In an action by A for delivery of the business books and documents, *held* that the property in these was not reserved to A but passed to B.

Following on a minute of agreement of 30th January 1899, between James Morrison of the first part and Robert Orr Morrison of the second part, the first party sold the business of John Gloag & Company, tailors and clothiers in Largs, of which he was the sole proprietor, to the second party. The minute of agreement stipulated—"*Second.* The first party shall retain right to the whole book and other debts due to the said firm at the date hereof, and shall pay all obligations due by the said firm prior to the date of the said valuation. *Third.* The second party agrees to collect free of charge all book debts due to the first party, and to hand over the sums as and when collected to the first party or his agent." . . .

The business-books were not mentioned in the minute of agreement at all.

After the business had been taken over by Robert Orr Morrison, James Morrison raised an action in the Sheriff Court at Kilmarnock against him for delivery of—"(1) The day books and ledgers of the business of John Gloag & Company between 1st January 1891 and 13th January 1899; (2) The whole time books and wages books of the said John Gloag & Company between said last-mentioned dates; (3) The whole invoices for goods supplied to said John Gloag & Company between said last-mentioned dates; (4) The whole receipts for