should be in full satisfaction of all causes of action, and without such a contractual exclusion I think that an action for implement would have lain.

There is, however, a separate and conclusive answer. When the pursuer presented Mr Beal to the defenders he presented at the same time Mr Beal's terms; the minute of agreement was considered and approved by the defenders themselves, and with direct relation to those terms the two partners said to the pursuer in their docquet, "We also homologate the arrangement made by our senior as to commission to be paid to you on the sale." After this, it is in my opinion impossible for the defenders to maintain that the bargain with Mr Beal was not a sale.

LORD ADAM—I concur in that opinion.

LORD M'LAREN—Under the defenders' letter of 29th May 1889 Mr Menzies was to be paid a commission of 1½ per cent. on the price of the brewery for the service which he proposed to render, which is thus expressed—"On your obtaining for us the price arranged for brewery." In the view taken by the Lord Ordinary the commission would only be payable if the price arranged should be actually received by the seller. This is doubtless a possible construction of the words of the letter, but it is also consistent with the ordinary use of language that the expression "obtaining for us the price arranged" should mean obtaining for us a contract of sale at the price arranged. When it is considered that the business of a commission agent is to procure a contract of sale, and not necessarily to enforce the performance of the contract, and when it is further considered that according to ordinary usage a commission is earned when the contract is made, unless a *del credere* commission be specially undertaken, I agree with the Lord President that the construction which is consistent with the nature of the employment is the true construction, and that Mr Menzies' right to a commission was not made conditional on the purchaser's performance of his contract. This construction is also indicated by the words which follow—"in the event of there being no sale you are to have no account against us." The two heads of the letter are mutually exclusive, and as there is to be no account, *i.e.*, no commission "in the event of there being no sale," I infer that if there is a sale the commission is understood to be earned.

It is of course implied that a real sale at the price arranged is effected. The mere form of a sale would not be sufficient. But while it is easy to see that a question might arise as to the reality of a sale, I am of opinion that no such question can arise in the present case, because the sellers ratified the contract which Mr Menzies had made for them, and accepted Mr Beal as the purchaser of the brewery. In such circumstances it must be taken that the contract of sale effected by Mr Menzies was a sale in terms of the agreement for a commission.

Again, I do not think that this can be considered as a conditional sale. There is a clause in the final contract applicable to the event of the price not being paid on or before 31st October 1889. But when this clause is considered, its true object appears to be to effect a rescission of the sale on the ground of non-fulfilment of the purchaser's obligation with a right on the part of the seller to retain the instalment of £5000 already deposited and virtually paid to account. The defenders exercised their right of rescission, and they are no longer under obligation to convey the brewery. They also successfully asserted their claim to the deposit of £5000. But the exercise of their rights cannot, as I conceive, annul the facts that a contract of sale was executed on 22nd August 1889 by and between the defenders and Mr Beal, and that this contract was obtained through the agency of Mr Menzies. It follows, in my opinion, that the pursuers are entitled to the commission sued for.

LORD KINNEAR was absent.

The Court recalled the interlocutor of the Lord Ordinary and gave decree for the sum concluded for.

Counsel for the Pursuers—Baxter—W. Campbell. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders—H. Johnston — Craigie. Agents — Watt & Rankin, S.S.C.

Friday, January 25.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

HOPE JOHNSTONE *v.* HOPE JOHNSTONE'S EXECUTOR.

Bill of Exchange—Promissory-Note—Renewal—Loan—Interest—Presumption of Abandonment of Claim for Arrears of Interest.

On 13th August 1885 A lent B £300, for which B granted his promissory-note. When the note was about to prescribe, a new note was granted by B on 19th August 1891 for the same sum, and A gave up the old note to B. B having died in 1893 without having paid back any part of the loan, A brought an action against his executor for the £300 given in loan, with interest from 13th August 1885. The defender admitted that the principal sum of £300 was received by B in August 1885, and had not been repaid, and offered payment of that sum with interest thereon from 19th August 1891, but refused to pay interest between 13th August 1885 and 19th August 1891. He averred that when the first note was granted A intimated to B that she might possibly never use it, and that there was no arrangement to pay interest and no

intention on A's part to claim interest, and that, when A handed back the first note and took the second for the same sum, she abandoned all claim which she might have had for interest under the first note.

Held (*aff.* judgment of Lord Wellwood) that the defender had made no averments relevant to show that the pursuer had abandoned her claim for interest from the date of the loan, and decree *granted* in favour of the pursuer—*diss.* Lord Young, who *held* that the pursuer had abandoned her claim for the interest due under the first note by giving it up discharged in exchange for the second note.

The Honourable Mrs Octavia Hope Johnstone raised an action against Spencer Cornwall, of London (against whom arrestments *ad fundandam jurisdictionem* had been used), as sole executor, administrator, and universal legatory under the last will and testament of the deceased John Charles Hope Johnstone, who died on 28th November 1893. The action concluded for declarator that on 13th August 1885 the pursuer advanced or lent to the said deceased Mr Johnstone the sum of £300 sterling, which she had borrowed from the Union Bank of Scotland; that the said loan was granted on the understanding that Mr Johnstone should repay the pursuer the interest which she should pay to the bank, and should pay to her interest at the rate of 5 per cent. on the instalments (which she was bound to pay to the bank), when paid, and after the last instalment had been paid, should pay interest at the rate of 5 per cent. on the loan of £300 until repayment; and further, that the said principal sum of £300 lent, and the interest paid by the pursuer to the bank, and interest at 5 per cent. on the instalments paid by her to the bank, and on the principal loan after the date when the last instalment was paid, were debts owing to the pursuer by the deceased, and that the pursuer was a creditor for the same and had an interest in the means and estate of the said J. C. H. Johnstone for payment thereof.

The pursuer averred—Cond. 2. "On the 13th August 1885 the pursuer advanced on loan to the said deceased John Charles Hope Johnstone the sum of £300, for which he granted a promissory-note in her favour. . . . When the said promissory-note was about to become prescribed, it was thought necessary or desirable that the said John Charles Hope Johnstone should grant in lieu thereof a new promissory-note for the said principal sum of £300, and accordingly on or about 23rd August 1891 the original promissory-note was delivered to him in exchange for a promissory-note by him dated 19th August 1891, by which he promised to pay to the pursuer the said sum of £300 one day after the date thereof within the office of the Union Bank of Scotland, Limited, at Moffat. The said last-mentioned promissory-note is produced herewith and is referred to. Cond. 3. The said principal sum of £300 advanced by the pursuer as aforesaid to the said John Charles Hope Johnstone has not been paid, and is now due and resting owing to the pursuer."

The defender averred—Ans. 2. "Admitted that on or about 13th August 1885 John Charles Hope Johnstone received from the pursuer the sum of £300, and that he granted a promissory-note in her favour for that sum. Admitted that on or about 23rd August 1891 said promissory-note was delivered back to the said John Charles Hope Johnstone, and that he delivered to the pursuer a promissory-note dated 19th August 1891, for the same sum of £300. *Quoad ultra* denied. Explained that when said first promissory-note was granted, the pursuer intimated to the said John Charles Hope Johnstone that she might possibly never use it. There was no arrangement to pay interest, and the defender believes and avers no intention on the part of the pursuer to claim interest under the note, and, when she handed back the first note and took the second for the same sum, she abandoned all claim which she might have had for interest under the first note. Ans. 3. Admitted that the sum of £300 contained in the promissory-note of 19th August 1891, with the interest therefrom from 20th August 1891, is due and resting owing to the pursuer. Admitted that the defender refuses to admit liability for the sum sued for. Ans. 4. The defender has always been ready to pay the sum contained in the promissory-note of 19th August 1891, with interest, but the pursuer has insisted in her present claims."

On 8th June 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor—"Decerns against the defender for payment to the pursuer of the sum of £300, with interest thereon at the rate of 5 per cent. per annum from 13th August 1885 till the date of payment: Finds no expenses due."

"*Note.*—On the 19th of August 1891 the late Mr J. C. Hope Johnstone granted in favour of the pursuer, who was a near relative, a promissory-note for £300. Mr Johnstone died in November 1893. That note is not prescribed, and there is no question that the principal sum and interest is due, and in the third answer the defender offers to pay that sum with interest from 19th August 1891. The question arises on the pursuer's claim for payment of interest on a sum of £300, from 13th August 1885 until the granting of the note on 19th August 1891. The defender has stated a very candid, although it is a cautious defence, and his candour enables me to take a very simple view of the matter. The action is laid, not on the promissory-notes, but on the loan made by Mrs Hope Johnstone to her relative, and the pursuer is entitled to prove that loan in any competent way. The defender has admitted enough to amount to a judicial admission that in 1885 the pursuer lent the deceased £300. In answer 3 he admits that the promissory-note of 1891 was granted for the same sum as that in the promissory-note of 1885. That is an admis-

sion that the loan of 1885 was unpaid in 1891. A loan carries interest *ex lege*, and interest is therefore presumably due here. It is not suggested that interest was ever paid. Answer 2 proceeds on the opposite assumption. That being so, the only question is, whether there is any necessity for inquiry in the case, and I do not think there is. The defender does not allege any payment of interest, and he does not allege relevantly, in my opinion, that the pursuer agreed to forego interest. His statements are these — 'Explained that when said first promissory-note was granted, the pursuer intimated to the said J. C. Hope Johnstone that she might possibly never use it.' He does not say she said that she would not use the note, and if she said she perhaps would not use it, the fact that she had resolved to use it is established by this, that when the first note was about to prescribe, she took another instead of it. With regard to interest, what defender says is—'There was no arrangement to pay interest, and the defender believes and avers no intention on the part of the pursuer to claim interest under the note, and when she handed back the first note and took the second for the same sum, she abandoned all claim which she might have had for interest under the first note.' It is not said that she ever agreed with the debtor that he should not pay interest, and I take these words simply to express the inference the defender draws from the fact that she took the new note for £300 without adding interest. If the defender had actually said that she at that time stated that she abandoned her claim to interest, he would have been entitled to a proof, but I do not understand him to mean anything more than that he infers, from taking a bill for the same sum, that the claim for interest was abandoned. I cannot sustain that, for it is plain that the sole object of taking the second note was that it should replace the first, which was about to prescribe, and the mere fact of interest not being included does not go far, as the pursuer might not have wished to accumulate interest.

"On the whole matter, I think there are sufficient materials in the record to enable me to decide in favour of the pursuer, with no expenses to either party."

The defender reclaimed, and argued—The pursuer by taking the promissory-note of 1891, and giving up that of 1885, discharged the latter—Bills of Exchange Act 1882 (45 and 46 Vict. cap 61), sec. 61. If she wished to retain a claim for interest under the first note after the second note was granted, the interest should have been included in the sum for which the second note was granted, or she might have kept possession of the first note as security for payment of the interest—*Lumley* v. *Musgrave*, Nov. 7 ,1837, 4 Bingham (new series) 9. The debt of 1885 had been discharged when the note of that year was given up. The pursuer was bound to take proof on the contract under which he claims.

Argued for pursuer — The Lord Ordinary's decision was right but the form of his interlocutor was wrong. Mr Cornwall was a foreigner, and was not confirmed at the date of the action. Therefore the action was one of declarator. The Lord Ordinary's interlocutor should be recalled, and findings pronounced. Although the form of the interlocutor was wrong the decision was sound. The action was not founded on the promissory-note but on the loan. The loan was admitted, and it was the loan she was suing on, not on the documents of debt. There was sufficient admission of indebtedness on record to entitle the Court to decide the action in her favour. Alternatively a proof must be allowed in order that the pursuer might show that she had never discharged her claim for interest under the first note—*Flockhart* v. *Lawson*, July 2, 1831, 9 S. 873. *William* v. *Allan*, May 29, 1882, 9 R. 859; Dickson on Evidence, secs. 1033, 1035, and 1069.

At advising—

LORD JUSTICE-CLERK — In August 1885 the pursuer lent to the late Mr Hope Johnstone a sum of £300, for which he granted her his promissory-note. When the note was about to become prescribed, a new note was granted for the same sum, and the pursuer gave up the old note to her debtor. The debtor having died in 1893, the pursuer now sues on the debt. She asks a decree for £300 given in loan, with interest from the date of the loan. Liability for the loan is not disputed, nor for interest from the date of the current promissory-note. The question between the parties relates to the interest which in ordinary course would become due between the date of the first note and the date of the substitution of the second note for the first, that is, between 1885 and 1891. The pursuer maintains that this has not been paid, and is still due. The defender does not aver that it has been paid as matter of fact. His case on his averment is that there was no arrangement that interest was to be paid. That is of course a wholly irrelevant averment as an answer to a demand for interest, but it is also quite inconsistent with the idea that the interest had been in fact paid, and it is not suggested that it ever was. His next averment is equally inconsistent with the idea of payment. It is that the pursuer had no intention to claim interest, and is as irrelevant as the other. The only remaining averment of the defender is that when the pursuer "handed back the first note and took the second for the same sum, she abandoned all claim which she might have had for interest under the first note." If this is to be taken as an averment of fact it is not in such a form as could be admitted to proof. It seems to be only a statement of an inference from a fact, viz., that by the act of handing the first note to the deceased the pursuer abandoned all claim for interest. That is practically a plea in law, and is indeed the question which falls to be decided here. But otherwise the question is—must it necessarily be inferred that because the pursuer gave up to the deceased the promissory-note of 1885 she

therefore discharged her claim for interest due on the debt for which the note was the document of obligation?

Now, in considering that question, the circumstances stated by the defender himself seem to me to be important. It is his statement that in August 1891 the promissory-note of 1885 "was delivered back to the said John Charles Hope Johnstone and he delivered to the pursuer the promissory-note dated 19th August 1891 for the same sum of £300." That statement amounts practically to this—that there was at the delivery of the first note in exchange for the second no change in the relation between the creditor and the debtor, but only that a voucher of indebtedness, which from its form was about to become an insufficient voucher, was replaced by another for the purpose of keeping up the obligation against the debtor. That was undoubtedly the purpose of the exchange of the one note for the other. The debt relation between the parties was not upon the face of what was done intended to be affected. I am unable to hold that such an exchange unaccompanied by any other act of discharge has the effect of discharging the debtor of any sum he is at its date liable for. The pursuer held no document for interest. Her right to interest depended on the not disputed loan, of which the note was the document of obligation, and the non-payment of that sum is admitted, the new note being granted because it was still due and was not paid. The consideration for giving up the old bill was not payment, it was the granting of the new one, so that there might be a good security of the pursuer's claim. Had that not been done, the pursuer, who was willing to continue the loan, if she got a good document of debt, might have taken her own course to exact from the deceased the principal sum and the interest now in dispute.

Upon the defender's own statement I come to the conclusion that whatever was the debt relation between the lender and borrower in 1891 was not altered by the exchange of the note of later date for that which was about to expire.

Had it been necessary, I should have been prepared to allow a proof in this case as to the circumstances of the substitution of the one document for the other. I do not think that, considering the statements made in defence, any proof is necessary.

If the judgment of the Court should be in accordance with this view it will be necessary that the Lord Ordinary's interlocutor should be recalled and decree of declarator pronounced. His Lordship has pronounced an interlocutor which is not appropriate to the conclusions of the summons.

LORD YOUNG—The defender, who is executor of the deceased Mr J. C. Hope Johnstone, is sued by the pursuer, who was sister-in-law of the deceased, the conclusions of the action being declaratory, and their object, as stated in the pursuer's plea-in-law, being to obtain a decree *cognitionis causa tantum*.

The pursuer avers a loan by her to the deceased of £300 on 13th August 1885, "for which he granted a promissory-note in her favour," and this averment is admitted. It is also a fact in the case admitted and indeed averred by both parties, that on 23rd August 1891 this promissory-note was delivered back to the borrower and obligant on the note, in exchange for a promissory-note of like amount by him dated 19th August 1891 in the pursuer's favour. The defender admits (Ans. 3) that the amount of this note with interest from its date is due to the pursuer as the payee and holder, which she is, and I do not know what she proposes to do with it, but she is the onerous holder of that note.

The only question between the parties regards the interest of £300 between 13th August 1885, the date of the first note, and 19th August 1891, the date of the second. The pursuer maintains that she ought to be allowed a proof of an "understanding and agreement," in which she alleges that the loan was granted, viz., that Mr Hope Johnstone should repay to her the interest "at overdraft rates," which she had herself undertaken to pay to a bank from which she borrowed the money (repayable by instalments) in order to lend it to him down to 10th January 1888, when the last instalment to the bank was paid, and that he should thereafter pay her interest at the rate of 5 per cent.

The defender denies the "understanding and agreement" thus averred, and therefore if the averment is relevant and such as may be proved by parole (there is no writing) a proof must be allowed. The conclusions for declarator of it and of the several sums for which, according to it, the pursuer is a creditor on the executry estate, are alone in controversy.

I need hardly say that I do not doubt the validity of an agreement by a borrower to pay the lender the costs and charges of himself procuring the money from a bank or any other money-lender, or to pay interest at any rate, though I doubt whether it can be proved by parole. But the case which we have to deal with is the simple and familiar enough case of one relative or friend accommodating another with a loan upon his promissory-note for the amount. In such a case (and it would make no difference if the parties were strangers) I think it not doubtful that payment of the promissory-note, or the absolute discharge of it, by handing it back to the obligant upon any consideration the holder is pleased to accept or even gratuitously, operates a discharge of the loan for which it was granted. Accordingly, had the promissory-note given for the loan been handed back to the obligant on payment of the amount in cash with interest at any rate the holder was pleased to accept, or without interest if the holder was minded to give it up on payment of the principal, I cannot conceive any ground whatever on which the lender on the security of it alone could have gone back on the loan and asked a proof of the understanding and agreement on which it was made. I should point out perhaps that this is not a case of

a promissory-note being taken as collateral security. It was the only document of debt taken or in existence for the loan which was made in 1885. There are various cases illustrating the difference between such a case, and that where a promissory-note or bill is taken as a collateral security. Does it make a difference that it was given up in return for another note of like amount, or of any amount, whether greater or less, which the holder was content to take and the obligant to give for it? I can see no ground for thinking so. I assume, of course, that when the note was given up there was six years' interest due upon it, not according to any understanding and agreement connected with the loan, but on the common law relating to promissory-notes. Your Lordship observed that you did not think that the giving up of the one note, that of 1885, and demanding the other note of 1891, made any difference in the relation between the parties or the state of debt and credit between them. I should have thought it clear enough that under the bill or note of 1885 interest was running from that date, whereas under the note of 1891 interest was only running from 1891, which makes a very distinct difference. Before the giving up of the earlier note the holder was in a position to sue not only for the principal of £300, but for the interest from 1885 upon the note. Upon giving it up it operated as a discharge of it. Taking instead of it a note for the same sum in 1891, interest upon that sum ran only from 1891. On payment of the note with this common law interest on it the obligant was entitled to have it back, and be discharged of it, and the debt for which he had given it.

In August 1891 interest for six years was as much due on the note of 1885 as the principal, and the pursuer could not have been required to give it up without payment of both. If the interest only was paid, she was entitled to retain the note for the principal, and if the principal only was paid she was equally entitled to retain it for the interest. The holder of such a note can at any time sue upon it and recover anything, whether principal or interest, remaining due upon it. But in this case the pursuer ceased to be the holder of the note of 1885, and the obligant became the holder of it discharged so that the pursuer could not thereafter sue on it for anything. The words of the statute—and I think they are in accordance with the rule of our common law, are—(clause 61 of the Act of 1882)—"When the acceptor of a bill is or becomes the holder of it, at or after its maturity in his own right, the bill is discharged." And a subsequent clause of the Act says that the provisions of this Act relating to bills of exchange apply with the necessary modifications to promissory-notes, and in applying these provisions the maker of a note shall be deemed to correspond with the acceptor of a bill. Therefore when this note was given up in 1891 it was discharged. In lieu of it she was content to take another note on which she may sue as long as she remains the holder, or she may transfer it. The law of the case would have been exactly the same had the second note been for double the amount of the first, the pursuer requiring, and the obligant agreeing, that it should be so as the condition of discharging the first, the only important point being that it is discharged on terms agreed to by the holder and implemented by the obligant. When a note is given up at the end of two, three, four, five, or six years it is discharged, not only with respect to the principal, but also with respect to the interest which has been running upon it, and is due upon it. That it should be held as discharged with respect to the principal only is obviously absurd, for it is out of the pursuer's hands and so good for nothing to her or indeed to anybody except the obligant, whose possession of it is evidence that it is discharged. I have pointed out that the only question between the parties regards interest from August 1885 to August 1891, while the pursuer continued to be the holder of the promissory-note which she gave up at the latter date. It seems clear enough that she could not be creditor during that period for interest both on the loan and on the promissory-note which she held for it, and I should have thought it equally clear that her right was on the note only—a note which never was dishonoured and which never appears from any of the statements to have been even presented for payment or payment claimed upon it, and which is discharged. She might, as I have observed, have transferred it, and in that case the obligant would have had to deal with the transferee with respect to interest as well as principal. Suppose he had done so and satisfied him, no matter on what terms, is it conceivable that interest was still left due and running in favour of the pursuer upon an "understanding and agreement" regarding the loan for which the note was granted? Or is it a tenable proposition that interest ran and was due only on the loan for which the note was granted if the lender continued to hold it, but only on the note itself if she transferred it to another?

I am disposed to agree with the defender's view, that the pursuer not only legally but knowingly and intentionally abandoned any claim which she had for interest under the first note when she handed it back and took the second. Her conduct was, I think, consistent with this and with nothing else. She was certainly then entitled to demand six years' interest and to keep the note till she got it, or, if her debtor could only give another note for his debt, and she was willing to take it, why should the note not include the interest if she desired it? On the other hand, suppose she was willing to abandon it, what more obvious and satisfactory way of doing so would occur to anyone than to take the new note for the principal only? I suppose she had some sensible adviser—probably the bank agent at Moffat—who was aware of the law of prescription, and

I think it highly improbable that this matter of interest was overlooked or not quite intentionally and intelligently dealt with as it was. The legal view of the case which I have expressed thus coincides with what I am convinced is the truth and justice of it, according to which the pursuer can have no more than the defender offers, that is, payment of the note which she holds with interest from its date.

I have heard a suggestion since I wrote what I have read, that the omission to put the amount of the six years' interest due on the note of 1885 into the new note which was taken in 1891 may be accounted for by the desire on the part of the pursuer, the holder of the earlier note, to abstain from taking compound interest. If it had been put into the note of 1891, of course, it would have been for a larger sum by about £90. It would have been for £390, and the interest would have been running under that note for £90 as well as for the £300. Now, that suggestion does not, I own, commend itself to my mind. I think it is an unlikely one, and it proceeds upon the assumption that she desired to remain creditor for the interest. She could have done so quite well by retaining the bill of 1885—taking payment of the principal only, and leaving the interest only due, marking upon it "the principal has been paid." There is no difficulty about prescription. I do not known anything about prescription here, because we have no proof, and no information, and I do not know what was the term of payment of that note of 1885. It is not stated; we have no suggestion that it ever was presented for payment, and I do not suppose it ever was. There is no suggestion in the case that this relative, who I suppose was not wealthy, but nevertheless was able to assist a friend, ever demanded either principal or interest during the six years between 1885 and 1891, or thereafter down to her accommodated relative's death. But prescription is very easily avoided; and it is as clear as anything can be—we do not require any decision in order to show it—that, if a party receives payment of the principal of a note, or of a bill, whether in money or in another bill, the interest remains due, and she is entitled to retain the bill for the interest, or to have any other document she pleases. An instance of that is in the case—I do not know whether or not it was cited to us—of *Lumley* v. *Musgrave*, 4 Bingham (New Series), p. 9, a curious enough case, certainly, as to the plea of one of the parties, but I should have thought a familiar and simple enough case in itself. The rubric indeed states the whole of it, almost in a sentence, very distinctly—"Plaintiff held a bill of exchange accepted by defendant; when it became due in March defendant asked for time, and in June gave plaintiff another bill for the same sum, plaintiff telling him at the same time that something was due for interest, and continuing to hold the first bill; the second bill was paid after it became due" (and of course, given up so that the creditor thereafter held only the first). "Held that the plaintiff was still entitled to sue defendant on the first bill for the interest due on it." The case went to trial upon an allegation of an understanding and agreement for which there was no writing, that when the second bill was given the understanding and agreement was that, if it was duly paid, all claim for interest upon the first should be abandoned. The case went to trial only upon that defence of understanding or agreement. There seemed to have been very little evidence, but there was argument that the taking of the second bill gave some countenance to that view. The learned Judge left it to the jury, who negatived the idea that there was any such understanding or agreement, and consequently they gave a verdict for the interest due upon the first bill. The case came before the Court upon a motion for a new trial, first, on the ground that the jury had gone against the evidence—that they ought to have held that there was sufficient evidence of the understanding and agreement alleged; and further, that the jury ought to have been directed in point of law that the receipt of the second bill as a renewal was sufficient proof of the agreement set out in the plea. Now, the question raised there is just that which occurs here as to the effect of giving up a bill, for the first bill was not given up; it was reclaimed and sued on by the holder. In deciding the case Lord Justice Tindal said in the Court upon the motion for a new trial—"I think the verdict is justified by the facts of the case. As to the alleged misdirection I left it to the jury to say whether the agreement set up in the plea had been established in proof, with an impression on my own part that it had not. The first bill became due in March 1836, when nothing was done. Shortly afterwards the defendant requested time; and three months afterwards the second bill was given. But it was mentioned at that time that a sum was due for interest on the first bill; the old bill remained in the hands of the testator, and the new bill was not drawn from the day the old one became due. Surely there was enough in these circumstances to induce the jury to infer that the agreement set up in the plea was not made out, and that the first bill was left in the hands of the holder as a security for the interest due."

Now, if the first bill here had been retained there could have been no question about its being discharged. It is not discharged with respect to anything; and therefore if it had been retained there would have been no discharge of the interest; but when given up it is discharged with respect to both principal and interest, and I cannot take it as an explanation at all satisfactory to my mind that the only object of that was to avoid compound interest.

I must apologise for having occupied so much time in a case of so little importance in itself in a pecuniary point of view, but I think it involves legal questions of great importance and of very extensive application, viz., as to the effect of the discharge of a bill or a promissory-note

under the provisions of the statute and our common law rules. My own opinion is clear and decided to the effect that, when a bill or promissory-note is taken for an advance of money, or anything else, and is given up discharged in exchange for another note of greater or less amount—if the original debt was £50 or £100 and the bill or note taken for it was £50 or £100, and it is given up discharged for £5, or a bill for £5, or for nothing—that bill is completely discharged, and also the debt for which it was granted. When a bill is given to a relation or beneficent person for a loan of money made at any time, and that bill is given up discharged, there being no question of collateral security, but that being the only document existing, I think, in the absence of an averment and evidence to the contrary that that debt is discharged, and that the discharge of the bill or note is not just equivalent to the bill or note never having been in existence, but is a discharge of it, and of the debt for which it was granted.

LORD RUTHERFURD CLARK—I am of opinion that the pursuer is entitled to our judgment as she now asks for it, viz., for the principal with interest at five per cent. from the date of the loan. I proceed upon these grounds, that the action is laid on the debt, that there is an unqualified admission of the debt, and that there is no averment that any new contract or any change of contract was made when the promissory-note was given in exchange for the note which was prescribed, or was about to prescribe. To my mind this is a very special case, for I am only enabled to decide in favour of the pursuer on the very candid admission which the defender has made.

LORD TRAYNER—The counsel for the pursuer concluded his argument by moving for decree in terms of the conclusions of the summons, or, alternatively, for a proof (if that was considered necessary) of the circumstances attending the granting of the promissory-note dated 19th August 1891 in renewal of the then existing promissory-note dated 13th August 1885. I should have thought the pursuer entitled to the proof so asked, had it appeared to me that there was any difficulty in the way of granting decree in the state of the facts disclosed on the record. But for my own part I think any such proof unnecessary. I am prepared to give the pursuer decree without any further inquiry.

The facts of the case are few, and are to all practical effects undisputed. The pursuer in August 1885 advanced on loan to the late Mr Hope Johnstone (whose executor the defender is) the sum of £300 for which the borrower granted his promissory-note. When that note was about to prescribe, the debt being still unpaid, a new promissory-note "for the same sum of £300" (as the defender states) was granted to the pursuer by her debtor dated 19th August 1891, and the old promissory-note given up. When Mr Hope Johnstone died in November 1893, no part of the loan had been repaid, and no interest had been paid in respect of it. The pursuer now seeks to have a decree constituting her claim against Mr Hope Johnstone's estate for the amount of the loan and interest thereon. The defender admits that the amount of the loan is due to the pursuer as well as the interest thereon from August 1891, the date of the promissory-note given, as I have explained, in place or in renewal of the note granted when the advance was made. The only question therefore is whether, in the circumstances stated, the pursuer is entitled to interest on the loan between August 1885, the date when the loan was given, and the month of August 1891, when the promissory-note originally granted was given up in exchange for another of the like amount.

Now, there can be no doubt that the pursuer in August 1891, before she delivered up the promissory-note which she then held, was entitled to demand and recover from her debtor the sum contained in the bill and interest thereon from the date when it became due. The interest was as much due to her—as much a debt—as the principal sum; and both were due, not because the pursuer held the debtor's promissory-note, but because she was the creditor in the loan which the promissory-note represented. The promissory-note did not enlarge her rights; it merely afforded instant proof of the debt and a means of doing summary diligence for its recovery. The interest being then due—being part of the debt recoverable from the debtor—has it been paid or discharged? If not, it is still due and recoverable. The defender does not say that this interest was ever paid, but his defence to the present demand appears to be this (1) that there was no arrangement between the parties that interest should be paid; (2) that the pursuer had no intention to ask or take such interest; and (3) that when she took the second promissory-note and gave back the first, she abandoned all claim which she might have had for interest under the first note. The first and second of these defences are easily disposed of—1st, There was no need of any arrangement to entitle the pursuer to claim interest. Interest was due *ex lege*. 2nd, No matter what the pursuer's intention may have been, such intention could be changed assuming that it ever existed. Her intention did not absolve the debtor from his legal obligation if the creditor chose to enforce it. The third defence requires more consideration. The defender does not say that at the time when the pursuer delivered back the first note she actually by word or any form of expressed agreement gave up her claim to interest. In answer to a question put by me the defender's counsel said that he could not aver or prove any abandonment of the claim for interest beyond what the law would infer from the fact that the first note was given up and a second taken in its place without any demand for the interest then due being made. And the real question in the case is whether such

abandonment can be inferred from the circumstances stated. I am of opinion that it cannot. In the first place, it is to be kept in mind that the taking of the second note was in no sense and to no extent a settlement or partial settlement of the debt then due to the pursuer. It was merely the exchange of a good document of debt for that which by force of law was immediately to become no document of debt at all; a new promissory-note for the same sum to vouch the same debt was given for one that was about to prescribe. It was not therefore a settlement of a debt where the creditor took less than was demandable, from which it might (I do not say would) be inferred that he had taken a partial payment in full of his demands. In the second place the re-delivery of the first note leads in the circumstances to no inference of any abandonment of claim in respect thereof. The first promissory-note was then, or just about becoming, a document which would sustain no action or diligence. It was therefore useless to the pursuer for that purpose, and useless as a voucher since she had got another. On the other hand, the debtor was entitled to get, or at all events might reasonably ask to get, and the pursuer as reasonably give up the first note, because otherwise there would be existing documents which might get into other hands, vouching debt to the extent of £600 (although only one of them could be used as founding action or diligence), whereas the principal debt due by the debtor was only one half of that sum. He was fairly and reasonably entitled to get up the old voucher which he had replaced.

The legal inference which the defender asks us to draw from the mere fact that a renewal promissory-note was granted and the old one delivered up is not supported by any authority in our law with which I am acquainted, and none such was cited by the defender. There is, however, a case reported in the English books—*Lumley* v. *Musgrave*, 4 Bing. N.S. 9—which bears, as I think, directly upon the question. In that case a bill in the hands of an endorsee fell due in October 1835, and was not retired; the acceptor asked for time, which was granted, and in June 1836 the acceptor granted a new bill for the same sum. The old bill was retained by the creditor, who told the debtor, at the time of the renewal, that a sum was due for interest on the first bill, The second bill was paid and delivered up to the debtor, and an action brought afterwards against the debtor for the interest on the first bill. The defender maintained in defence that there had been an agreement to the effect that no interest on the first bill should be exacted, but in support of the defence no evidence whatever was tendered. The defender then urged in law (the fact having failed him) that, upon receiving the sum secured by the second bill, the holder had lost all right of action on the first, and, if the right of action for the principal sum secured by that bill was gone, the right to sue for the accessory interest was gone also. That contention was repelled and the action for interest on the first bill was sustained. On the authority of that case, Mr Justice Byles states the law to be that "even if the new bills be duly paid, the holder may recover on the old bills if the amount of principal and interest due thereon be not covered by the amount of the new bills" (15th ed., p. 377). And the law is stated in the same terms in Addison on Contracts, 9th ed. 139. The mere acceptance, therefore, of a second bill in place of a first, or the payment of the amount contained in the second bill, does not in itself operate a discharge of interest due upon the first. It is true that in the case I have cited the creditor retained the first bill and stated that interest was due upon it at the time he got the second bill, and these facts undoubtedly went to show that no such agreement had been made as the defender alleged. But these circumstances do not, in my view, weaken the case as an authority against the contention of the defender in the present case. The old bill in *Lumley's* case was still capable of founding action, and for that reason might very well be retained by the the creditor. In the present case it was, as I have pointed out, otherwise. Then, the mention of the fact that interest was due in *Lumley's* case did not make the creditor's right to that interest other than it was and would have been had no such intimation been made. The debtor's liability for interest was not increased or lessened by such an intimation; it was due or not due apart from intimation. The fact that the pursuer in this case (as I shall assume) said nothing about interest being due on the first promissory-note, when she took the second, did not lessen her right to demand it. Such silence did not amount to the renunciation or discharge of a debt undoubtedly due. In short, when the second promissory-note was granted Mr Hope Johnstone owed the pursuer £300 of principal and also the interest due thereon. For the principal she received a new voucher; for the interest she received none. But the amount of the debt was not affected by the fact that only part of it was vouched. The question is, has that debt been paid? It is admitted that it has not, and the pursuer is therefore now entitled to recover her whole debt, unless any part of it has been renounced or discharged by her. Nothing of that kind having been established, the pursuer is entitled to decree for the whole.

It was further argued that, under the terms of the 61st section of the Bills of Exchange Act 1882, the first promissory-note was discharged whenever it came into the hands of Mr Hope Johnstone, and he became the holder of it. But the statutory discharge covered nothing but what was contained in the bill itself; it did not discharge a debt accessory to or arising out of the bill, which did not appear on the face of the bill. Accordingly, even holding that the re-delivery of the first note to Mr Hope Johnstone operated as a discharge of that note so far as it imposed an obligation on him to pay £300, it operated no discharge

of the interest then due, which was a debt in addition to what was contained in the bill. The argument that the right to recover this accessory debt followed the right to recover the principal debt was advanced, as I have already pointed out, in *Lumley's* case and was repelled.

I am therefore of opinion that our judgment should be in favour of the pursuer for the amount of the loan and 5 per cent. from its date till paid, for which only (although different from the conclusions of the summons) the pursuer now insists. The form of the Lord Ordinary's interlocutor however will require to be altered.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of Lord Wellwood dated 8th June 1894: Find and declare that on 13th August 1885 the pursuer advanced or lent to the deceased John Charles Hope Johnstone the sum of £300, and that the same, with interest thereon at the rate of £5 per cent. per annum from said 13th August 1885 until payment, is a just and lawful debt resting-owing by the said deceased John Charles Hope Johnstone, and that the pursuer is a just and lawful creditor for the same, and has an interest in the means and estate of the said deceased John Charles Hope Johnstone for payment thereof," &c.

Counsel for the Pursuer—Hope. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defender — Younger. Agents—Carment, Wedderburn, & Watson, W.S.

Wednesday, January 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MORRIS *v.* BOASE SPINNING COMPANY, LIMITED.

Reparation — Master and Servant — Personal Injury—Culpa—Factory and Workshop Act 1878 (41 *and* 42 *Vict. c.* 16)—*Child.*

A girl under the age of fourteen who was employed in a spinning mill as a full-timer, when, under the provisions of the Factory Act, she should only have been employed as a half-timer, met with an accident which caused her death. In an action of damages at the instance of her father, against her employers, the jury returned a verdict for the pursuer. The Court granted a new trial on the ground that the verdict was contrary to the evidence, in respect that it was proved (1) that the work in which the pursuer's daughter had been engaged was quite safe for a child, and that the accident had been caused solely by her own act in removing the guard of a dangerous machine; and (2) that the breach of the Factory Act in employing the pursuer's daughter as a full-timer instead of a half-timer had not contributed in any way to the accident.

The Factory and Workshop Act of 1878 (41 Vict. c. 16) provides, sec. 12—"With respect to the employment of children in a textile factory the following regulations shall be observed—(1) Children shall not be employed except on the system either of employment in morning and afternoon sets, or of employment on alternate days only. (5) A child shall not be employed two successive Saturdays, nor on Saturday in any one week if on any other day in the same week his period of employment has exceeded five and a-half hours." Sec. 96—"In this Act, unless the context otherwise requires, the expression 'child' means a person under the age of fourteen years."

This was an action of damages by Robert Morris, blacksmith, Lochgelly, Fife, against the defenders, the Boase Spinning Company, Limited, Hawkslaw, Leven, Fifeshire, for the death of his daughter, who had been killed by the carding machine in the defenders' works. The pursuer averred that his daughter, who was under fourteen years of age, had been employed by the defenders in their carding room, at work, which on account of her age and inexperience was dangerous owing to the proximity of the carding machine; that, though she was a child within the meaning of the Factory Acts, the defenders, without obtaining her birth certificate or making any inquiry regarding her age, education, or fitness for such employment, or obtaining the certificate of fitness required by said Acts, had culpably and negligently employed her as a full-timer in the carding machine section, where on account of the danger connected with said machines none but grown-up persons were employed, and that the accident, which resulted in his daughter's death, was due to the fault of the defenders in failing to observe the provisions of the Factory Act, and in employing her in dangerous work unsuited to her age.

The defenders pleaded—"(3) The accident condescended on not having been caused by the fault of the defenders, they are entitled to absolvitor. (4) The said accident having been caused, or at anyrate contributed to, by the fault of the pursuer's daughter, *et separatim* of the pursuer himself, the defenders should be assoilzied. (5) The defenders having, in employing the pursuer's daughter, been misled by her misrepresentation, and the pursuer having induced, or at anyrate failed to warn the defenders against such misrepresentation, he is personally barred from holding the defenders responsible for his daughter's death."

The case was sent to trial by jury on the usual issue of fault.

The evidence showed that the pursuer's daughter was under fourteen years of age at the time of the accident; she entered the mill in or about the last week of March 1894, and had never been employed in a mill before; when asked her age she said she was "going seventeen," and from her appearance she might have been supposed to be that age; she was accordingly employed as a full-timer in the