annual payments of a like nature with annuities —that upon all such payments income-tax is to be deducted. I do not think that there is any great ambiguity in the matter. We were referred to a case in the English Court of Exchequer—*Foley* v. *Fletcher* (3 Hurl. and Nor. 779)—in which the price of lands sold, which was to be paid by yearly instalments, was held not to fall within these words of the Income-tax Act, and I have no intention of expressing any dissent from that judgment, because it is quite justifiable on the footing that the payment there was not a payment of income, interest, or other annual prestation, but was truly a payment of capital. Therefore I shall say no more about that case.

The question is, whether we have here got an annual payment of the nature of an annuity under a contract? What is the nature of the payment here. It is a payment made annually by the Duke of Abercorn so long as a certain lease endures, and received annually by the Railway Company, for the purpose of enabling them to discharge the annual burdens which they undertook to the tenant. The right of the tenant under the Railway Acts is a claim for compensation directly against the landlord; and this claim arises from the consideration that the *vis major* of an Act of Parliament having deprived the tenant of part of what he possessed under the lease, he is entitled to be repaid by the landlord, who has received the price of the lands sold to the Railway Company. Now, if the claim is made directly against the landlord, it just takes the form of an annual deduction from the rent. But in this case the Railway Company say, "Never mind about the deduction. Just take the full rent, and we shall settle with the tenants. Only, to enable us to do so, you must give us an annual deduction during the currency of the lease of 3 per cent. on the price of the lands taken." Now, what was the obligation which the defender thus undertook with the Railway Company? It was an obligation to make an annual payment to the Company to enable them to satisfy the claims of the tenants. If the tenants did not choose to enter into any special agreement, they would of course settle with the Company on the footing of their common law rights; and what they were entitled to apart from any agreement was an annual deduction from the rent so long as the lease endured. There were thus two annual payments—one by the Duke of Abercorn to the Railway Company, and the other by the Railway Company to the tenants. Now, I cannot conceive anything more clearly falling under section 102 of the statute; and it does not appear to me in the least degree to affect the question that the tenants agree to take from the Railway Company a slump sum instead of an annual payment. The payment by the Duke of Abercorn remains an annual payment in discharge of an obligation to the Railway Company just as much as before. It appears to me plain that these abatements were paid as a personal debt or obligation by the Duke of Abercorn to the Railway Company. I therefore agree with the Lord Ordinary.

Lord Deas and Lord Mure concurred.

Lord Shand—The statute includes and specifies as the subject of charge "all annuities or other annual payments . . . payable as a personal debt or obligation by virtue of any contract." These terms directly apply to this annual payment. What was the nature of the transaction between the parties? The proprietor says—"As you undertake to settle all claims by my tenants, and thereby to secure to me my full rents under the current leases, without any deduction for land taken, I shall pay you 3 per cent. annually during the currency of the leases on the price of the land you take." That appears to me to be just a case of an annuity payable by contract, and as such directly within the terms of the statute. It is not at all like *Foley's* case, for there the purchaser was paying off the price—a capital sum—gradually; here he is not. There is no doubt here an arrangement for the settlement of the price, and it was as part of this arrangement that the agreement for an annual payment was made. But the price was wholly paid. There was in fact an over-payment, and it was in respect of this over-payment that the parties contracted that an annuity or annual payment should be made for a certain time.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Lord Advocate (Watson)—Darling. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Defender (Respondent)—Gloag —H. Johnston. Agents—Mackenzie & Kermack, W.S.

Saturday, January 10.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

DRUMMOND (CARSE'S FACTOR) *v.* GILLESPIE (CARSE'S CURATOR) AND OTHERS AND GILLESPIE (CARSE'S CURATOR) *v.* DRUMMOND (CARSE'S FACTOR).

Bills—Promissory-note—Sexennial Prescription—Markings of Payment of Interest by Debtor on Back of Note—Entries in Books of Debtor.

Upon the back of a promissory-note dated in 1833 there were markings of payment of interest in the handwriting of the debtor, dated in 1840, *i.e.*, subsequently to the expiration of six years from the date of the note. Further, in a book kept by the debtor, of his intromissions as factor on the creditor's estate, there were entries of payment of interest up to 1846. *Held* that sufficient evidence was thereby afforded of the existence of the debt, and that when a debt of that nature is thus reared up after the lapse of six years, it remains in force until paid or extinguished by the long negative prescription.

Bills—Vicennial Prescription of Holograph Writs. Observations (*per* Lord Curriehill) upon the operation of the Vicennial Prescription Act (12 Geo. III. cap 72), as affecting bills and relative markings, holograph of the granter, and upon the necessity of pleading the statute upon record in order to entitle a party to a restricted mode of proof.

These actions related to the trust-estate of the late Edward Carse, bootmaker in Musselburgh. The

parties were, in the first action, Mr Drummond, who was judicial factor on the estate of the late Stewart Carse, painter in Musselburgh, pursuer, and the defender was Mr Lees, the sole surviving trustee of Edward Carse. He having died as after mentioned, the action was transferred against his representatives, and also against Mr John Gillespie, W.S., *curator bonis* to Thomas Carse, son of the deceased Edward Carse junior, the truster's son, and others, the whole beneficiaries or representatives of beneficiaries on the trust-estate. The purpose of this action was to reduce a decree of adjudication obtained, as after explained, in absence, by Mr Lees, as Edward Carse's trustee, against the widow and four of the children of Mrs Stewart Carse. The second action was one of count, reckoning, and payment at the instance of the whole beneficiaries on the estate of Edward Carse against Mr Drummond as Stewart Carse's trustee. The same questions being involved in the two actions they were conjoined.

Edward Carse had died in 1835 leaving a trust-disposition and settlement. The trustees were Edward Carse junior, the truster's son, Stewart Carse, the truster's nephew, and Mr Thomas Lees. Mr Lees, the last surviving trustee, died in January 1878. Stewart Carse had been appointed factor on his uncle's estate by the trustees in 1837, and had continued to act as such till his death in 1863. The minute appointing him bore "that he was appointed to be their factor, with power to uplift, receive, and discharge the rents, feu-duties, and interests due to the said trust estate from and after the term of Whitsunday 1837, and of which office Mr Stewart Carse hereby accepts." In this capacity he had collected the rents and intromitted with the estate generally down to the date of his death, but it was alleged by Edward Carse's representatives that after 1840 he had failed to prepare and submit accounts of his intromissions. He had made various payments to the beneficiaries, but it was alleged that a large balance was still due to them on his intromissions. Mr Lees, as sole surviving trustee on Edward Carse's estate, had raised an action of constitution and adjudication against Mr Stewart Carse's estate in 1866, in respect of two sums due by it to Edward Carse's estate, in which decree in absence had been allowed to pass. The defenders were therein decerned to make payment of £454, 16s. 3d. as the amount owing to Edward Carse's estate and certain heritable subjects which had belonged to Stewart Carse were adjudged. The first of the present actions was, as already mentioned, a reduction of that decree of adjudication. In this action a remit had been made to an accountant to report upon Stewart Carse's intromissions, and in the result a large balance was brought out as due by his estate to the beneficiaries, and the action of count and reckoning was thereupon brought at their instance to obtain payment of this balance.

It has not been thought necessary to report more than the following branch of the actions,

One of the sums said to be due by Stewart Carse's estate, and included in the decree obtained in 1866, was £250 contained in a promissory-note by Stewart to Edward Carse, dated 14th January 1833. The note was holograph of Stewart Carse, and the sum was included in the inventory of Edward Carse's estate, signed by, among others, the debtor. There were on the back of the document markings of interest paid to the creditor. The last was in these terms—"1840, January 14—One year's interest, £10, paid on the within bill to this date, and also the previous interest. (Signed) STEWART CARSE." It was thus subsequent to the prescriptive period. There were, further, up to 1846, in a cash-book kept by Stewart Carse as factor, various entries of the interest upon the note as having been paid by himself as debtor to himself as factor. Edward Carse's representative claimed payment, *inter alia*, of the contents of this note, which was refused on the ground that it was prescribed, and that the pursuers were barred by delay and taciturnity.

The Lord Ordinary (CURRIEHILL), after various procedure, including a proof, issued an interlocutor disposing of the whole matters at issue. The following are the parts of the interlocutor dealing with the question relating to the promissory-note:—"Finds that by promissory-note, dated 14th January 1833, the deceased Stewart Carse promised to pay to the also now deceased Edward Carse, one day after date, the sum of £250, value received; (2) Finds that the said note bears on the back thereof a marking holograph of the said Stewart Carse, and dated 14th January 1840, more than six years after the date of the said note, to the effect that he then paid interest on said note to said date; (3) Finds that in the cash-book kept by the said Stewart Carse as factor for the trustees of the said Edward Carse, there are various entries from 1840 to 1846 of further payments of interest by him upon said note; (4) Finds that by the markings on the note and entries in the cash-book it is proved that at the dates of said markings and entries a debt of £250 was due by the said Stewart Carse to the said deceased Edward Carse and his representatives; (5) Finds that at the dates of the decree of constitution and adjudication sought to be reduced, the said debt of £250, which formed one of the items for which said decree was given, was still resting-owing and unpaid by the said Stewart Carse and his representatives, with interest as concluded for in said action of constitution and adjudication." . . . .

"*Note.*— . . . . . Now, one of the assets of the estate at the death of Edward Carse senior, and which came into the custody of Mr Lees as law-agent, on the resignation of Edward Carse junior in 1837, was a promissory-note for £250 by Stewart Carse to his uncle, dated 14th January 1833, and payable one day after date. The note is holograph of Stewart. In 1866, some time after Stewart Carse's death, Mr Lees, then the sole surviving trustee of Edward Carse senior, found it to be his duty to recover from Stewart's estate the said debt of £250, and the balance due by him on his factorial intromissions. Now, on looking at the conclusions of the summons of constitution and adjudication, it will be seen that the defenders, the representatives of Stewart Carse, are sought to be decerned and ordained to pay to Mr Lees, as then the sole surviving trustee of Edward Carse senior, 'the sum of £250 sterling, due by the said deceased Edward Carse, and contained in a promissory-note granted by the said Stewart Carse to the said deceased Edward Carse, dated the 14th day of January 1833, and payable one day after date, with interest upon the said principal sum at the rate of four per

cent. per annum from the 14th day of January 1863 until payment. . . . . .

"Now, the first objection which is taken to the debt sued for in the constitution and adjudication, and which might competently have been stated by the defenders in that action had they appeared and resisted the conclusions, is, that in so far as it consists of the sum contained in that promissory-note, the decree is bad, in respect the note was prescribed at the date of the action. It is quite true that at the date of the action in 1866 more than six years had elapsed after the date of the note; but the plea of prescription, founded upon the Act of 1772 (12 Geo. III. c. 72), does not exclude actions for payment of the debt after the lapse of six years. All that is declared by the statute is that no bill or note 'shall be of force or effectual to produce any diligence or action in Scotland unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes become exigible.' The Act thus does not exclude actions for the debt; it merely excludes action upon the bill as being the sole ground of debt; and accordingly the same statute provides that 'it shall 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.' Now, it is well settled that markings of interest on a bill in the handwriting of the debtor, if dated after the expiration of the six years, are sufficient proof of the debt and of its subsistence by the writ of the debtor. In the present case there is a marking on the back of the note, holograph of Stewart Carse, to the following effect:—'1840, January 14.—One year's interest, £10, paid on the within bill to this date, and also the previous interest. (Signed) STEWART CARSE.' This marking is not only subsequent to the six years, but I think the evidence shows that it was made by Stewart Carse, the debtor, for the express purpose of eliding the sexennial prescription, or rather of preserving, under the hand of the debtor, evidence of the debt and of its continued subsistence. Further, there are, up to 1846, in the cash-book kept by Stewart Carse as factor for the trustees of Edward Carse senior, various entries of the interest upon that note as having been paid by himself as debtor to himself as factor. It is therefore quite clear that the debt did not become extinguished six years after its date, and that it subsisted and was in full force as late, at all events, as 1846. And the question comes to be, whether it still subsisted in 1866, or had been again destroyed by the lapse of six years from the date of the last marking in 1846?

"The pursuer maintains that markings on the back of a bill, though after the lapse of six years, have only the effect of rearing up the debt for six years from the date of the marking, and not of establishing the subsistence of the debt as an obligation enduring until extinguished by payment by the long negative prescription; and he founds, in support of that argument, upon the case of *Ferguson* v. *Bethune*, 7th March 1811, Fac. Col. Now, that case is not very satisfactorily reported, but it does appear that one of the bills there dealt with was, in the original judgment, held to be non-subsisting, in respect that six years had elapsed between the date of the last marking on the back of the bill and the date of the action. Whether the Court had fully in view the precise words of the statute, and the distinction there taken between the extinction of the bill as a document of debt, and the subsistence of the debt after six years if proved in the manner allowed by the statute, does not appear from the report; and it is unfortunate that the Lord President (Blair), who delivered the judgment of the Court, does not in his opinion touch upon the point now in question, because any expression of opinion by that eminent judge as to the interpretation of the Act of 1772 would have carried with it the greatest possible weight. The effect of the judgment, however, as it stands, is much weakened by the fact that it was reclaimed against and altered without discussion, as the marking was found in point of fact to have been less than six years before the date of the action. In an earlier case—*Russell* v. *Fairie*, 23d May 1792, M. 11,130,—'a doubt was started by one of the judges whether an interruption of the sexennial prescription by writing was to be considered as a renewal of the voucher, so as to make room for a new course of the same prescription, to be reckoned from the date of the interruption, as was found in the case of the septennial limitation of cautionary engagements; or whether the operation of the statute being thus completely done away the bill would subsist as a legal instrument for forty years, unless from the circumstances of the case there arose a presumption of payment. But it was not necessary to determine the point.' And in dealing with the matter, Professor Bell, in his Commentaries, vol. i. p. 420, says—'Such markings, provided they are in the debtor's handwriting, on the very last day of the six years, or after the expiration of the term, are answers to the plea of prescription, or rather proofs of the subsistence of the debt. It seems to follow that such proofs ought not to suffer the limitation proper to a bill, but the Court has considered such a constitution of the debt by relation to the bill as subject to a prescription as short as that of the original bill.' And in a note to this passage he says—'This question was raised on the Bench in *Russell and Fairie's* case, 1792, M. 11,130. The question was debated on the Bench, and the Judges much divided in opinion; seven Judges and the Lord President holding the limitation to take place, while the other seven Judges were of a different opinion; but the point was decided as above—*Horsburgh* v. *Bethune*, 13th February 1811, 16 F.C. 194; see also *Ferguson* v. *Bethune*, 7th March 1811, 16 F.C. 226, though as to this point that case is not reported with sufficient precision to be entirely satisfactory.' Mr Bell is mistaken in supposing that it was in the case of *Horsburgh* v. *Bethune* that the decision was pronounced. It was in the case of *Ferguson* v. *Bethune*, 7th March 1811, that the judgment was pronounced under the circumstances already adverted to, and he corrects the error in his Illustrations (published in 1838), vol. i. p. 353, adding in a note—'This case is imperfectly reported in the Faculty Collection. But unquestionably the Court did decide the last point, though, it is conceived, erroneously.' And in the fourth edition of his Principles (published in 1839, sec. 599) Mr Bell says—'The debt is restored, not as if the bill

were re-established, to run a new course of six years, but as a debt subject to the prescription of forty years;' and he refers to the case of *M'Indoe* v. *Frame*, 18th November 1824, 3 Sh. 295, where the Court concurred in the opinion delivered by Lord Pitmilly, who said—'There is a marked distinction between the document and the debt. If an action be raised against one co-obligant before the lapse of six years, the bill will be sustained against all the rest for forty years; but if not till after the six years have expired, the only question will then be whether the debt be proved? By the lapse of six years all the privileges and effects of the bill are lost; and it is the debt and not the bill which must be proved by the writ or oath of the debtor; but the writ or oath of each debtor can only affect himself. It is quite inaccurate to say that the prescription is interrupted by a marking of payment of interest after six years, for this is merely the writ of the party establishing the debt. It has been thought by some that the writ or oath of the debtor rears up the bill for a second course of six years, but this is quite incorrect. It is the debt only which is raised up, and it is then subject to the ordinary prescription.' It appears to me that the views here expressed, although not necessary for the actual decision of the case of *M'Indoe*, state the law more correctly than the judgment in the case of *Ferguson* v. *Bethune*. It is, I believe, now universally held by lawyers that the debt when reared up by markings after the lapse of six years remains in force until paid or compensated or extinguished by the long negative prescription; and I am humbly of opinion that to give to the Statute of 1772 the limited construction contended for by the pursuer would be doing violence to the plain language of the statute, which, while declaring the bill or note to be ineffectual as a ground of action, provides that the debt itself may be proved by the writ or oath of the debtor 'at any time after the expiration of the said six years.'

"The pursuer, however, further maintained at the debate on the proof, although he had not on the record or at the proof indicated his intention to do so, that even assuming the bill to have been reared up into a subsisting document of debt by the markings on its back, and by the entries in Stewart Carse's cash-book, yet, as the bill itself and these relative markings are holograph, they fall under the Statute 1669, cap. 4, which provides that 'holograph missive letters, and holograph bonds and subscriptions in compt books without witnesses, not being pursued for within twenty years, shall prescribe in all time thereafter, except the pursuer offer to prove by the defender's oath the verity of the said holograph bonds and letters and subscriptions in the compt books.' The pursuer declined to avail himself of the opportunity which I offered to him of adding to the record a plea founded upon the statute just quoted; and I might probably, without injustice to him, have ignored that part of his argument altogether, but upon the whole I think it better to deal with the argument, which appears to me to be entirely unfounded. Without stopping to inquire whether the Act 1669 was intended to apply to bills and notes at all, or whether in the position which Stewart Carse occupied in relation to the trust-estate of Edward Carse senior, he or his representatives are entitled to state such a plea as that now under consideration, one or two points are sufficiently clear to warrant me in refusing any effec to this plea of vicennial prescription.

"In the first place, the pursuer allowed the case to go to proof without pleading the statute; he cannot therefore now object that the holograph character both of the bill and of the markings on it, and of the entries in the cash-book, admitted of being proved only by the writ or oath of 'the defender.' It must not be forgotten, as sometimes happens in questions under that statute, that a party founding on a holograph writing after the lapse of twenty years is not limited as to the mode of proving either the constitution or the subsistence of the debt; he is only prevented from proving the genuineness of the writing founded on except by the writ or oath of 'the defender.' But the statute must be pleaded to entitle 'the defender' to insist upon the restricted mode of proof; and where a proof *pro ut de jure* of the authenticity of holograph documents is allowed, and is taken without objection, the vicennial prescription cannot therefore be pleaded. In the case of *Boyd* v. *Wyse*, 2d July 1847, 9 D. 1405, that point was expressly decided, Lord Fullarton saying—'Like every other prescription, it must be pleaded. It is a privilege of party. If the defender wished to avail herself of it, she ought to have done so when the Lord Ordinary remitted to probation, for it is a plea against the mode of proof. Instead, however, of making any such plea, they go to issue in the ordinary way, and the result is that the authenticity of the writing is established.' Now, in the present case, although a proof *pro ut de jure* was allowed 'before answer,' that limitation did not affect the mode of proof. A proof before answer is a proof allowed before disposing of the relevancy or sufficiency of the averments; and it will never entitle a party to prove by parole facts which can be proved only by writ or oath, and to leave the competency of the proof for further consideration. But where the defender, who has it in his power to insist upon his opponent proving his case by writ or oath, does not exercise his privilege, and allows the fact remitted to probation to be proved by parole, he cannot be allowed to come forward after the proof has been taken and concluded without any objection, and then to maintain that certain matters could only admit of being proved by writ or oath.

"But, in the second place, were it otherwise, and even if the present pursuer was still entitled to say that the verity of these documents can be proved only by the writ or oath of 'the defender,' I think that has been fully done in the present case"—[*His Lordship here stated his grounds for so holding upon the proof*].

Drummond (Carse's judicial factor) reclaimed.

Additional authorities — *Duncan's Trs.* v. *Shand*, Jan. 7, 1873, 11 Macph. 254; *Wink* v. *Speirs*, Mar. 23, 1868, 6 Macph. 657; *Waddel* v. *Waddel*, Dec. 20, 1790, 3 Pat. App. 188; *Cullen* v. *Wemyss*, Nov. 16, 1838, 1 D. 32; *Howden* v. *Howden*, Jan. 20, 1841, 3 D. 388; *Wilson* v. *Wilsons*, Nov. 26, 1783, M. 11,646; *Storeys* v. *Paxton*, Dec. 7, 1878, 6 R. 293; *Picken* v. *Arundale & Co.*, July 19, 1872, 10 Macph. 987;

Bilsborough v. *Bosomworth*, Dec. 5, 1861, 24 D. 109; *Mowat* v. *Banks*, July 1, 1856, 18 D. 1093; *Bank of Scotland*, 1747, 5 Br. Sup. 748; *British Linen Company* v. *Thomson*, Jan. 25, 1853, 15 D. 314; *Fisher's Trs.* v. *Fisher*, Dec. 5, 1850, 13 D. 245.

At advising—

LORD ORMIDALE—The Lord Ordinary having entered so very fully into the merits of this case, and dealt so carefully with every question of importance involved in it, I do not think that any lengthened statement of my own views will now be necessary.

The case relates to the estate and succession of Edward Carse, who died so far back as the 26th of May 1835, leaving a trust-disposition and settlement. The trustees under that deed were Edward Carse, the truster's son, Stewart Carse, his nephew, and Mr Thomas Lees, all of whom accepted and acted. Stewart Carse, besides being one of the trustees, was also factor, appointed by his co-trustees on 15th May 1837, "with power to uplift, receive, and discharge the rents, feu-duties, and interests due to the trust-estate from and after the term of Whitsunday 1837;" and of this office Stewart Carse at once accepted, and thereafter acted as factor till his death on 9th May 1863.

It would appear that part of the means and estate left by the truster Edward Carse was a promissory-note for £250, granted to him by Stewart Carse, of date 14th January 1833, payable one day after date. That this note was resting-owing by Stewart Carse at the death of the truster and for many years thereafter has not been disputed; but whether it was resting-owing at the date of the decree of constitution and adjudication to be immediately noticed, and is still resting-owing, is one of the questions now to be determined.

Proceeding upon the assumption that the promissory-note remained unpaid, and that there was, besides, a balance of £454, 16s. 3d. due to the trust by Stewart Carse on his intromissions as factor, an action of adjudication and constitution for these debts was in 1866 raised by Mr Lees, as the then sole surviving trustee of Edward Carse, against the representatives of Stewart Carse, and in this action decree in absence was allowed to pass. The decree continued undisturbed till the present action of reduction thereof was raised in 1877 by the representatives of Stewart Carse, on the ground chiefly that the promissory-note was prescribed long before the date of the decree, and that neither it nor the balance of £454, 16s. 3d. was then resting-owing. Another or counter action of count, reckoning, and payment was afterwards, in November 1878, raised by the beneficiaries under Edward Carse's trust against Mr Drummond, as judicial factor on the estate of Stewart Carse, concluding for payment of the contents of the promissory-note with interest, as also for payment of £1000, or such other sum as might be ascertained to be due by Stewart Carse as factor on the trust-estate of Edward Carse. These actions were conjoined, and the judgment now reclaimed against by Mr Drummond has been pronounced in the conjoined actions.

The conclusion come to by the Lord Ordinary is that the debt in the promissory-note, and a balance besides of £140, 6s. 8d., are still resting-owing by the representatives of Stewart Carse to the trust-estate of Edward Carse. In considering whether the Lord Ordinary is right in this conclusion some difficulty arises, as might have been expected, from the time which was allowed to elapse before the action of constitution and adjudication was raised against Stewart Carse's representatives, and again from the time which was allowed to elapse after the date of the decree of adjudication and constitution before the action of reduction of it was brought. The consequence of all this delay has been that by the death of parties, and particularly of Stewart Carse and Mr Lees, who it is presumed could best have explained many things in relation to the dispute, all the information which might have been obtained from them has been lost; but notwithstanding of this, it appears to me that the main questions in dispute are susceptible of a satisfactory solution.

I think that the debt of £250 contained in the promissory-note which has been referred to must be held to be still resting-owing, for while there is no evidence of that debt ever having been paid by Stewart Carse or his representatives, there is, notwithstanding the running of the sexennial prescription, abundant evidence of the debt itself being still subsisting. It is true that the sexennial prescription has put an end to the promissory-note as a privileged document, or as capable by itself of sustaining action or diligence. The debt, however, was not extinguished by that prescription, but may notwithstanding be shown by competent evidence, including the bill or note as an adminicle, to be still existing. There are, besides, written acknowledgments, subsequent in date to the prescriptive period, of the subsistence of the debt, holograph of Stewart Carse. I refer, first, to the acknowledgments, written on the back of the promissory-note, of the payment of the interest "on the within bill," one of them being dated more than six years after the promissory-note had fallen due; and, secondly, to the entries, also holograph of Stewart Carse, in the cash-book kept by him as factor, acknowledging payments of interest on the promissory-note debt down to 14th January 1846, being thirteen years after it had become payable.

There is really therefore no room for doubting that, according to the authority of Professor Bell and the decided cases referred to by him in section 599, subdivisions 2 and 3, of his Principles; by Mr Dickson in his Book on Evidence, sec. 450; and by Professor More, at pp. 432 and 435 of the 1st vol. of his Lectures, that the £250 debt must be held to have been subsisting at the date of the decree of adjudication and constitution. The contention of the pursuer that the written acknowledgments of Stewart Carse, which have been referred to as proving the subsistence of the debt subsequent to the prescription of the promissory-note, had merely the effect of giving rise to a new course of prescription, and are also struck at by the vicennial prescription of holograph writings, is, I think, very clearly shown to be untenable by the authorities to which I have already referred, and also by Professor More at pp. 427–8 of the 1st vol. of his Lectures.

[*His Lordship thereafter proceeded to deal with the other branches of the case.*]

In my opinion, therefore, the Lord Ordinary's judgment in the conjoined actions ought to be adhered to.

The LORD JUSTICE-CLERK and LORD GIFFORD concurred.

The Court adhered.

Counsel for Drummond, Carse's Judicial Factor (Reclaimer) — C. Smith — Millie. Agents — M'Caskie & Brown, S.S.C.

Counsel for Edward Carse's Representatives (Respondents)—Asher — J. A. Reid. Agent—Thomas White, S.S.C.

Saturday, January 10.*

SECOND DIVISION.

[Sheriff of Lanarkshire.

MP.—BROWN (PROCURATOR-FISCAL OF GLASGOW) *v.* MARR AND OTHERS.

Sale—Sale on "Sale and Return"—Right of Third Parties Purchasing bona fide *from a Party who had Fraudulently Bought from Others in a Contract of Sale and Return.*

A party by fraudulent practices obtained goods from another without paying for them, on a "sale and return" contract. He then pledged them for advances of money with certain pawnbrokers who were ignorant of the fraud. *Held* that the latter were entitled to refuse to restore the goods to their original owner until their advances were repaid.

Observed per the Lord Justice-Clerk (Moncreiff) that the only difference between a contract of "sale and return" and an ordinary contract of sale is that in the former case the buyer has the right to return the goods to the seller within a reasonable time and of thereby extinguishing his liability for the price, and the seller must receive these in satisfaction of the buyer's obligation.

Observed per the Lord Justice-Clerk (Moncreiff) that a condition annexed to a contract of sale empowering the buyer in a certain event to return the goods is not suspensive of the sale.

Sale—Sale or Return—Sale and Approbation.

Observations per curiam upon the destinctions between a sale of goods on "sale or return," and on "sale on approbation," and upon the rights of parties purchasing under the two contracts.

This was a multiplepoinding brought in the Sheriff Court of Lanarkshire by the Procurator-Fiscal in that Court, in order to determine the right of property in 36 gold watches and five diamond rings of which the pursuer was the holder. In January 1878 James Marr junior had been apprehended on a charge of having stolen during the months of November and December 1877, and of January 1878, *inter alia*, the watches and other articles forming the fund *in medio*, and he was thereafter indicted at the Circuit Court of Justiciary, held at Glasgow in April 1878, on a charge of having stolen or embezzled, *inter alia*, these articles, and having pleaded guilty to part of the charge made against him, was sentenced to five years' penal servitude. James Marr junior and others were called as defenders.

Robert Barclay and others, pawnbrokers in Glasgow, respectively claimed certain of the watches in question, or otherwise sought decree against the claimants or claimant who might be found conditionally entitled to obtain delivery of these watches, ordaining them to repeat the sums advanced by them in security. They averred that in accordance with a practice of trade, and in accordance with the lawful and usual course of their pawnbroking business, they had advanced money on watches pledged by Marr. It was stated that for upwards of a year prior to Marr's apprehension he had carried on business as a watchmaker in Glasgow, and in the course of his business he had had dealings with the claimants upon the security of goods of which he was the lawful or reputed owner, or of which he was in the lawful possession. It was averred that the goods pawned, which had been handed to the police authorities, were still subject to the claimants' rights.

A claim was also put in by Benjamin Smith for delivery of a watch which he had purchased on 30th Nov. 1877 from Marr, and which he had delivered to the police for the purpose of the proceedings against Marr.

R. & G. Drummond, James Crichton, Lorimer & Moyes, John Jamieson, John Scouler, and others, who were wholesale watchmakers and jewellers, and who had, on the understanding that he was to effect a sale of them, handed various watches and other goods to Marr, which he had forthwith pledged, were also claimants in respect of the said watches.

It was stated in Scouler's condescendence—"(Cond. 2) On or about 14th November 1877 James Marr junior, then watchmaker and jeweller, 58 Edmund Street, Dennistoun Street, Glasgow, called upon the claimant at his said business premises, and stated that he had received an order for a gold watch, and requested the claimant to entrust him with four gold watches, that he might submit same to the person from whom he had the order, that the latter might select one therefrom. (Cond. 3) The claimant, in the belief that the statements so made by the said James Marr junior were true, handed to and entrusted him with four gentlemen's gold lever watches for the purpose of submitting same for selection, as aforesaid, to his intending purchaser, and on the distinct, express, and sole understanding that he should so submit same for selection, and thereafter return to the claimant the three remaining watches if one had been selected, and pay the price of the watch so selected; and in the event of none of the watches being selected, that he should return the whole four watches to the claimant. (Cond. 4) On or about 30th November 1877 the said James Marr junior called upon the claimant, explained that the watches referred to in article 3 had not been returned to him with a selection made, and stated that he expected an order for another gold watch, and requested the claimant to entrust him with other three gold watches, that he might submit same to the intending purchaser, in order that he might select one therefrom." These were given him upon the same understanding as in the previous case. Upon the 1st December, being next day, Marr again

* Decided 8th January.