does not complain of the interlocutor, and it is therefore conclusively determined against him that he is bound severally as as well as jointly with the other defenders to erect the buildings required by the superior. For this reason, as well as that given by the Lord Ordinary, I think the objection taken to the form of the judgment is not well founded.

The Lord Ordinary has dismissed certain conclusions of the summons as unnecessary. This may probably turn out in the result to be quite right. But it seems to me to be premature to throw out alternative conclusions, which may possibly be made available to the pursuer if the defenders fail to build. I express no opinion as to the competency of these conclusions. But in the meantime I am disposed to think that that part of the interlocutor should be recalled so as not to foreclose any question which may be raised hereafter.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court pronounced this interlocutor—

"Recal said interlocutor (of 1st March 1895) in so far as it dismisses the fourth, fifth, and sixth conclusions of the summons: *Quoad ultra* adhere to the interlocutor with this variation, that the rebuilding is to be commenced within three months from the date of this interlocutor: Find the defenders the Callander and Trossachs Hydropathic Company and the Eagle Property Company, Limited, conjunctly and severally liable in additional expenses since the date of said interlocutor, . . . and decern" &c.

Counsel for the Pursuer—H. Johnston—J. Wilson. Agents—J. & J. Turnbull, W.S.

Counsel for the Defenders the Callander and Trossachs Company—Asher, Q.C.—W. Campbell. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders The Eagle Company—Deas. Agent—Wm. C. Dudgeon, W.S.

Thursday, July 18.

SECOND DIVISION.

CAMPBELLS' TRUSTEES *v.* HUDSON'S EXECUTOR.

*Promissory-Note—Sexennial Prescription—Proof by Writ—Resting-Owing—*12 *Geo. III. c.* 72, *secs.* 37 *and* 39.

In a question as to the liability of a debtor in a promissory-note which had prescribed, *held* (1) (*diss.* Lord Young) that it was not necessary for the creditor to prove that a debt had existed prior to and independent of the promissory-note; (2) (*diss.* Lord Young) that the promissory-note, being in the hands of the creditor, was available as an adminicle of evidence to prove the existence of the debt; and (3) that receipts granted by the creditor for interest on the promissory-note paid by the debtor after the period of prescription had elapsed were constructively the writs of the debtor.

A promissory-note for £800 granted by three parties prescribed in 1881. One of the co-obligants died in 1893, and a Special Case was presented to have it determined whether the debt contained in the prescribed promissory-note was resting-owing by the deceased obligant's executor. The evidence placed before the Court consisted of (1) the promissory-note, which had remained in the creditor's possession; (2) a retired promissory-note, granted by the deceased obligant in September 1882 "for value received in interest," which was admitted to have been granted for interest due on the promissory-note for £800; and (3) receipts by the creditor for interest on the promissory-note for £800, paid by the deceased obligant from 1883 down to the date of his death.

Held (*diss.* Lord Young) that the debt was proved to be resting-owing by the deceased's executor.

The Act 12 Geo. III. c. 72, section 37, provides "That no bill of exchange or inland bill or promissory-note . . . shall be of force or effectual to produce any diligence or action in that part of Great Britain called Scotland unless such diligence shall be raised and executed or action commenced thereon within the space of six years after the terms at which the sums in the said bills or notes became exigible." Section 39 enacts—"Provided always . . . that it shall and may be lawful and competent at any time after the expiration of the said six years in either of the cases before mentioned, 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."

On 2nd June 1869, Mrs Gibb, George Gibb, her son, and John Hudson, her brother, jointly and severally, granted to John Darling's trustees a promissory-note for £800 "for value received." The said sum of £800 was the total amount of sums received by Mrs Gibb at various times from John Darling or his trustees. In real security, and for the more sure payment of that sum, Mrs Gibb also executed a bond and disposition in security of certain heritable subjects in Duns in favour of Mr Darling's trustees, dated 7th, and recorded 8th June 1869.

On 2nd June 1875, no part of the £800 having been repaid, the promissory-note was renewed by said grantors the new note being in the following terms:—

"£800. "*Dunse, 2nd June* 1875.

"One day after date, we, jointly and severally, promise to pay to Messrs Robert Rae and James Wylie, the trustees of the deceased John Darling, formerly in Cockburn Mill, or their order, within the British Linen Company's Banking Office here, the

sum of Eight hundred pounds sterling, for value received.

"ISABELLA GIBB.
"GEORGE GIBB.
"JOHN HUDSON."

In August 1875 Mr Darling's trustees made over the said promissory-note by endorsement for full value to James Wylie and others, the marriage-contract trustees of Dr and Mrs Campbell, and also assigned to them the bond and disposition in security. Mrs Gibb duly paid the stipulated interest of 4½ per cent. on said £800 until 1882, when her affairs became hopelessly embarrassed, and on 18th October of that year she granted a trust-deed for behoof of her creditors in favour.

On 20th April 1882 James Wylie, who acted as factor to Dr and Mrs Campbell's marriage-contract trustees, wrote the following letter to Mr Hudson:—"I am sorry to say that up till now Mrs Gibb has paid me only £15 of the £35, 2s. 6d. due by her for interest to Mrs Campbell's trustees on 1st June 1881. If the loan is not to be called up, the interest must be more punctually paid, and as you are security for it, I shall thank you to see after it. Mrs Gibb promised the £20 in Feby. or March."

On 19th May 1882 Mr Wylie wrote to Mr Hudson—"I beg to annex a copy of a letter to Mrs Isabella Gibb calling up the bond for £800 at Martinmas first. You are aware that the trustees hold a promissory-note by you, Mrs Gibb, and Mr George Gibb, in further security of the debt." On 17th August 1882 Mr Wylie again wrote to Mr Hudson—"I am under the necessity of pressing you for the year's interest due at Whitsunday last, but am willing to take your bill at three months for it, say £36. Of course, if I recover the interest as well as the principal from the house when sold, I shall account to you for what you pay.

On 1st September 1882 Mr Hudson granted the following promissory-note for the interest on the said £800 at 4½ per cent due as at 1st June 1882, and which Mrs Gibb had failed to pay:—"Three months after date I promise to pay Mr James Wylie, as factor for the marriage-contract trustees of Dr and Mrs Campbell, or his order, within the British Linen Company's Banking Office here, the sum of Thirty-six pounds stg. for value received in interest."

On 17th November 1882 Mr Hudson called on Mr Wylie, and paid him the £36 contained in the promissory-note of 1st September, receiving the following receipt endorsed on the back of the note—

"*Dunse, 17th Nov.* 1882.—Received the amount of the within bill, say Thirty-six pounds stg., from Mr John Hudson, the same being in payment of the year's interest to Whitsunday 1882 of Mrs Gibb's Bond to the Trustees of the Marriage Contract of Dr and Mrs Campbell.

"JAMES WYLIE,
"*Factor for said Trustees.*"

By arrangement with Mr Hudson, Mr Wylie collected the rents of the said heritable subjects in Duns falling due at Martinmas 1882 and Whitsunday 1883. These rents, after paying public burdens, &c., were insufficient by £10, 17s. 10d. to meet the interest on the said sum of £800 falling due at 1st June 1883, and this deficiency Mr Hudson paid when he called on the factor on 25th June 1883, and he received a receipt therefor. Mr Hudson thereafter collected the rents of the foresaid heritable subjects, made the necessary disbursements, and paid the said interest as it fell due to said factor, and received receipts therefor from him down to the term of Martinmas 1892 preceding his death, which occurred on 2nd January 1893.

The following is a specimen of the form of these receipts:—

"½-Year's interest due Marts. 1886 on Mrs Gibb's bond and her and Mr Hudson's proy. note to the Marriage-Contract Trustees of Dr and Mrs Campbell, . . .	£18	0	0
Less Income-tax, . . .	0	12	0
	£17	8	0

"*Duns*, 23 *Nov.* 1886.—Received the above Seventeen pounds 8/- stg. from Mr John Hudson, Ashgrove.

J. W. 23 Nov. 1886.

"JAMES WYLIE,
"*Factor for said Trustees.*"

In November 1893 Dr and Mrs Campbell's marriage-contract trustees sold the heritable subjects disponed by the bond by public roup for £600.

After applying the free proceeds of the sale in reduction of the sum contained in said bond and promissory-note p. £800, there remained a balance due thereon of £242, 10s., as at 11th November 1893, which had not been paid.

Mrs Gibb had died on 16th December 1890, and George Gibb was utterly impecunious.

No papers bearing on the said promissory-note for £800, except the promissory-note for £36, the receipts for the interest on the £800, and the letters from Mr Wylie above mentioned, were found in the repositories of Mr Hudson after his death.

In these circumstances a question arose as to whether Mr Hudson's executor-nominate was not liable to pay the said £242 to Dr and Mrs Campbell's marriage-contract trustees out of Mr Hudson's executry estate.

For the decision of this question a special case was presented by (1) Dr and Mrs Campbell's marriage-contract trustees, and (2) Mr Hudson's executor-nominate. In the special case the facts above stated were set forth.

The question of law was—Are the foresaid promissory-note p. £36, receipts, and letters found in the repositories of the deceased John Hudson, taken in conjunction with the fact of the continuous possession of the said promissory-note p. £800 by the first parties, sufficient to elide the sexennial prescription of said promissory-note p. £800, or to prove that the said balance of £242, 10s. is resting-owing by the second party?

Argued for the first parties—Their continuous possession of the promissory-note

p. £800, and the payment of the interest by Mr Hudson after the sexennium, as evidenced by the receipts, the promissory-note p. £36, and the letters found in Mr Hudson's repositories after his death, were sufficient to elide the sexennial prescription, and prove that the balance of £242, 10s. was resting-owing by the second party. It was not necessary to prove the constitution of the debt, but only its subsistence, by the oath or writ of the debtor. Prescription did not destroy the bill; it only raised a presumption in favour of payment which could be redargued by the writ or oath of the debtor—*M'Neil* v. *Blair*, January 31, 1823, 2 S. 174, January 21, 1825, 3 S. 319; *Laidlaw* v. *Hamilton*, May 31, 1826, 4 S. 636; *Christie* v. *Henderson and Murdoch*, June 19, 1833, 11 S. 744; *Wilson* v. *Strang*, March 3, 1830, 8 S. 625; *Wood* v. *Howden*, February 7, 1843, 5 D. 507; *Boyd* v. *Fraser*, January 28, 1853, 15 D. 342; *Drummond* v. *Lees*, January 10, 1880, 7 R. 452; *Renny* v. *Urquhart*, January 25, 1880, 7 R. 1030.

Argued for the second party—The promissory-note p. £800 prescribed on 6th June 1881, in virtue of 12 Geo. III. cap. 72, sec. 37, and could not be founded on as a document of debt. There was no writ of the deceased John Hudson after the sexennium admitting the said debt of £800. As the constitution and resting-owing of the debt could only be proved by the debtor's writ, the second party, as Mr Hudson's executor, did not owe the £242, 10s. to the first parties—*Blair* v. *Horn*, June 17, 1859, 21 D. 1004; *Macpherson* v. *Williamson*, March 20, 1865, 3 Macph. 727.

At advising—

Lord Justice-Clerk—On 2nd June 1875 the late John Hudson along with Mrs Isabella Gibb and George Gibb, her son, granted a promissory-note for £800 to the trustees of one John Darling. This note was a renewal of a previous promissory-note for the same sum which had been signed in June 1869. The note of 1875 was endorsed to the first parties for onerous causes.

The second promissory-note, being payable one day after date, became prescribed in June 1861, and no diligence or action has been raised upon it before the expiry of the years of prescription.

The first parties maintain that they now prove the debt contained in the promissory-note by the writ of John Hudson, and acknowledging that certain sums have been paid to account, they demand payment of the balance. Their case is that this is proved by the writ of John Hudson. And they maintain that, if it is so proved, it is of no consequence upon what footing Hudson signed the note, whether it was between him and Mrs Gibb as a cautioner only. Hudson having, by signing the note, become debtor for the amount to the holder of the note, I think this proposition is sound, and must be given effect to.

The first question is, can the holders of the note competently prove the subsistence and resting-owing of the debt by the deceased Mr Hudson's writ? I think they can. The statute states that after prescription the creditor, if he is to recover the debt, must prove the debt and the resting-owing—that is, as expressed in the Act, "the debt contained in the said bill or promissory-note" by the writ or oath of the debtor.

The next question is, Does the evidence made part of this case prove the debt to be resting-owing?

The written evidence upon which the first parties found consists of one document under the hand of the late Mr Hudson, and several documents not in his handwriting but found in his repositories, and which, it is maintained, both on principle and authority, are to be held constructively his writ. The document under his hand is a bill for £36 granted in September 1882, more than a year after the year of prescription had expired. It bears to be granted for value received in interest, and there is a receipt upon it for the amount, which bears that the amount was interest due under Mrs Gibb's bond, which she had granted as greater security for the £800. It is also judicially admitted by its being stated as a fact in this case that that bill was granted for interest due on the £800 for which the promissory-note was granted, and that Mr Hudson retired the bill at maturity. Thus he is proved to have paid interest after 1882 on the debt for which the promissory-note was granted. But further, there were numerous receipts found in Mr Hudson's repositories which are acknowledgments of interest due on the debt of £800 for which the promissory-note was granted extending from the year 1882 down to December 1892. Now, these receipts are not, of course, Mr Hudson's writ, in the sense of being granted by him under his hand. But they were his vouchers retained by him, and so retained were practically the same thing as if they were informal jottings or entries by him in books instructing that he had made certain payments, which were of interest upon a debt due. Such documents retained in the possession of a party have been held to be constructively his writ in questions practically identical with that raised in this case. When all this evidence is taken together with the note itself which remains undischarged in the hands of the indorsees, I feel bound to hold on the authorities that subsistence of the debt is proved. The case seems to me to be very analogous to that of *Wood* v. *Howden*, 5 D. 507, the only difference being that in that case there was a difficulty in connecting the documents founded on with the prescribed bill. Here there is no such difficulty, as that is practically an admitted fact in the case. In the case of *Wood* a letter by the debtor acknowledging that he owed a balance of interest, and a receipt found in the debtor's repositories for interest paid by him, were held sufficient to instruct the subsistence of the debt in the bill. Indeed, Lord Fullerton was of opinion that each, *separatim*, was sufficient. In this case there is a promissory-note for unpaid interest corresponding to the letter in *Wood's* case, and there are numerous receipts bearing to be

for interest on this note found in the deceased's repositories, as one receipt was found in *Wood's* case.

I would propose, therefore, that the Court should answer the question as amended according to the second alternative, which will be done by leaving out the words "to elide the sexennial prescription of said promissory-note for £800," and answering the question in the affirmative.

LORD YOUNG—The position of the parties of the first part is this, that, having as assignees and holders of a bond and disposition in security for £800 sold the subject of the security for less by £242, 10s. than the amount of the bond (and interest), they desire to recover this deficiency from the second party as executor of Mr John Hudson, whose promissory-note for £800 (to the same persons who are the grantees of the bond) they hold.

The second party says that the promissory-note is prescribed, which, it being twenty years old, is of course conceded, and that there is no writ of the deceased, whose estate he is administering, sufficient to prove the debt contained in it, and that the same is resting-owing, which is disputed by the first parties, who contend that the promissory-note for £800 in their possession, and another promissory-note for £36, and certain receipts and letters found in the repositories of the deceased, and admitted to be genuine, are sufficient to prove the debt and that it is resting-owing.

The parties, in the view that they are agreed on the facts, and in dispute only upon the law applicable thereto, have presented this case under sec. 63 of the Court of Session Act 1868.

I greatly doubt whether the parties can be regarded as agreed on the facts, and incline to think that they cannot. The question as put in the case is whether or not certain specified writings prove that a sum of £800 is due by the one party to the other. Legal considerations may enter into this question, but only, I think, as they may into many, and indeed most, questions of fact. The admissibility of the writings is not questioned, and certainly is not put to us as a question. The question before us is put on the assumption of their admissibility, and seems an ordinary jury question of fact upon evidence consisting of writings, the legal construction of none of them being in controversy, any more than their admissibility according to the law of evidence. I have thus difficulty in holding that the case is competent under the Act.

But supposing this difficulty to be overcome somehow (although I do not see how it can be), the question put to us is whether certain specified writings "prove that the said balance of £242, 10s. is resting-owing by the second party." The question is inaccurately expressed, but I take it as meaning this—Whether the writs prove facts which show that the deceased Mr Hudson had undertaken an obligation to make good to the holders of Mrs Gibb's bond and disposition in security any deficiency in the price of the property when sold under the bond to meet the amount of the bond and arrears of interest. "The said balance of £242, 10s." referred to in the question is, I assume, truly stated to be the deficiency which actually occurred, and if the writs referred to show that it was a debt of the late Mr Hudson, the second party, as his executor, is liable for it, and otherwise not.

The legal question, which I believe the parties desire our opinion upon, has relation only to the meaning and import of the provision of sec. 39 of the Act 12 Geo. III. cap. 72, regarding the proof of the debts contained in prescribed bills and promissory-notes. Very conflicting views were presented to us, and it is certainly desirable that the true view should be ascertained and affirmed, and any contrary or inconsistent view negatived.

It was contended that the words which occur in this clause—"the debts contained in the said bills and promissory-notes"—referred, with respect to promissory-notes (and we need not here consider bills), to the debts incurred by signing them, and had no reference, or at least no necessary reference, to any others—whether prior, contemporaneous, or subsequent—so that in any particular case the absence of any debt whatever, except that which was incurred by signing the note, was of no significance, such signing being sufficient to constitute the debt "contained in" the note to be proved after prescription "by the oath or writ of the debtor." It is manifest that this view would, if accepted, render the prescription of promissory-notes altogether nugatory, for every subscribed promissory-note is the writ of the subscriber, and being admitted or proved to be genuine, necessarily proves any debt which he incurred by the mere fact of subscribing it; while, as to the resting-owing, the law presumes that a note in the hands of the payee or indorsee is unpaid, whether prescribed or not.

I think the true meaning and import of the clause in question is that the prescription of a bill or note should not imply payment of the debt for which it was granted, but only limit the mode of proving it. It is trite law that the payment of a bill or note implies payment (or rather perhaps is payment) of the debt for which it was granted, and it is now statute as well as common law that a bill or note in the hands of the obligant thereon is presumed to be paid. Now, this clause 39 of the Act, as I read it, signifies that, as the prescription enacted by sec. 37 is founded on the consideration of policy or expediency that the force of such documents should be of limited endurance, and not on any presumption of payment; and that, as bills and notes are generally granted for debts, these ought, in reason and justice, to be admitted to proof after the bills and notes given for them have lost their virtue by too long keeping. Nor is the limitation of the proof to writ or oath unreasonable on the face of it, having regard to the time which the creditor has allowed to elapse with so sharp an instrument in his hand. Let me illustrate what I mean by two simple cases—first, a promis-

sory-note given to a money-lender for a loan of money; and second, a promissory-note, of like amount, given to a merchant for the price of goods bought from him. I do not imagine that anyone would think that the debts contained in these notes were the same, although of like amount, or that after prescription the proof under sec. 39 of the Act would be the same in either case, viz., that the note was genuine (*i.e.*, not a forgery), and had not been paid. I should think it too clear to admit of dispute that the debt—that is, the loan of money in the one case, and goods purchased in the other—must, to satisfy the Act, be proved by the debtor's oath or writ. Suppose that in either case action is brought after prescription, it could not be on the note, which had ceased to be "of force or effectual to produce any diligence or action," and must therefore be on the debt owing on the contract of loan in the one case, or the contract of sale in the other. I may put a third case—that of a promissory-note for a gambling debt. Such note would no doubt be worthless, except only in the hands of a *bona fide* holder for value, and even in his worthless after prescription, and when proof of the debt is required from him. But why is a promissory-note for a gambling debt worthless? The only, but quite sufficient, reason is the illegal quality of the debt contained in it. The law, indeed, requires valuable consideration in every case, although it is presumed in the case of an onerous holder in due course, so long as the note is unprescribed, for after prescription the most onerous and *bona fide* holder must prove the debt. Clauses 27 to 30 (and especially sec. 28) of the Bills of Exchange Act 1882 may be referred to on this subject.

Clauses 37 and 39 of the Prescription Act (12 Geo. III. cap. 72) taken together seem to be quite inconsistent with the notion of liability on a prescribed bill or note on which action has not been commenced before prescription. There may, indeed, be liability enforceable by action against the acceptor or granter of such bill or note, but not on the bill or note which is declared to be no longer "of force or effectual to produce any diligence or action." Liability on an instrument, enforceable by action—but by action not on the instrument which creates it, and on which it stands—is, to me, at least, incomprehensible.

I therefore reject the view of liability on the prescribed note, provided only it is proved that the note is genuine (*i.e.*, not a forgery) and has not been paid, and accept the view that by prescription liability on the note is extinguished, but with the important qualification that this extinction of the note should not involve the extinction of the debt for which it was granted, if such debt and that it is resting-owing, be proved by the oath or writ of the debtor.

These observations express, and I hope sufficiently explain, my opinion on the only question of law involved in the case. I say "involved," for no question of law is distinctly stated. The question as put is whether certain specified writings are sufficient "to prove that the said balance of £242, 10s. is resting-owing by the second party." This question has no reference to the legal construction of any of the writings, but only to the sufficiency of all of them taken together "to prove" some facts, not specified or indicated, leading to the legal conclusion that a sum of £242, 10s. is resting-owing by one party to another. What are these facts? They can hardly be merely these—1st, that Mr Hudson's signature on the note is genuine; and 2nd, that the note is unpaid—for these have never, as I understand, been disputed, and the writings have no bearing on either of them. The sum specified in the question is the deficiency of the price realised by the sale of Mrs Gibb's property under her bond to meet the loan of £800, for which it was granted. Now, what is the fact alleged to be proved by the writings referred to upon which Mr Hudson's executor is debtor for that deficiency? If he was joint-borrower with his sister, and bound himself as such to the lender, he (and after his death his executor) would no doubt be bound for any unpaid balance of the loan. The idea that the writings referred to in the case prove that this is true in fact, and that the legal consequence is thus the same as if he had been a joint obligant with his sister on the bond, seems to me to be so extravagant on the statement of it that I will not dwell upon it. It is a more plausible view that he agreed to become, and did become, cautioner or surety for the loan to his sister. That this was his true position seems clearly enough to have been the opinion of Mr Wylie, one of the first parties, and who acted for the others—see his letters of 20th April, 19th May, and 17th August 1882. But I think it certain and clear that Mr Hudson's position from the first was that he was a mere accommodation party who signed the promissory-note without receiving value therefor, and therefore, that although absolutely liable upon it for six years—that is, so long as it retained its virtue—there was, so far as he was concerned, no debt behind to be proved by his oath or writ. Had there been writing to show that he became cautioner or surety for the loan (and under the Mercantile Law Amendment Act 1856, sec. 6, only a writing subscribed by Hudson would avail), the septennial prescription of the Act 1695, cap. 5, would apply. But there is certainly no such writing, and so this view of suretyship is, even without the Act 1695, as untenable as that of joint-borrower.

Therefore, assuming the competency of the case, I am of opinion that the question put ought to be answered in the negative.

LORD RUTHERFURD CLARK concurred in the opinion of Lord Trayner.

LORD TRAYNER—The late John Hudson (whose executor is the second party to this case) on 2nd June 1875 granted a promissory-note for £800 along with Mrs Gibb and George Gibb to the trustees of the late Mr Darling. The first parties to the case are now the indorsees and onerous holders of that promissory-note. That promissory-

note was payable one day after date, and therefore fell due on the 6th of June 1875. It accordingly prescribed on 6th June 1881, six years after maturity. The question put to us in this case is two-fold, viz., first, whether the writs produced and referred to are sufficient to elide the prescription; or second, whether they are sufficient to prove that the debt contained in the bill (or rather a balance of that debt, for part has been received by the first parties out of another security) is still resting-owing. On the first part of the question there can be no doubt. By the Act 12 Geo. III. c. 72, it is provided that no bill of exchange or promissory-note shall be of force or effectual to produce any diligence or action in Scotland unless such diligence is raised and executed or action commenced thereon within six years from its maturity. Nothing can avoid or elide the statutory prescription except that which the statute itself provides, namely, action or diligence commenced or done upon the promissory-note within the six years. No such action or diligence proceeded upon the promissory-note in question, and therefore it is prescribed. Nothing can be done by the debtor or creditor after the six years have expired, which will give the bill force or effect as a ground of action or diligence.

But the same statute provides that after the expiry of the six years it shall be lawful and competent to prove the debt contained in the bill, and that the same is resting-owing by the oath or writ of the debtor. The real question before us is, whether the debt and the resting-owing of the debt contained in the promissory-note have been established by the writ of the debtor, his oath not now being available. In considering this question I do not regard it as of any moment whether the promissory-note in question was granted as an additional security of an already existing bond by Mrs Gibb, or whether Mrs Gibb's bond was granted as an additional security for the promissory-note. In either case the signing of the promissory-note by Mr Hudson made him debtor, and put him under obligation to pay the holder thereof the amount therein contained. Nor does it affect the case, in my opinion, that as in a question between Mr Hudson and Mrs Gibb, the former was only a cautioner for the latter, because in a question with the holder of the promissory-note, Mr Hudson was undoubtedly a co-obligant with Mrs Gibb, and full debtor to the payee or holder of the promissory-note. Well, then, what have the first parties to prove in order to establish their claim against Mr Hudson's executor? They have to prove the debt and its resting-owing. What debt? The statute answers this question. It is the debt "contained in the said bill." The bill as a warrant for action or diligence is at an end by the force of the statutory provision, but the debt remains. But for the prescription the production of the bill would have proved the debt, but now that the bill is prescribed the debt and its resting-owing must be proved otherwise than by the mere production of the bill. But it is not necessary to prove that a debt had existed before the granting of the bill, and independently of it. If it were necessary to do so, it could be done in this case, for it is admitted (and a judicial admission is the best proof, for it renders all other proof unnecessary) that the promissory-note in question was granted in renewal and extinction of another and previous promissory-note for the same amount by the same debtors or obligants to the same creditor. But, as I have said, I do not think it at all necessary to prove the existence of a debt prior to and independent of the promissory-note in question. The debt "contained in the said bill" must, however, be proved by the writ or oath of the debtor, and here by the writ as the oath is not available. Now, I venture to say, and without any hesitation, that that has been done. In the first place, the promissory-note is still in the hands of the creditor, and it is still available as an adminicle of evidence It was stated by Lord Gillies in the case of *Christie* that after the expiry of the sexennium there is a presumption that the bill has been paid. There is no such presumption authorised by the Act of Geo. III., and the whole effect of the prescription of a bill is there provided. But assuming that such a presumption exists, it is merely a presumption which may be redargued, and the first step towards redarguing it is that the bill or promissory-note is still, that is, after the sexennium held by the creditor, and not by the debtor, who presumably would have got up the bill on payment if he had paid it. But the next item of evidence is the bill for £36 granted by Mr Hudson to the first parties, which is dated 1st September 1882—that is, about fifteen months after the promissory-note in question had prescribed. That bill was granted by Mr Hudson, as the statement in the case bears (art. 5) "for the interest on the said £800 at 4½ per cent. due as at 1st June 1882," and was retired by him before maturity. There can be no doubt therefore that this bill (undoubtedly Mr Hudson's writ), and the judicial admission concerning it, prove that after the period of prescription Mr Hudson paid interest on the debt "contained in the said" promissory-note, and payment of interest on a prescribed bill or debt after the period of prescription has run has frequently been sustained as proof of the existence of the debt and its resting-owing. In addition to this—but to be taken and considered in the light of it—we have produced from Mr Hudson's repositories a number of receipts, extending over the period from June 1883 until December 1892, by the factor of the first parties to Mr Hudson, acknowledging the receipt from him of the interest periodically due on the debt of £800 for which the promissory-note was granted. These receipts are not in Mr Hudson's handwriting, and are not his writ in that sense, but they are his writ in this sense, that they were received and preserved by him as his own proper vouchers. I have no difficulty in holding these receipts as constructively the writs of Mr Hudson. Taking these receipts along

with the promissory-note for £800 still held by the first parties, and Mr Hudson's bill for £36 above referred to, I am of opinion that they amply prove, in the manner required by the statute, the debt contained in the prescribed promissory-note and its resting-owing, and therefore that the second part of the question should be answered in the affirmative.

I am unable to concur in the view that the question here submitted for our opinion and judgment is a question that cannot competently or fittingly be submitted in the form of a special case under the 63rd section of the Act of 1868. That clause, looking to the obvious purpose for which it was enacted, is entitled to very liberal interpretation, and covers in my opinion any case where the parties are agreed upon the facts, and ask the Court to determine the legal consequence of such a state of facts. I think the parties are here agreed upon all the facts necessary to raise the legal question put to us. That question may quite fairly be regarded in both its branches as a question of law. Whether a prescription has been elided is a question of law, and it is also a question of law to ask whether certain admitted documents are in law sufficient to establish liability.

The Court answered the second part of the question in the affirmative.

Counsel for the First Parties—C. S. Dickson—Gunn. Agent—William Fraser, S.S.C.

Counsel for the Second Party—W. Campbell—W. K. Dickson. Agent—W. & J. Burness, W.S.

Tuesday, July 2.

OUTER HOUSE.

(Exchequer Cause.)

[Lord Moncreiff.

LORD ADVOCATE *v.* THE GENERAL COMMISSIONERS OF INCOME-TAX FOR THE CUNINGHAME DIVISION OF AYRSHIRE.

Revenue — Appointment of Assessor of Income-Tax—Revenue Act 1884 (47 *and* 48 *Vict. cap.* 62), *sec.* 7 (3).

Section 7 (3) of the Revenue Act 1884 provides that, "Where an officer of Inland Revenue has been appointed to be an assessor within any county or burgh" for the purposes of the Valuation Acts, "no other person shall be appointed to be assessor for the district or division of such officer for the duties to which the Taxes Management Act 1880 relates."

Held that it was incompetent for the General Commissioners of Income-tax for a district to appoint an assessor of income-tax for the whole district, when it included a burgh for which an officer of income-tax had already been appointed assessor under the Valuation Acts, and that the appointment as regarded the burgh fell to be cancelled.

This was an application presented by the Lord Advocate under the 15th section of the Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. cap. 56). The petition contained the following statement:—"That, on 18th September 1894, the General Commissioners of Income-tax for the Cuninghame Division of the county of Ayr appointed Mr Robert D. Tannahill to be income-tax assessor for the whole division. The burgh of Kilmarnock is included within the division. More than ten years ago Mr Benjamin Corke, the Surveyor of Taxes at Ayr, was, in virtue of the powers conferred by 20 and 21 Vict. cap. 58, appointed by the magistrates of Kilmarnock to be assessor of lands and heritages for the burgh, for the purposes of the Lands Valuation Acts. Mr Corke has since then continued to hold this office. His district as surveyor comprises the division of Cuninghame, with the exception of seven parishes, which are within the district of the surveyor of Paisley. The appointment of Mr Tannahill to be income-tax assessor was illegal as regards the burgh of Kilmarnock. It is provided by the Revenue Act 1884 (47 and 48 Vict. cap. 62), sec. 7 (3), that 'Where an officer of Inland Revenue has been appointed to be an assessor within any county or burgh, for the purposes of the Act of the session of the seventeenth and eighteenth years of the reign of Her present Majesty, chapter ninety-one, no other person shall be appointed to be assessor for the district or division of such officer for the duties to which the Taxes Management Act 1880 relates.' In making the appointment the General Commissioners acted in direct contravention of this provision. It was not competent for them to appoint any other person than the surveyor who was lands valuation assessor to be income-tax assessor for the burgh of Kilmarnock."

The petitioner craved the Court to give decree ordaining the Commissioners to cancel the appointment of the said Mr Tannahill so far as regarded the burgh of Kilmarnock, and to give that appointment to Mr Corke, the lands valuation assessor for the said burgh.

The Commissioners lodged answers, in which they stated, *inter alia*:—"Section 7, sub-section 3, of the Revenue Act 1884 (47 and 48 Vict. cap. 62), which is cited by the petitioner, is not applicable to the circumstances of the present case. In the first place, that provision applies only where the district to which the officer of Inland Revenue has been appointed as lands valuation assessor is the same as that for which the appointment of assessor of income-tax is to be made. In the present case the two districts are not the same. The burgh of Kilmarnock is only part of the parish of Kilmarnock, which in turn is only one of the sixteen parishes forming the Cuninghame district. Mr Tannahill was appointed by the respondents to be assessor of income-