[10*th April*, 1848.]

ALEXANDER WATSON, of Kilmalcolm, in the county of Renfrew, *Appellant*.

ALEXANDER R. JOHNSTONE, Merchant in Greenock, *Respondent*.

Prescription.—Novation.—Evidence.—Where a debtor enters into an arrangement with his creditors, which amounts to a re-constitution of their debts, and a provision for their payment, it is not competent to look to anything anterior to this arrangement as affecting the validity of the original evidence of the debt or its liability to prescription.

Insurance.—Evidence.—Acknowledgment of a debt arising from loss upon a policy of insurance, and a promise to pay, will, in the absence of production of the policy, elide an objection upon the 35 George III., cap. 63, that a contract of insurance can only be proved by a written policy duly stamped.

Prescription.—Trust—A trust for payment of debts elides the plea of prescription.

Trust.—A trust for payment of debts, where the debtor is allowed to retain and administer his estate, and no discharge of him or his estate is given by the creditors acceding, does not preclude these creditors from going against the general estate of the debtor for payment of their debts.

Trust.—Evidence.—Prescription.—A recital, in an heritable bond to a third party, of a trust-deed having been executed by the granter for payment of his debts at his death, *held* to be evidence in a question with the creditors of the granter, sufficient to establish the trust, to the effect of eliding a plea of prescription.

IN the year 1807, Alexander Watson, who carried on business in Greenock as an underwriter, became insolvent, and executed

a deed conveying all his estate to trustees, for payment of his debts.

His creditors signed a deed of accession to the trust, but having perfect confidence in his integrity, granted him a supersedere from diligence during his life, and allowed him to retain possession both of his property and of the trust deed.

In the course of the same year (1807), Watson realized sufficient funds to pay his creditors a dividend of 12*s.* in the pound, which he paid them according to a scheme of division drawn up by him in his own handwriting. This scheme contained the following title, "State of claims upon, and payments made by, "Alexander Watson, underwriter in Port-Glasgow, among his "creditors, May 1807, which payments are made from proceeds "of his voluntary sale of house furniture, his whole premiums "for last April and next October, and a considerable advance on "his own credit by a friend, which advance, so far as not paid "at my death, to be a preferable claim on my estate.

"(Signed) ALEXR. WATSON."

This scheme was divided into columns, containing the following headings: "Creditors.—Claims.—Dividend, May 1807, "12*s.* per pound.—Creditors paid the dividend of May 1807.—"No.—We the creditors acknowledge to be now paid up "the remaining eight shillings per pound, of our claims, with "interest."

After paying the dividend of 12*s.*, Watson continued his business as an underwriter in Port Glasgow until his death, which occurred in 1825.

In the year 1811, he had realized sufficient money to enable him to lend a sum of 700*l.* to M'Farlane, upon the security of an heritable bond, which contained this recital:—"Know all "men by these presents, that I, Peter M'Farlane, merchant and "sugar-refiner in Port-Glasgow, acknowledge that I have of this "date, borrowed and received from Alexander Watson, town "clerk of Port-Glasgow, late underwriter there, 700*l.* sterling,

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" for granting these presents, which I do, formed as it is at his " express desire, and as the condition of the loan, of which sum " I acknowledge the receipt, renouncing every exception and " objection in the contrary; and oblige myself, my heirs and " executors, to pay the interest thereof to him or his assigns " during his life, half-yearly, at Martinmas and Whitsunday, " beginning the first at Martinmas next for what shall be then " due, and at the first term of Whitsunday or Martinmas after " his death the principal sum, in proportion to their claims, to " Robert Dennistoun, Richard Dennistoun, James Buchanan, " junior, and Colin M'Lachlan, and Colin Thomson, the " partners of George and Robert Dennistoun and Company, " merchants in Glasgow, and to David Connell and James " Connell, of said city, and the other partners, if any be, of " David and James Connell, merchants there, creditors of the " said Alexander Watson, the former for 350*l.* 2*s.* 3*d.*, under " deduction of 210*l.* 1*s.* 4*d.* paid in May 1807, and the latter for " 335*l.* 13*s.* 2*d.*, deducting 201*l.* 7*s.* 10*d.* paid same time, both " by his acceptances to them, and to the survivors and survivor " of the said partners respectively, and their or his assigns, for " behoof of the said several companies, the residue of principal " and interest going to the lender's heirs or assigns, with a fifth " part more of the said principal, and of each term's interest of " liquidate penalty in case of failure in payment thereof, " severally." And in the body of the deed there was the following statement:—" As the reason of taking this security, the " lender desires, in case of his death, to have this explanation " given in the body of the deed: that having as an underwriter " been unfortunate, he, while his credit was yet entire, none of " his acceptances noted or protested, made a stop and a voluntary " conveyance of all that he had to his creditors, of his own " voluntary motive. The creditors without exception allowed " him to manage the trust affairs, retain the deed of trust, and " without any control, or asking him a question, received the

" dividend he made them of 12*s.* per pound, not even looking " at or desiring a state. But though the deed of trust signed " by them all bore that the lender should enjoy his future earn- " ings while he lived, yet George and Robert Dennistoun and " Company, and David and James Connell, did, at scarcely " twelve or eighteen months after, apply to know when he " would make a further dividend, and after being answered, both " by this lender and their own correspondents, that this was left " till his death by the trust acquiesced in by them, in case of " sickness or other disability preventing his following his busi- " ness, from which alone, if health permitted, he was to be " enabled to pay them, but that, notwithstanding thereof, he " was struggling hard, and even denying himself not merely " comforts, but necessaries, to get all paid off in his own life- " time, principal and interest, yet they repeated these applica- " tions from time to time, while not another creditor did so in " any shape, and the Messrs. Dennistoun went the length of " offering him their business at this port, on the base condition " of his allowing what arose therefrom to be applied to the " extinction of their claim, a proposition and undue preference " which he spurned at. The lender thinks this explanation due " to his character, and therefore having fulfilled, by complete " security for their payment, the obligation upon him toward " these two companies contained in his deed of trust, he will " very soon pay off all his other creditors, as he would have " these two also, had they acted a more handsome and feeling " part."

This bond was paid off in the year 1818, and a discharge duly attested was endorsed upon it by Watson in these terms:

" Messrs. Robert M'Lachlan, Archibald Falconer, junior, " James M'Lean, William Ewing, James Anderson, James " Cooper, and Alexander M'Lean, merchants in Port-Glasgow, " and Miss Mary Macfarlane, the accepting and acting trust- " disponees of the before-designed Peter Macfarlane, having now

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" paid me up the principal sum of 700*l.*, with 35*l.* 8*s.* 6*d.* of " interest, contained in and due by the foregoing bond, I, at " their desire, and as their choice, do now acknowledge the " receipt of the said principal sum, and interest, now paid me as " in full and complete satisfaction of said bond, which, with my " sasine upon the security lands, and the whole title-deeds of " said lands, delivered to me and in my hands, I have now " delivered up to Mr. James M'Lean, by whose hands the said " money has been paid, and I oblige myself and my heirs, to " warrant this receipt to be good at all hands, and against every " mortal."

Watson died in 1825, and in the year 1842 the Respondent brought an action against the Appellant, as Watson's heir and personal representative, concluding for payment of eight shillings in the pound of debts owing to four persons, whose names, together with the amount of their debts, appeared in the scheme of division which has been mentioned, and for interest upon the amounts from the time of the contraction of the debts.

In his summons the Respondent set forth that three of these debts were due upon promissory notes, which had been granted in the years 1806 and 1807; that the dividend of 12*s.* in the pound had been paid upon all of them, but that the balance continued owing at the time of Watson's death; and that he had acquired right to the debts by assignations from the creditors in the years 1827, 1840, 1841, and 1842. One of the debts sued for had been owing to a firm of the name of D. M'Dougall and Co. The promissory note which had been granted to them by Watson was in these terms:—

" 79*l.* 17*s.* 11*d.* " Port-Glasgow, 23rd June, 1806.

" On the twenty-sixth day of October next, I promise to pay " Messrs. Dond. M'Dougall & Co., or their order, seventy-nine " pounds, seventeen shillings and eleven pence, for loss on sloop " 'Friendship.'

" (Signed) ALEX. WATSON."

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The assignation to this debt upon which the Respondent sued contained the following recital:—"That in the year 1806, "or about that time, the said Company of Donald M'Dou- "gall and Company, insured or caused themselves to be insured, "against loss by perils of the sea or otherwise, upon a sloop or "vessel called the 'Friendship' of to the extent of "79*l.* 17*s.* 11*d.*, or about that sum, with the deceased Alexander "Watson, underwriter in Port-Glasgow; and the said vessel "having been lost, the said Alexander Watson became justly "due and addebted to the said Donald M'Dougall and Com- "pany in consequence of said insurance effected as aforesaid in "the said sum of 79*l.* 17*s.* 11*d.*, for which sum the said Alex- "der Watson granted the said Dond. M'Dougall and Company "his promissory note, under date 23rd June, 1806."

A statement almost *verbatim* the same as the foregoing, was contained in each of the other assignations.

In support of this action the Respondent founded upon the scheme of division, which did not, in the column for acknowledgement of payment of eight shillings in the pound with interest, contain the signature of any of the creditors whose debts he sued for, and indeed had the signature of only one creditor out of forty; at the same time, however, in a column containing the numbers of the creditors, there were the letters "pd." opposite the numbers of fourteen creditors. He also founded upon the statements which have been quoted from the heritable bond granted by Mc Farlane to Watson in 1811.

The Appellant in defence admitted his representation of the original debtor, but denied that the several debts sued for were owing by him at the time of his death. He produced several documents showing that other creditors had been paid the second dividend of 8*s.* in the pound, and relied upon these and the letters "pd." in the columns as doing away any effect which the absence of the Respondent's signature in the column for receipt of the second dividend could have, by showing that other creditors

had been paid although their signatures did not appear there. And he pleaded specially that the assignations under which the Respondent sued arose out of contracts of insurance which, under the 11th and 14th sect. of the 35 Geo. III., cap. 63, could not be pleaded or given in evidence unless by production of a formal policy duly stamped, a document which had not been produced in regard to any of the debts. That the evidence thus required by the statute could not be supplied by the promissory notes given by Watson to the creditors: And that the debts, even if proved, were prescribed by the triennial, sexennial, and vicennial prescriptions.

The Lord Ordinary (*Robertson*) upon the 1st July, 1845, decreed for payment of all the debts in terms of the libel. "In "respect, First, That the debts to which the pursuer has right by "assignations, now finally found to be regularly stamped and "executed, are acknowledged by the late Alexander Watson in "the State of Claims dated in May 1806 to be due by him, to "the amount of the principal sums now demanded. Second, "In respect of the statement contained in the heritable bond, "dated 18th July, 1811, and of the terms of the other docu-"ments, admitted to be genuine. Third, In respect that the "defender admits that he represents the said Alexander Watson, "and does not aver payment of any of the sums due at the "date of his death. And Fourth, In respect of the decision "of the Court in the case of Watson *v.* Hunter and Co. "18th February, 1841." The Court upon a reclaiming note adhered to this interlocutor. The appeal was against these interlocutors.

Mr. Wortley and *Mr. A. Mc Neill* for the Appellant.—I. The exact basis upon which this action has been brought does not appear. From the frame of the summons it is not certain whether it is founded upon the original contracts of insurance, upon the promissory notes, or upon what happened afterwards.

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All the documents upon which the claim is rested show, however, that the origin of the debts was contracts for insurance on which losses had been incurred; but as the statute is express in requiring that every contract of this kind shall be written, and in declaring that it shall not be given in evidence unless it is also stamped, the action cannot be supported without production of policies of insurance in respect of each of the debts upon which a claim is made.

With regard to the promissory notes, they are prescribed, under 23 Geo. III., cap. 18, by the lapse of six years from the time at which they were payable, and cannot form any ground for the action; though the debt may be left unaffected, the notes, as a proof of it, are extinct and cannot be of any avail; the debt must be proved by other means.

The only other evidence upon which the Respondent can rest, is the scheme of division and the heritable bond to Mc Farlane. These documents cannot be used as establishing any new or original debts, all the use that can be made of them is to prove previously existing debts; but then the question arises what debts? And the answer must be, debts arising upon contracts of insurance which brings the party back to the objection that such debts can only be proved by the policies of insurance.

[*Lord Campbell.*—It is the common practice in England, in insurance cases upon trials at Nisi Prius, where the loss has been adjusted, to produce the adjustment signed by the party and nothing more, and no more is required.]

But, admitting that the documents in question can be used as reconstituting the debt, do they, in fact, establish this? Though there is no receipt by the Respondents upon the scheme of division for the second dividend, the same circumstance is observable as to other creditors, who undubitably have been paid that dividend, even where the letters "pd." are not opposite their number in the scheme.

[LORD CAMPBELL.—Proof of payment to A does not raise any presumption of payment to B.]

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Perhaps not. But the whole circumstances here, in regard to so old a debt, give strong reason to presume that the debts sued for were paid as well as the others. At all events the scheme of division, which is the only document that establishes the debt, is open to the vicennial prescription of holograph writs by the statute 1669, cap. 9.

[*Lord Chancellor*.—By the terms of the trust-deed, as stated in the bond to M'Farlane, Watson was to enjoy his earnings during his life; the debts, therefore, were not to be paid in his lifetime. No presumption of such a payment, therefore, can arise, and there is no allegation by the Appellant of payment since his death.]

There is no proof of the trust-deed or its terms; M'Farlane's bond is not signed by Watson; any statement in it therefore is M'Farlane's, not Watson's.

[*Lord Chancellor*.—But Watson has adopted the statement in the bond by signing the discharge upon the back of it. And if this trust-deed was in operation what prescription can there be of a trust?]

The case was not so pleaded below, the documents were only used as acknowledgments constituting the original debt, not as making any new debt.

Mr. Attorney and *Mr. Anderson* for the Respondent were directed to confine their observations to proof of the trust for payment of Watson's creditors, and to showing how the Appellant was entitled to proceed against Watson's general assets instead of coming in under the trust, as the only questions upon which the House entertained any doubt. But the observations which fell from the Lord Chancellor upon the subject make it unnecessary to give the arguments used by them.

LORD CHANCELLOR.—My Lords, after looking very attentively through these papers, and listening to the arguments

which have been addressed to your Lordships at the bar, there really is no difficulty in our disposing of this case. As to the point of fact whether these debts have been paid or not, it appears to me quite conclusively that they have not, and the more the matter is investigated the more free is it from any doubt. It is quite clear that they were not paid at the time the "State of Claims," as it is called, was made out. Numerous debts were then due. The note which we have of the trust in the heritable bond shows that the arrangement between the parties was, that for all the debts then due 12*s.* in the pound should be paid, and that 8*s.* should remain over until after the death of the debtor. And following the evidence there are the subsequent stages of the account and the subsequent receipts or marks upon that account of debts paid. Every debt which was paid is accounted for. The debts in question are not, and do not appear ever to have been dealt with as debts paid, but as debts which remained unpaid. That carries the transaction down to very recently before the death of the debtor, because we find a debt paid in the year 1825, and of that there is an acknowledgment, a memorandum, leaving no doubt of that fact; but there is no memorandum, no acknowledgment, nor any notice whatever showing the payment of the debts in question.

Then at the time of the death of the debtor, in 1825, these debts were debts owing, but they were debts owing upon a trust. Now at first sight, no doubt, it would appear singular that the trust is not proceeded upon; but that the claim is made by the pursuer in virtue of the assignments of these particular creditors, as for a substantive debt against the general estate. But when we look to all that we have had produced as to the contents of the trust deed, I think that that is sufficiently explained. It appears that at the time the trust deed was executed it was an assignment of all the party's interest, all his estate, in trust to pay his debts; but he himself recites that

the creditors had so much confidence in him that they permitted him to be in possession of and to manage the estate, he being allowed to receive the income arising from the property until his death, and taking upon himself the duty, which nobody was bound to assume, of paying such debts as he could. The result of that, therefore, would be that at the time of the death, whatever estate there was coming would come to his representatives from him and be in his possession, he being the party left in possession of the estate.

Now that trust deed might have contained provisions discharging the general estate and leaving the creditors to proceed only upon the property named in the trust; but it does not at all follow that it did so, and, if it did not do so, then it was only an additional security to the creditors, and did not at all release the estate of the debtor from the obligation to pay beyond that contract, which is recited, of not suing him during the period of his life. That may or may not be so in point of fact. But if in point of fact there was any such release, then it is only to be found in the trust deed; it is not to be found in any part of that evidence which we have as affecting the contents of the deed, because that evidence does not contain an atom as to any discharge by the creditors, but refers only to the obligation which they have entered into of not suing the debtor during his life, they taking the payment in the mode prescribed.

Therefore the trust deed, according to the recital which we have, would be in the possession of the debtor. He remained not only in the possession of the property, but of the trust deed. If therefore produceable at all it should be produced by those who represent that debtor, if they have it. If they have it not the only evidence which we have of its contents is comprised in the recital in the hereditable bond; and in that recital nothing whatever is to be found to bar the creditors from proceeding upon the right which they have independently of the trust.

Then that brings it down to the death of the debtor, and if

the debt does not rest either upon the policy of assurance or upon the notes, but rests upon the arrangement come to between the debtor and his creditors, in which he admits the amount due to them and provides for the payment of that amount, which in my opinion is now the state of the transaction between the debtor and the creditors, we cannot look at anything antecedent to the time at which the debt was so constituted, whatever may have been its origin. That therefore being the mode in which the debt was constituted at the time of the debtor's death, in 1825, no prescription has run from that period up to the time when proceedings were commenced, which was in the year 1842.

Under these circumstances, it remains clear that these are debts admitted to be due by the first of the transactions which took place in 1807, and nothing has occurred since to displace these debts; but it being clear that though they were due they were not demandable up to the time of the debtor's death, no prescription would run in the meantime.

Then, with regard to the interest, these were clearly debts carrying interest, and nothing has taken place between the parties which would prevent interest running from the date of the arrangement. We are referred to the memorandum of payment of some of the debts, in which interest is calculated from that time. There is, therefore, no contract to prevent the parties from having the benefit of the debt; it is only the payment of the 12*s.* of the debt, but leaving the other 8*s.* of the debt just as it stood before, with the additional security whatever that might be, comprised in the trust,—a security which the creditors, having entire confidence in their debtor, appeared at a subsequent period to have relinquished; but still the contract with the debtor at the time of his death remained, and although that contract was broken by some of the creditors there is no evidence whatever of the contract not having been kept by the creditors in question.

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There is one question remaining, which is, whether certain parties who are creditors can act for others. We do not know at all what arrangements were made between them; but this we know, that between one person whose name appears in the list of debts, and the debtor, the sister was recognised as a creditor, and entitled to receive the amount. In the absence of all evidence as to the nature of that transaction, we must recognise the debt as the debtor himself recognised it, as a debt owing by him and payable to the sister,—whether for her own benefit or for the benefit of her brother, is a matter which we cannot determine; we can only deal with it as the debtor dealt with it. Under these circumstances it appears to me that on all the points the interlocutor appealed from ought to be affirmed.

LORD CAMPBELL.—My Lords, it appears to me that not one of the three reasons upon which the Appellant relies can be supported: the first is, that the Respondents' claims arising upon contracts of marine insurance, could only be established by showing the policies, and by proof of possession of insurable interests in the different vessels to which the claims referred, and of their loss by perils of the sea within the terms of the policies; in short, that this claim could not be supported without proving everything which it would be necessary to prove, if the debt never had been acknowledged by the underwriter, and if it were necessary to prosecute him upon the policy. It would be a very strange state of the law of Scotland, if that were so laid down. It is preposterous to say that after this settlement, and the constitution of the debt, when the creditor would have been fully justified in throwing all the vouchers into the fire by which the debt had been originally constituted and proved, if the payments were afterwards refused, he should be thrown back into the same situation as if the debt had been denied. I am very glad to find no authority whatsoever in sup-

port of such a doctrine as has been brought forward; it is contrary to reason, and it seems to me to be without any decision. By our practice in England, after the adjustment of a policy of insurance, nothing more is necessary that to prove the signature of the underwriter to the adjustment; but here the debt has been re-constituted in a formal manner, and it is not at all to be considered that the creditor is in the same situation as if the debt had always been denied, and he were to proceed upon proof of its original constitution.

Then, my Lords, with regard to prescription; according to the turn which the thing has taken, and the situation of these parties, it is only a vicennial prescription that can be relied upon, the debt being re-constituted. The action is brought in the year 1842, within the twenty years, and therefore that prescription will not apply.

The only other ground upon which the Defender has rested his case, is, that it is to be presumed that these debts have been paid. Now it seems to me that the party was very well advised not to accept an issue, for if it had gone before a jury, they could not have hesitated for one moment in coming to the conclusion which has been arrived at by my noble and learned friend, and in which I entirely concur, that these debts never have been paid. There are no materials whatever from which any such presumption can be drawn in point of law. Because one debt has been paid, it does not follow in the slightest degree that another debt has also been paid. There are two or three matters which occurred in the lifetime of the debtor himself, from which it is quite apparent to me that he died without having paid these debts; and since his death it is evident that not a shilling of them has been paid.

I think that the interlocutor of the Court of Session, adhering to the decision of the Sheriff, was perfectly well founded. Upon the question as to the interest; looking to the transactions between Watson and his creditors, it appears to me that

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12*s.* in the pound was paid in the meantime, and that time was given for the payment of the remainder of the debt until his death; but there is no renunciation of interest. The debt before was a debt that would have carried interest; there is no stipulation that interest shall be waived and abandoned; and it seems to me that the 8*s.* remaining would carry interest, just as the whole 20*s.* would have carried interest.

It seems to me, therefore, that the interlocutor must be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed. And it is further Ordered, That the Appellant do pay or cause to be paid to the Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant, &c.

LAW, ANTON, and TURNBULL—LE BLANC and COOK, Agents.