Thursday, July 10.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

STOCKS AND OTHERS *v.* M'LAGAN AND OTHERS.

Bond and Disposition in Security—Cautionary Obligation—Septennial Limitation—Act 1695, *cap.* 5—*Bond "by Way of Corroborative Guarantee."*

In a bond and disposition in security for £40,000 granted in 1874 by a company over its property, certain of the shareholders bound themselves "as individuals and by way of corroborative guarantee" to repay the sum lent. In 1884 the agents of the company, in a letter written to the creditors in the loan, with the view of effecting a reduction in the rate of interest, stated that "the loan is further secured by the personal obligation for its repayment given at the date of the allowance by" the said shareholders. The loan was continued at a reduced rate of interest, and in 1888 the company went into liquidation. It appeared from a proof that at the time when the letter was written neither debtors nor creditors had the Act of 1695 in view, that no special instructions were then given by the said shareholders, and that until after the liquidation they had thought themselves still bound. *Held* that the said shareholders were cautioners, and as such entitled to the benefit of the septennial limitation secured by the Act 1695, cap. 5, that their obligation *ipso facto* ceased in 1881 by the lapse of the seven years, and that no new obligation had been created by the letter of 1884.

The Leith Heritages Company, Limited, was incorporated in 1874 under the Companies Acts 1862 to 1867, one of its objects being to acquire certain property in Leith for the purpose of, *inter alia*, borrowing money on the security of said property. Having acquired it the company issued a proposal for effecting a loan of £40,000, in which they stated that "In addition to the heritable security offered as above, the company are prepared to contribute the personal corroborative guarantee of the following gentlemen from among their shareholders, viz.:—P. M'Lagan, Esq. of Pumpherston, M.P.; Henry Moffat, Esq. of Eldin; Adam Beattie, Esq., Builder, Edinburgh; Robert Clark, Esq., Printer, Edinburgh; Thomas Aitken, Esq., 5 Grosvenor Crescent, Edinburgh; Hugh Morton, Esq., Belvidere House, Trinity; and David MacGibbon, Esq., Architect, 89 George Street, Edinburgh."

Peter Stocks and others, tutors and curators of the children of the late James Methuen, agreed to advance the money, the rate of interest to be 4½ per cent. and thereafter received a bond and disposition in security over the property dated 5th and 6th November and recorded 12th November 1874. The bond and disposition in security, after acknowledging receipt of the money, provided as follows—"which sum of forty thousand pounds sterling we the said The Leith Heritages Company (Limited) incorporated as aforesaid bind ourselves and our successors and representatives whomsoever and our capital funds estate and effects and we Peter M'Lagan Esquire of Pumpherston Member of Parliament for Linlithgowshire Henry Moffat Esquire of Eldin Adam Beattie Esquire Builder in Edinburgh Robert Clark Esquire Printer Hanover Street Edinburgh Thomas Aitken Esquire residing at Number five Grosvenor Crescent Edinburgh Hugh Morton Esquire residing at Belvidere House Trinity near Edinburgh and David MacGibbon Esquire Architect Number eighty nine George Street Edinburgh all shareholders of the said The Leith Heritages Company (Limited) bind ourselves as individuals and by way of corroborative guarantee conjunctly and severally and our respective heirs executors and representatives whomsoever without the necessity of discussing them in their order and renouncing the benefit of discussion and we the whole granters hereof conjunctly and severally bind ourselves and our respective foresaids as aforesaid to repay to the . . . Tutors foresaid and to the survivors or survivor of them and to their successors in office and assignees whomsoever."

In 1878 the then surviving tutors and curators of Mr Methuen's children resolved to call up £10,000 of the £40,000 lent, and in 1879 an arrangement was entered into whereby £7000 was paid by the company in cash, and the bond was discharged to that amount and £3000 were paid by the trustees of the late William John Aitchison, 11 Buckingham Terrace, Edinburgh, upon an assignation of the security to that extent.

The said Hugh Morton died on 10th June 1878, and the said Adam Beattie died in February 1880.

On 1st February 1884, the law-agents of the said company wrote to the agents of the said tutors in the following terms:—"*Leith Heritages Company — Methuen's Trust*—£30,000 *Loan.* Dear Sirs—Referring to our interview with you to-day, we beg to mention that this company has at present a loan from the late Mr Methuen's trustees of £30,000, over the old Glass Work property in Salamander Street, Leith. . . . The loan is further secured by the personal obligation for its repayment, given at the date of the advance (which we may state was originally £40,000) by Peter M'Lagan of Pumpherston, M.P.; Henry Moffat of Eldin; the late Adam Beattie, builder; Robert Clark, printer; Thomas Aitken, 5 Grosvenor Crescent; the late Hugh Morton, shipbuilder; and David MacGibbon, architect. The rate of interest payable on the bond at present is 4¼ per cent. As we explained to you, the company have now an opportunity of paying off the loan and negotiating a new one at the rate of 4 per cent. per annum, as the security for the loan is perfectly unexceptionable. If the

trustees are unwilling to continue the loan at the reduced rate of interest above mentioned, you can let us know in the course of next week, so as to enable us, if necessary, to give the requisite notice."

The money was allowed to remain with the company at the reduced rate of interest proposed viz., 4 per cent.

The said company on 29th November 1888 passed an extraordinary resolution to the effect that it be wound up voluntarily. The voluntary winding-up was, on 1st December 1888, continued subject to the supervision of the Court.

Notice of the meeting, at which the resolution to wind up the company was to be proposed, was sent to the agents of Mr Stocks, the only surviving tutor and curator of Mr Methuen's children, with an intimation that the company would not pay the interest upon the loan at the ensuing term of Martinmas. Mr Stock's agents thereupon wrote a letter to Messrs Moffat, Clark, Aitken, MacGibbon and M'Lagan, and to the representatives of Mr Hugh Morton and Mr Adam Beattie, intimating that Mr Stocks would require payment of the half-year's interest due at the ensuing Martinmas from them. Answers to all these letters were received denying liability, and in February 1889 Mr Stocks, with the consent of Mr Methuen's children, who were then all out of pupillarity, brought an action against Messrs M'Lagan, Moffat, Clark, Aitken, and MacGibbon, and against the trustees of the late Mr Hugh Morton, and the trustees of the late Mr Adam Beattie, to have them decerned conjunctly and severally or severally, and according to their respective liabilities, to make payment to the pursuer, as tutor and curator foresaid, of the sum of £30,000 with interest from 15th May 1888.

The Act 1695, c. 5, provides . . . "That no man binding and engaging for, hereafter, for and with another, conjunctly and severally, in any bond or contracts for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution, and that whoever is bound for another either as express cautioner, or as principal or co-principal, shall be understood to be a cautioner to have the benefit of this Act, providing that he have either clause of relief in the bond, or a bond of relief apart, intimate personally to the creditor at his receiving of the bond." . . .

The pursuer averred that he and his colleagues had transacted with the company, and had lent them money upon the footing that the defenders or their authors should be co-obligants in the bond. If it had not been for the additional security thereby given the tutors would not have lent the money under their charge to the said company. The defenders were well aware that the tutors relied (and they intended that they should rely) upon their obligation as a corroborative and continuing obligation, and it is believed and averred that the view that they were only cautioners was suggested for the first time when the company went into liquidation, and it became necessary for them to make good the loan. Further, the defenders have by their actings recognised their obligations as that of co-obligants, and in particular by the application already referred to, which was made in 1884 with their knowledge and under their authority for a reduction in the rate of interest.

The defenders explained that they or their representatives had become parties to the said bond only as cautioners for the company, and that their obligations have expired.

The pursuer pleaded—"(1) The pursuer is entitled to decree against the defenders as libelled in respect of the obligation undertaken by them or their authors in the said bond and disposition in security. (2) The individual grantors of the said bond being parties thereto as principal co-obligants and not as cautioners, the defenders are not entitled to the benefit of the septennial limitation. (3) The investment having been in the contemplation of both parties an investment of a continuing nature, as condescended on, the septennial limitation does not apply. (4) The defenders by their actings in relation to said loan are personally barred from pleading the septennial limitation of cautionary obligations."

The defenders pleaded—"(2) Prescription."

The defenders Hugh Morton's trustees pleaded—"(2) The obligations undertaken by the late Hugh Morton having been extinguished by the septennial limitation introduced by the Statute 1695, c. 5, the present defenders ought to be assoilzied from the conclusions of the summons with expenses."

The trustees of the late W. J. Aitchison brought a similar action upon the same grounds against the same defenders for payment of £3000 in respect of the assignation to them of the said bond and disposition in security to that amount as explained above.

The actions were conjoined.

Upon 29th June 1889 the Lord Ordinary (KINNEAR) found that the obligation undertaken by the defenders in the bond libelled was extinguished by the operation of the Statute 1695, c. 5, and assoilzied the defenders from the conclusions of the summons in the conjoined processes.

"*Opinion.*—The action is brought for payment of £40,000 lent to the Leith Heritages Company, and is founded upon a bond dated 5th and 6th November 1874, to which the company and the defenders Mr Peter M'Lagan and others, or deceased persons whom they represent, were parties. The defenders maintain that they became parties to the bond as cautioners for the company, and in no other capacity, and therefore that their obligation is extinguished by the septennial limitation introduced by the Statute 1695, c. 5. The first question is whether the statute is applicable so as to extinguish the defenders' obligation.

"The construction of the statute is fixed by a series of decisions, and in particular by

two decisions of the House of Lords affirming judgments of the Court—*Scott* v. *Yuill*, 5 W. & S. 436, and *Tait* v. *Wilson*, 1 Rob. App. 137. The result of those decisions appears to be that the statute extinguishes a cautionary obligation after the lapse of seven years in two separate cases—First, where the cautioner is bound in the same writing as the principal debtor, and by the form of the bond is bound expressly as cautioner; and secondly, where he is bound as principal or co-principal, and is shown to be a cautioner by a clause of relief in the bond itself, or by a separate bond of relief intimated at its execution to the creditor. The defenders have no clause of relief, or separate bond of relief intimated in terms of the statute, and the question is whether they are cautioners by the form of the bond itself. I find nothing in the statute nor in the decisions to make the word cautioner indispensable if equivalent words be used. All that is necessary is that the character of the obligation shall be made apparent by the express terms of the bond, and by the express terms of the bond in question the defenders are in my judgment cautioners. It begins with an acknowledgment by the company alone, to which the defenders are not parties, that the company has borrowed and received from certain persons the sum of £40,000, and then follows the clause of obligation by which the company binds itself and its estate and effects, and the defenders bind themselves 'as individuals and by way of corroborative guarantee,' and 'the whole grantors bind themselves, conjunctly and severally,' to repay the sum borrowed by the company at the term of Whitsunday 1875. An obligation by which certain persons bind themselves 'by way of corroborative guarantee' to pay another person's debt is nothing but a cautionary obligation. It is of no consequence that they have not the benefit of discussion, not merely because cautioners for the payment of debt have been deprived of that benefit by the Mercantile Law Amendment Act, but because it was quite settled before the passing of that Act that persons bound as 'full debtors' might be cautioners in the sense of the Act of 1695. The position of the defenders, indeed, answers exactly to the very words of the Act. The entire enactment to which they require to appeal is contained in a single clause—'That no man binding and engaging for, hereafter, for and with another, conjunctly and severally, in any bonds or contracts for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution."

"The statute therefore gives its own definition of a cautioner. It is a person binding and engaging for and with another in a bond or contract.' That is exactly what the defenders have done. They bind themselves for the company by way of corroborative guarantee, and they bind themselves conjunctly and severally with the company in the same bond by which the company acknowledges its debt.

"It is said that the words I have quoted are qualified or restricted by the immediately following clause of the Act. But the House of Lords decided that to be a wrong construction—*Scott* v. *Yuill*. The Lord Chancellor, after commenting on the words already quoted, goes on to say—'All this having been ordained with respect to the person who is cautioner or co-obliger with another,' then comes the clause, which he proceeds to quote, beginning with the words 'and that whoever is bound for another,' and that clause he says is to be taken 'as an extension of the remedy as a new clause coming in when the first fails.' It is not by way of exception that those words are introduced into the Act, but by way of 'express provision.' This is by way of addition. This is something 'adjected into what had passed before, as if the Legislature had said first let it be understood whoever is bound for another shall have the benefit of this septennial limitation, and next whoever is bound as principal or co-principal shall have the benefit of the Act, provided that he is made a cautioner by having a clause of relief or a separate bond of relief intimated to the creditor.'

"It is said that a corroborative guarantee is a different thing from a cautionary obligation. But if two persons bind themselves in the same instrument—the one to repay money lent to him, and the other 'by way of corroborative guarantee' to repay the money lent to the first—these last words have no significance whatever if they do not mean that the second has come forward as surety or cautioner for the first. Accordingly Lord Mackenzie says—*Tait* v. *Wilson*—that as a matter of course he takes guarantee and caution to be equivalent terms, and the Lord Chancellor's criticism of that observation in the House of Lords does not appear to me to detract from its value as an authority upon the ordinary use of those two terms in our legal language.

"The Lord Chancellor's observation is directed exclusively to the construction of the particular instrument before him, and what he says is—'That the term guarantee, as used in the appellant's letter, does not express an undertaking that others shall perform what they had contracted to do, but amounts to a distinct contract to pay the sum due on demand.' I do not understand that to mean that the writer of the letter could not be a cautioner because he had undertaken to pay the sum secured to the creditor, not merely in default of the principal debtor, but, in the first instance, and at all events on the contrary, his Lordship points out that he may be and very often is in the position of 'a surety or cautioner.' But the point of his observation is that there was in that case a separate and independent contract to pay, and the ground of judgment is that such separate and independent contracts, whereby one person binds himself to pay as principal a sum of money also contracted to be paid by another, are not provided for by the terms of the statute.

"All the cases cited, in which it has been

held that guarantees or bonds of corroboration are not within the operation of the statute, appear to me to depend on the same principle. The granter of a separate guarantee or of a bond of corroboration is not within the terms of the enactment on which the defenders rely, because he has not bound himself for and with the other in the same bond or contract. But when the express terms of the bond make it apparent that one of the parties, although as between himself and the creditor he is a principal debtor, is a cautioner as between himself and the other for and with whom he binds himself, then according to all the authorities the cautioner has the benefit of the statute.

"If the statute applies there appears to me to be no foundation for the plea of personal bar. The debt is not prescribed but extinguished by the statute, and in order to revive it it would be necessary that the defenders should have undertaken a new and distinct obligation, upon which the creditor could sue independently of the extinguished bond. The case of *Scott* v. *Yuill* appears to me to be conclusive on this part of the case."

The pursuers reclaimed, and argued—1. The defenders were co-obligants with the company, and not cautioners for it. Consequently they were not entitled to the benefit of the Act 1695. That Act was to be construed strictly, and the defenders must show they came under it. It had been decided—*Burnet* v. *Middleton*, June 29, 1742, M. 11,018; *Scott* v *Yuill*, September 15, 1831, 5 W. & S. 436—that two classes of obligants were entitled to the benefit of the statute, viz., those expressly described in the bond as cautioners, and those, although not so described, who had a clause of relief or separate bond of relief intimated to the creditor. The defenders did not come under either of these categories. They were bound "by way of corroborative guarantee," which was not equivalent to "as cautioners." They were principal co-obligants without any clause or bond of relief. Since the case of *Gordon* v. *Tyrie*, November 16, 1748, M. 11,025, it had been held that those liable under bonds of corroboration were not entitled to the benefit of the statute. That was the true position of the defenders here—Stair, i. 17, 3; Bell's Comm. i. 361; *Scott* v. *Rutherford*, February 8, 1715, M. 11,012; *Muir* v. *Fergusson*, January 1728, M. 11,014; *Howison* v. *Howison*, December 7, 1784, M. 11,030; *Park* v. *Maxwell*, February 16, 1785, M. 11,031. 2. They were entitled to a proof in order to show that the defenders, even if originally under the Act, had renounced the benefit of it, or had set up a new obligation by instructing their agent to write the letter of 1st February 1884.

Argued for the respondents—1. It was not necessary to use the word "cautioner" to make an obligant one. It was not a word of style, and "guarantee" was not equivalent to "cautioner"—*Wilson* v. *Tait and Others*, July 21, 1840, 1 Robinson's App. 137. They were bound with and for another, they had renounced (however needlessly) the right of discussion, which only a cautioner renounced, and they were bound by way of corroborative guarantee. They were therefore clearly cautioners, and as such entitled to the benefit of the statute. 2. The obligation came absolutely to an end in 1881—*Carrick* v. *Carse*, August 5, 1778, M. 2931. The letter of 1st February 1884 could not keep up an obligation which was dead, and could not rear up a new obligation, at least not against Mr Morton's trustees and Mr Beattie's trustees. A proof was unnecessary.

Before deciding the case the Court allowed a proof, from which it appeared that no special directions were given by the defenders to Mr Neilson (of Messrs Morton, Neilson, & Smart), who attended to the affairs of the company, when he wrote the letter of 1st February 1884, that it was written with the view of getting the interest paid by the company reduced, and that the Act 1695 had not been thought of by anyone until after the company went into liquidation.

Argued for the appellants—They had been led to continue their loan upon the representations of the letter referred to. There was at least an honourable understanding that the personal obligation of the defenders should continue. There was a re-adoption of the bond from the date of the letter. Those of them who had been examined had admitted that they thought they remained bound until their attention had been called to the Act after the company went into liquidation. The case of *Norie* v. *Porterfield*, February 19, 1724, M. 11,013, which laid down that the benefit of the Act could not be renounced, was no longer good law. Whether the benefit of the Act was renounced or not depended upon circumstances. The circumstances here were sufficient to infer renunciation, or at least to set up a bar to pleading the statute—*Wallace* v. *Campbell*, July 13, 1749, M. 11,026; *Douglas, Heron, & Company* v. *Riddick*, March 1, 1793, M. 11,045, and (H.L.) April 2, 1800, 4 Pat. App. 133.

Argued for the respondents—The old obligation was absolutely at an end in 1881, and the proof had failed to show that any directions had been given by them in 1884 which created a new obligation. It was a case of ignorance of the statute on both sides, but that did not bar the defender from pleading it—*Carrick, supra.*

At advising—

LORD YOUNG—This is a very important case to the parties interested, and I am far from thinking it unimportant in law. Two questions have been presented. One of these was argued before and decided by the Lord Ordinary, and thereafter argued before us and taken to avizandum. That question is, whether having regard to the terms of the bond the individual defenders here, and the predecessors of those of them who are trustees, are cautioners to whose obligation under the bond the Act of 1695 applies? Upon considering that question at avizan-

dum it occurred to us that the evidence, which has since been taken, should be allowed, because on the assumption that the Lord Ordinary was right in thinking this was only a cautionary obligation the second question arose as to whether the defenders, by reason of the letter of 1st February 1884, which was the beginning of the negotiations to obtain a reduction of the interest and which has been so often referred to, lost the benefit of the statute.

Upon the first question the impression I formed at the conclusion of the argument before was in favour of the Lord Ordinary's judgment, that is, that according to the bond the defenders and the predecessors of those who are now here as trustees were cautioners and not principals—that it was a cautionary obligation to which the Act applies that they entered into. That was my opinion and after such further consideration as I have since given to the case that opinion still prevails and is confirmed. If, then, it was a cautionary obligation and the Act applies, the result is that upon the expiry of seven years from the date of the bond, which was executed in 1874, these cautioners were by force of statute relieved altogether. No doubt that view of their position, which I agree with the Lord Ordinary is the true view, was not laid before them, nor was the existence of the statute brought under their notice, but the statute must have effect nevertheless and if so then no obligation lay upon any one of these obligants after seven years.

That leads me to the second question, which we had argued to us to day, namely, whether the letter of 1884, written more than three years after the obligants were free, and the circumstances following upon it, that is the continuation of the loan at a reduced rate of interest, put the defenders under the obligation again. I think it did not. There was nothing in that letter to put this obligation upon them. It is plain from its terms that Mr Neilson who wrote it had not the Act 1695 before his mind, but the fact that he wrote this letter agreeing to the reduction of the interest without having the Act before him will not impose or restore the obligation. It happens that here in this particular case he did not change the impression and belief of the borrowers, for they had not the Act before their minds any more than the lenders had. It was a simple case of both borrowers and lenders having taken no account of the Act and of the loan continuing. But that will not prevent the statute having effect, and the latter not having restored the obligation the obligation has disappeared. That is the whole case. I do not know that any of the decisions have a direct bearing on this question. In the case of *Carrick* the money was paid by the cautioner after the lapse of seven years, in error as he alleged that the seven years had run, and the Court ordered the money to be restored. That case is strong upon this point, that upon the expiry of the seven years the obligation is gone, and no claim can be made against the cautioner, unless he has entered under a new obligation. I think the cautioners here entered into no new obligation, and that no new life was infused into the dead body of the old one.

My opinion accordingly is that the interlocutor of the Lord Ordinary should be affirmed.

LORDS JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD LEE concurred.

Counsel for the Pursuer and Reclaimer Peter Stocks—D.-F. Balfour, Q.C.—Low. Agents—J. & R. A. Robertson, S.S.C.

Counsel for the Pursuers and Reclaimers Aitchison's Trustees—Sir C. Pearson—W. Campbell. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defenders and Respondents Peter M'Lagan and Others—Dickson. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Respondents Hugh Morton's Trustees—Asher, Q.C. — Rutherfurd Clark. Agents — Morton, Smart, & Macdonald, W.S.

Tuesday, July 15.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

CADELLS *v.* BALFOUR AND OTHERS.

School—Medical School for Women—Refusal to Re-admit Students.

A school of medicine for women having been established and certain preliminary classes opened, a prospectus was thereafter issued setting forth that a full medical curriculum would be provided extending over four years, with the fees payable therefor, which might either be paid in one sum of £80, or in four yearly instalments of £35, £25, £15, and £10. It was declared that the decision of the executive committee respecting the admission or exclusion of a student should be final, and each student was required to sign a form of application by which she undertook to pursue a complete course of qualifying medical study, and to present herself in due course to the examining boards with a view to obtain a registrable diploma, and to conform in all respects to the regulations laid down by the organising secretary.

During the year which followed the issuing of the prospectus, two ladies, who had already attended the preliminary classes, took a full course of medical instruction, and paid the first instalment of £35. The following year they were refused re-admission to the school by the executive committee.

In an action at the instance of the two ladies against the executive committee, the following facts were proved:—On one occasion, more than a month before the end of session, the pursuers had broken the regulations by staying after the prescribed hour at the hospi-