Wednesday, March 9.

SECOND DIVISION.

QUOSBARTH, PETITIONER.

Process—Witness—Examination on Oath—Evidence in Foreign Suits Act (19 *and* 20 *Vict. cap.* 113)*—The Extradition Act* 1870 (33 *and* 34 *Vict. cap.* 52).

A petition under these Acts for examination upon oath of a witness resident within the jurisdiction of the Court of Session, in relation to a criminal trial pending before a court in a foreign state, *granted.*

The Act 19 and 20 Vict. cap. 113, section 1, provides that when any court of competent jurisdiction in a foreign country is desirous of obtaining the testimony of a witness resident within the jurisdiction of a court in this country, subsequently defined as including the Court of Session, in relation to any civil or commercial matter pending before the foreign court, it shall be lawful to make application to the Court "to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly." Section 2 provides that a certificate under the hand of the Ambassador, &c., of any foreign Power shall be evidence that the matter in regard to which evidence is sought is a civil or commercial matter pending before a competent court in the foreign country, and that the court desires the evidence of the person named in the application.

The Extradition Act 1870 (33 and 34 Vict. cap. 52), section 24, provides that the testimony of any witness may be obtained in relation to any criminal matter pending in any foreign court in like manner as it may be obtained in regard to any civil matter under the Act 19 and 20 Vict. cap. 113, "and all the provisions of that Act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal."

Hermann Quosbarth, Consul at Dundee for the Empire of Germany, presented a petition to the Court of Session, stating that in criminal proceedings pending before the Investigating Judge of the Hanseatic "Landgericht" at Hamburg against an inhabitant of that city on a criminal charge, the Court was desirous of obtaining the evidence of a certain witness resident in Scotland, and that he had been instructed by the Consul-General to make this application. A certificate under the hand of Paul Count Von Hatzfeldt, Wildenburg, Ambassador of His Majesty the Emperor of Germany at the Court of St James, London, was produced, certifying that the "Landgericht" was a competent court to try the criminal charge, and that it was desirous of obtaining the evidence on oath of the witness named in the application.

The petitioner prayed that the Court would order the examination of the witness upon oath before the petitioner, to command his attendance at such time as the petitioner might fix, upon giving the witness forty-eight hours' notice, and to grant authority to messengers-at-arms in common form.

The Court granted the prayer of the petition.

Counsel for the Petitioner — Baxter. Agent—Arthur S. Muir, S.S.C.

Friday, March 11.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE SECOND EDINBURGH AND LEITH 493RD STARR-BOWKETT BUILDING SOCIETY AND ANOTHER *v.* AITKEN.

Building Society—Instrument of Dissolution—Consent of Members—The Building Societies Act 1874 (37 *and* 38 *Vict. cap.* 42), *sec.* 32.

The 32d section of the Building Societies Act 1874 provides that a society may be dissolved by dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the shares, "testified by their signatures to the instrument of dissolution."

Held that members of a society under the Act who had employed mandatories to sign an instrument of dissolution on their behalf, had failed to testify their consent to a dissolution in terms of the Act, and that signatures adhibited by mandatories could not be reckoned in calculating, whether an instrument of dissolution was signed by three-fourths of the members of the society.

The Second Edinburgh and Leith 493rd Starr-Bowkett Building Society, incorporated under The Building Societies Act 1874 was duly registered on 7th February 1882. The object of the society was to make advances to members (chosen by ballot) on the security of heritable property, the funds for these advances being subscribed by the members, who were bound to pay sixpence a-week per share until they had subscribed £27, 6s. on each share of £100 held by them. The members who received advances were bound to repay them by instalments.

On 26th August 1890 an instrument of dissolution of the society was registered, which bore to be "signed by not less than three-fourths of the members holding not less than two-thirds of the number of shares in the said society." At the same date the number of shareholders on the register was 203, and 158 signatures were appended to the instrument. The deed appointed Peter Ronaldson, C.A., trustee for the special purpose of the dissolution.

In March 1891 the society, and Peter Ronaldson as its trustee, brought an action against Thomas Aitken, a member of the society, for payment of £33, 10s. 6d., as the balance due by him in respect of advances which he had received from the society.

The defender denied indebtedness, and further stated various objections to the validity of the instrument of dissolution, and, *inter alia*, that the names of eleven shareholders were adhibited by mandatories, which was not authorised by the Act of Parliament

He pleaded—"(1) No title to sue."

By the 32d section of the Building Societies Act 1874 it is provided, *inter alia*—"A society under this Act may terminate or be dissolved: (2) By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." . . .

After a proof the Lord Ordinary (KYLLACHY) on 1st December 1891 sustained the first plea-in-law stated for the defender, and dismissed the action.

"*Opinion*—I am very unwilling to sustain this defence, for I see that if I do so there may be great practical difficulty in working out the society's remedy against this member, who is undoubtedly due, and must ultimately in some form pay a considerable sum of money to the society. But the question is, whether I have any option in the matter. . . . There are, it appears, eleven signatures to the deed which were not adhibited by the members themselves, but by certain persons alleged to be their mandatories. I shall assume that these persons had good mandates at the time they signed, although I am afraid I cannot hold that proved. But assuming that that is so, I am afraid that the terms of the 32d section of the Act make it really too clear for argument that a member cannot under this statute testify his consent to a dissolution otherwise than by his own signature. The words of the statute are, 'as testified by their signatures to the instrument of dissolution.' I think that contemplates that the member's own signature, and not his signature through a mandatory, must be adhibited. If that be so, I am afraid it is fatal, because, taking the shareholders on the register at May as 164, and adding the 39 shareholders who became members in August, the total number of members on the register when the deed of dissolution took effect was 203. I think these must all be taken as members, and that being so, how many sign this deed of dissolution? There are 158 signatures in all, taking everything most favourably for the pursuers. But if eleven mandates are to be deducted, as the signatures of mandatories, that leaves only 147 good and genuine signatures. Now, I am afraid that 147 is not three-fourths of 203, and therefore this deed was not well executed, and the procedure was irregular. I say nothing as to its effect with respect to those members who have acceded to the liquidation. It may very well be that they are bound by their actings, but with respect to this defender I do not think that he has become bound to recognise the title of the liquidator, and therefore I have no option but to sustain the plea of no title to sue."

The pursuers reclaimed, and argued—The signatures adhibited by the mandatories must be held to be the signatures of the members, who had given the mandates, and such members had accordingly testified their consent to the instrument of dissolution in terms of the Act.

The defender was not called upon.

At advising—

LORD PRESIDENT—The question is whether the Lord Ordinary is right in holding that as regards eleven of the shareholders said to consent to dissolution the instrument of dissolution is defective in the statutory requisite of signature. Now, it appears to me that the objection is well founded and fatal. The company purports to be dissolved by the instrument of dissolution, and in order to make the dissolution valid it is necessary that a certain proportion of the shareholders should have consented to the dissolution and expressed their consent on the face of the deed, the statute providing that the consent of the necessary number of the shareholders shall be obtained "as testified by their signatures to the instrument of dissolution." In order to bring the number of consenting shareholders up to the required proportion, it is necessary for the reclaimer to rely on signatures, not of shareholders, but of mandatories of shareholders, or at least of persons who may for the present purpose be assumed to be mandatories. I do not think such an attestation meets the requirements of the statute. It was pressed on us that the members of a society of this kind being generally working people, it would be reasonable to expect special provision to be made by the Legislature for relaxing the formalities of execution where their signatures are required; but it appears to me that the Legislature has allowed a relaxation of the usual formalities, because the statute does not demand that there should be instrumentary witnesses to the signatures of the shareholders. It is enough if the necessary consents are testified by the signatures of the shareholders themselves. It is all the more necessary, therefore, to see that the formalities required by the Legislature have been complied with, and, in a word, I think that to maintain that the signatures of mandatories are the signatures of the shareholders themselves in the sense of the statute is a hopeless contention.

LORD M'LAREN—I concur with your Lordship, and at the same time I sympathise with the observations made by the Lord Ordinary as to the difficulties that may be caused to the society by our deciding that it is not possible to carry out the winding-up under the present administration. But I cannot help adding that the

liquidator might have perfected his title if he really has, as he professes to have, mandates from a sufficient number of shareholders, because if these mandates were granted by the shareholders in full knowledge of the purpose for which they were to be used, I can hardly doubt that the shareholders would, on a proper representation, be willing to sign the instrument of dissolution. Therefore it rather appears that there may be substance in this objection, and that it is impossible at present to obtain the requisite consents to a dissolution under the present management.

LORD KINNEAR—I also sympathise with the observations made by the Lord Ordinary at the beginning of his opinion, but it appears to me to be clear that we cannot avoid sustaining this objection. I entirely agree with the reason given by your Lordship for adhering to the Lord Ordinary's interlocutor, and have nothing to add.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—C. S. Dickson—Crole. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender—Gunn. Agent—John Mackay, Solicitor.

Saturday, March 12.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MOLLESON *v.* HUTCHISON.

Caution—Cautionary Obligation for Interest—Act 1695, *c.* 5—*Septennial Limitation.*

Held, by a majority of Seven Judges (the Lord President, Lords Young, Rutherfurd Clark, and M'Laren—*diss.* the Lord Justice-Clerk, Lords Adam and Trayner) that the septennial limitation introduced by the Act 1695, c. 5, does not apply to the obligation of a cautioner who is bound only for payment of interest on the principal sum due under a bond.

This was an action at the instance of James Alexander Molleson, C.A., against Robert Hutchison. The pursuer concluded for payment of £1600, or otherwise for payment (first) of the sum of £40, and (second) of interest at the rate of 5 per cent. per annum on said sum of £1600, from and after Martinmas 1890 and in all time coming, during the not-payment of the said sum.

The following narrative of the case is taken from the opinion of the Lord Ordinary (STORMONTH DARLING)—"In 1881 the Craiglockhart Hydropathic Company (Limited) borrowed £25,000 from an insurance company, and granted a bond and disposition in security for the amount over their heritable property. By this bond the defender and six other gentlemen bound themselves, jointly and severally, 'as cautioners and sureties' for and with the Hydropathic Company, to pay the interest of the said principal sum 'from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the not-payment of the said principal sum.' The term of payment named in the bond was the term of Whitsunday 1882. In 1884 the Hydropathic Company went into liquidation. In 1887 the bond came by assignation into the hands of the pursuer. In 1890 the security subjects were sold by the pursuer, with the concurrence of the liquidator, at the price of £13,800, thus leaving a balance of £11,200 of principal still due on the bond. The pursuer now sues the defender for his rateable proportion of this balance, viz., £1600, or otherwise for interest on £1600 at 5 per cent. from Martinmas 1890 and in all time coming. The defender pleads (1) that he is not, and never was, bound for the principal; and (2) that under the Act 1695, c. 5, his obligation to pay interest was extinguished at the end of seven years from the date of the bond."

By the Act 1695, c. 5, it is enacted—"His Majesty and the Estates of Parliament considering the great hurt and prejudice that hath befallen many persons and families, and oftentimes to their utter ruin and undoing by men's facility to engage as cautioners for others, who afterwards failing have left a growing burden on their cautioners, without relief: Therefore statutes and ordains, that no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bond or contract 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." . . .

On 2nd June 1891 the Lord Ordinary sustained the second plea for the defender, and assoilzied him from the conclusions of the action.

"*Opinion.*—This case raises an important question on the septennial prescription of cautionary obligations. . . . . .

"It is plain that the defender cannot be liable for the principal, or any part of it, except as an indirect consequence of his liability for the interest. If he is liable for the interest in perpetuity, he might desire to pay up the principal in order to escape from an interminable burden, but he cannot be compelled to do so. The important question is whether the statute applies to the obligation for interest. I am of opinion that it does, and that the defender is entitled to absolvitor.

"The statute, after narrating the great hurt and prejudice that hath befallen 'many persons and families, and oft times to their utter ruin and undoing, by men's facility to engage as cautioners for others,' ordains, in words which Lord Brougham described as more strong than he remembered to have seen in any statute, Scotch or English, with respect to anything in the nature of limitation or prescription (*Scott*