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*

v. *Yuille*, 5 W. & S. 436), '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.'

"Then follow some words defining more precisely the cautioners who are to have the benefit of the Act, including anyone who is bound for another 'as express cautioner.'

"Now, the defender here is an express cautioner, described as such in a bond for borrowed money, and therefore I think there can be no doubt that if he had been bound for the principal the Act would have entirely extinguished his obligation at the end of seven years from the date of the bond, that is to say, on 16th November 1888. For the Act is so peremptory in its terms that the practical effect of it is simply to write into every bond or contract to which it applies a declaration that the obligation of the caution of the cautioner shall endure for seven years from its date, and no longer.

"Can the case of the cautioner be worse when he undertakes liability, not for the principal, but for something which is accessory to the principal, viz., the interest? It would be a strange result if this were so, and certainly there is nothing on the face of the Act to lead to it, for it speaks of 'sums of money,' without distinction. It is a drastic Act in any view, but there is nothing more drastic in saying 'A man shall not be liable for interest for more than seven years,' than in saying the same of a capital sum.

"But the pursuer appeals to three cases which establish, in his view, the proposition that the Act has no application to any sum the term of payment of which is beyond the seven years. These cases are *Balvaird* (1709), M. 11,005; *Borthwick* (1715), M. 11,008; and *Miller* (1762), M. 11,027. *Balvaird* was the case of a cautioner for payment of a widow's jointure, and it was held that the Act did not apply on the ground that no diligence could be used so long as the annuity was punctually paid, which was done during all the seven years; but the Court expressly distinguished this from a bond for borrowed money under which the creditor might call up his money within the *septennium*. *Borthwick* was the case of a bond payable after the death of the creditor's wife, who survived the seven years; and *Miller* was the case of a bond in which the principal was not to be paid till a fixed term—eight years after the date of the bond. In both the ground of judgment was that no sums fell due for which diligence could have been used within the seven years. In all three it may be that some violence was done to the express words of the statute. But at all events there was this justification for all of them, that the creditor was helpless as regards either calling up the money or doing diligence, whereas in the present case he had his remedy in his own hands, and it was only by his act in allowing the principal to lie that any sum of interest was due after the seven years had expired. I cannot therefore recognise in these cases any justification for refusing to give effect to the express words of the statute.

"If the pursuer's argument is sound, it follows that the Act can never be of any use to a cautioner for interest alone. There is certainly no good reason why the same should not apply to a man who is cautioner both for interest and principal. Yet the cases show that where a charge was given within the seven years, and action was not raised till long afterwards, the cautioner was liable, not for interest during the whole period of the not-payment, but only for the principal and seven years' interest—*Reid* v. *Maxwell* (1780), M. 11,043. So in *Scott* v. *Yuille*, cited above, where interest had been paid after the seven years, and this circumstance was pleaded as barring the cautioner from founding on the statute, it was held that there was no bar, because he was not bound to pay the interest—Lord Chancellor's opinion, 444. This can only have been on the ground that the interest was a mere accessory of the principal.

"It is right to add that I was referred to a passage in Bell's Comm., i., 365, in which the learned author deals with obligations to pay interest on the sum in a bond, and says that while they look like obligations for interest only, they seem to 'result in an obligation for the principal sum,' and 'must be ruled by the same principles which regulate annuities.' He is not at the moment speaking of the septennial limitation, but it is difficult to account for his language, unless he thought that an obligation to pay interest was a perpetual obligation to which the Act did not apply. The passage, however, is too incidental to be invested with much authority, and if it involves the proposition that an obligation to pay interest alone carries with it a heavier liability than an obligation to pay principal alone, or principal and interest combined, I cannot assent to it.

"It may be that all parties intended and expected the money to lie for an indefinite time, and that the creditor's case is not without hardship. But there are no averments on record that the cautioner solicited delay, or prevented action being taken, or in any way barred himself from pleading prescription. The result might have been obviated, either at first by the creditor taking the bond in such a way as to exclude the Act (which is not difficult) or afterwards by his calling up the money within the *septennium*."

The pursuer having reclaimed, the case, after being twice heard before the Second Division, was put out for hearing before Seven Judges.

Argued for pursuer—The statute did not apply unless the sums for which the cautioner was bound were due from the date of the bond, and payment could be enforced by the use of diligence within the seven years. This rule had been applied in the case of a cautioner for payment of a

widow's jointure in regard to the annual payments falling due after expiry of the *septennium*—*Balvaird* (1709), M. 11,005—and also where the cautioner was bound for principal sums not payable until after expiry of the *septennium*—*Borthwick* (1715), M. 11,008; *Miller* (1762), M. 11,027. To give a cautioner the benefit of the Act he must be bound for a specific sum due at the date of the bond, and payable at a fixed term within seven years therefrom. Accordingly the Act had been held not to apply where the cautioner's obligation was for payment of the sum due under a cash-credit bond—*Alexander* v. *Badenach*, December 23, 1843, 6 D. 322; or for payment of a bankrupt's composition—*Cuthbertson* v. *Lyon*, May 23, 1823, 2 S. 330; or for a factor's intromissions—*Kerr* v. *Bremner*, March 5, 1839, 1 D. 618. In the present case the interest, payment of which was sued for, was not due at the date of the bond, and might never have become due if the debtor in the bond had paid the principal, and therefore the case was ruled by the authorities quoted—Bell's Comm., 7th ed., i., 365; Bell's Prin., sec. 602. The case of a cautioner bound for a principal sum, due from the date of the bond, and payable within seven years, and also for the interest thereon, was quite different, for the creditor could in such a case extinguish the obligation for interest within the seven years by enforcing payment of the principal.

Argued for the defender—The Act applied where a cautioner was bound for principal as well as interest—*Scott* v. *Yuille*, September 15, 1831, 5 W. & S. 436; *Reid* v. *Maxwell* (1780), M. 11,043,—and it would be a great anomaly if a cautioner bound for both principal and interest were in a better position than one bound for interest only. The Act spoke of "sums of money," words which were as appropriate to interest as principal. The authorities on which the pursuer relied did not support his contention. In *Balvaird's* case the payment in question was a widow's annuity. Such a payment had no reference to a principal sum, and thus every year *nata erat nova obligatio*, whereas interest was merely an accessory of a principal sum which the debtor in the bond continued under obligation to pay. In all the cases on which the pursuer relied the ground of decision was that the Act could not apply where the creditor had no means of enforcing payment of the debt due to him within the *septennium*. But that ground of decision did not apply to the present case, for here the creditor could proceed against the debtor for payment of the principal sum within the seven years, and payment of that sum would have extinguished at once the defender's obligation for interest.

At advising—

Lord President—The liability sought to be established against the defender is for a sum of money due at Martinmas 1890. It is admitted that, apart from the operation of the Act 1696, c. 5, the obligation to pay this money was validly undertaken by the defender in a bond dated in November 1881. The bond was primarily for a principa sum of £25,000 advanced to the Craiglockhart Hydropathic Company, Limited, and for this sum—the term of payment of which was Whitsunday 1882—the defender was not bound. The defender's obligation, which was and was expressed to be that of a cautioner, was to pay the interest of the principal sum at the rate of 5 per cent. from the date of the bond to the said term of payment, and half yearly, termly, and proportionally thereafter during the not-payment of the principal sum, at Whitsunday and Martinmas.

The defender has pleaded that his obligation under the bond has been extinguished by the operation of the Statute 1696, c. 5; while the pursuer's answer is thus stated in what he has proposed to add as his third plea—"The defender's obligation under the said bond has not been extinguished by the operation of the Statute 1696, c. 5, in respect the sums sued for were not due and payable till after the lapse of seven years from the date of the bond." My opinion is that the latter plea is well founded in the law as now authoritatively settled.

If the terms of the statute be looked at, apart from all authority, there is much to be said for the view that it means that all cautionary obligations for the payment of money, no matter when prestable, last for seven years and no longer. But then all this was said and was rejected by the Court within fifteen years after the passing of the statute, and the rule was laid down that the statute only extinguishes obligations prestable within the *septennium*. The case of *Balvaird*, which was decided in 1709, seems to me completely to cover the present question, the only difference being that the liability there was to pay an annual sum in name of annuity, and here it is to pay an annual sum in name of interest. There, as here, there was a liability to pay such annual sums within the *septennium* as well as beyond it. There, as here, the liability sought to be established was for annual payments due after the *septennium* had expired. The principle expressly laid down by the Court in *Balvaird*, that every year *nata erat nova obligatio*, supplies a rule which applies equally to this case as to that. The statute, according to *Balvaird*, does not cut down a liability to pay money in 1890 undertaken by a cautionary bond in 1881. The decision therefore definitely negatives the interpretation of the statute which, with much apparent plausibility, would make the date of performance immaterial, and the subsequent cases of *Borthwick* and *Miller*, the former decided in 1715 and the latter in 1762, directly follow and confirm the rule thus established. In the former case the obligation of the cautioner was prestable at an uncertain date, in the latter at a fixed date outside the *septennium*, but both decisions are irreconcilable with what the defender holds to be the sound construction of the statute.

The law so laid down has been regarded as settled ever since. Erskine, iii. 7, 23, says—"Neither do obligations fall under

this Act where the condition is not purified, nor the term of payment come within the seven years after the date of the obligation, because no diligence can be used upon these;" and he cites the case of *Borthwick.* Mr Bell in his Principles, s. 602, says—"To give the benefit of the statute, the obligation must be for a sum of money to be paid within the seven years;" and he cites the three cases of *Balvaird*, *Borthwick*, and *Miller*.

In *Alexander* v. *Badenach*, 6 D. 322, the various decided questions as to the application of the statute are gone over, and this among others is treated as settled.

I have already indicated, that to my thinking, the question as to which interpretation of the statute is the better, the narrower adopted by the Court in *Balvaird*, or the more comprehensive preferred by the Lord Ordinary, would be, apart from authority, entirely debateable. But both interpretations are tenable; and one, as I have shown, has been deliberately adopted and adhered to from very near the time of the statute itself down to the present day. Indeed, in stating the law of the septennial prescription, among others the point now under consideration, Erskine begins by observing that the Act "hath received a most limited interpretation" and a parenthetical remark of Mr Bell in his Commentaries shows that he also was somewhat critically alive to this characteristic of the decisions, which he proceeds to rehearse. But not the less significant is the fact that they treat the law as settled. The interval between Mr Bell's day and the present has passed without any challenge of what he thus acquiesced in, and it is impossible to suppose that, touching as it does so very common a transaction, the law thus laid down has not regulated the rights and the actings of men during the very long period of its prevalence.

The Lord Ordinary, however, and the defender in supporting his Lordship's judgment, while questioning the decisions to which I have referred, proffer a ground of judgment which might formally save those decisions while giving effect in the present case to the wider construction of the statute. They point out that while *Balvaird's* case was the case of an annuity, there was here a capital sum due by the principal debtor within the *septennium*, and the creditor might therefore, within the *septennium*, have recovered his debt by diligence. This is no doubt true; but I cannot think that it makes any effective difference. What has been regarded as the criterion in the question whether the statute applies, is, I think, the liability of the cautioner, and not the liability of the principal debtor, and the arguments in the decided cases about the creditor's remedies (founded on the last part of the statute), which the defender seeks to benefit by, relates to the creditor's remedies against the cautioner. When, for instance, in Fountainhall's report of *Balvaird*, he says—"Whereas on a bond of borrowed money I could inhibit and adjudge for the principal sum," the reasoning is on the comparison between a cautioner against whom diligence could be used within the *septennium* for the obligation in question, and a cautioner against whom diligence could not be so used. The fact that the creditor in a bond such as this could, if he liked, terminate the liability of a cautioner bound only for interest, by recovering the capital sum from the principal debtor, does not seem to me to furnish any adequate ground of judgment in favour of the defender by a Court bound by the authorities to which I have referred.

In my opinion the interlocutor of the Lord Ordinary should be recalled, and the pursuer is entitled to a decree giving effect to his rights under the bond. Which conclusion of the summons most accurately represents those rights will, I presume, be considered by your Lordships of the Second Division. We have heard no argument on the point.

LORD JUSTICE-CLERK—I concur entirely in the opinion of Lord Trayner.

LORDS YOUNG and RUTHERFURD CLARK concurred with the Lord President.

LORD ADAM—I concur in the opinion of Lord Trayner.

LORD M'LAREN—In considering questions which are governed by the Scottish statutes it is to be observed that while these statutes were framed by very eminent men, and while they express the principles intended to be incorporated into our law, often with great clearness and breadth, they do not in general profess to apply those principles to actual cases in the manner with which we are familiar in modern statutes. It is matter of history that the Court of Session, in times contemporaneous with the sittings of the Scottish Parliament and subsequently, were in the habit of applying a very liberal canon of construction to such statutes, assuming to themselves a latitude of interpretation which we should not think within our powers in dealing with the provisions of Acts of the Imperial Parliament.

My consideration of the present case is not at all affected by the view suggested in the argument that the decisions in the case of *Balvaird*, and the other cases noticed by the Lord Ordinary, are not altogether consistent with the statute as to guarantees according to its plain and literal interpretation. I do not think it at all necessary for the purposes of the case that I should form an independent opinion on the question decided in the series of cases beginning with *Balvaird*, because I hold that these cases have passed into the common law, and are as much a part of the law of guarantee or cautionary obligation as the statute itself.

Coming to the facts of the present case, I must say that the distinction which has been suggested between these facts and the facts of the older cases are merely circumstantial distinctions, and that they do not furnish any real ground for rejecting the principle of the old decisions and falling back on the words of the statute. For, let

me ask, what is the distinction? Merely this, that in *Balvaird* the obligation of the guarantor was to pay or see paid an annuity for life, while in the present case the obligation is to pay an annuity in perpetuity, or as long as the principal sum and interest shall remain unpaid. In either case the annual instalments for which the guarantor is bound might extend, and did in fact extend, over a period exceeding the limit of seven years prescribed by the statute.

Now, the report of the case of *Balvaird* leaves us in no doubt as to the principle on which the decision was based. We have there, what we do not always find in the older reports, a perfectly definite statement of the ground of judgment, because it is said that the Lords were of opinion that each termly payment was a new obligation; and it is plainly implied that the statute only takes effect on each obligation from the time when it becomes prestable. This may or may not be a sound construction of the statute, but it was considered to be contrary to equity that a creditor should lsoe his right by the elapse of a period of time within which he had no opportunity of enforcing his claim. This principle of decision was affirmed in two later cases.

In the present case I understand that during the seven years following the execution of the deed of security the interest on the loan was regularly paid. Now, as the obligation of the cautioner was only to secure the payment of the interest of the loan, there was no opportunity of making a demand on the cautioner during the septennial period. The case therefore is in this respect quite parallel to that of *Balvaird*. It is no doubt true that the creditor might have called up his bond within the septennial period, and if the debt were paid the guarantee would be extinguished, and this may be regarded as a distinction between the cases of a guarantee for a proper annuity and a guarantee for the interest of money lent. But, then, this is a distinction that only arises in a state of circumstances in which the obligation vanishes.

The creditor may call up the principal sum when he pleases, but he may also if he pleases continue the loan and leave his money in its existing state of investment until the debtor voluntarily tenders payment. Now, the case that we have to consider is the case where the creditor and the debtor were agreed that the loan should be continued for a period exceeding seven years, and I fail to see how consistently with this arrangement the cautioner could be distressed or sued within the septennial period for the debt or claim in this action which only arose after the expiration of the septennial period. The actual case appears to me to resolve into an obligation for an annuity in perpetuity, which could not have been claimed from the defender within the septennial period, and it is in my view no answer to say that in a state of facts which has not occurred the obligation might have been made the subject of a demand within the statutory period. I am therefore of opinion that the defender's guarantee is a subsisting obligation.

Lord Trayner—The obligation which is here sought to be enforced against the defender is contained in a bond dated in November 1881. By that bond the Craiglockhart Hydropathic Company acknowledged to have instantly borrowed and received from a certain insurance company the sum of £25,000, which sum they obliged themselves to repay at the term of Whitsunday 1882, with interest thereon at the rate of 5 per cent. from the date of the bond "to the said term of payment, and half-yearly, termly and proportionally, thereafter during the not-payment of the principal sum, and that at two terms in the year, Whitsunday and Martinmas." For the fulfilment of this obligation to the extent of the interest payable on the borrowed money, but for such interest only, the defender, along with several other persons, bound himself as cautioner and surety for and with the Craiglockhart Hydropathic Company. The holders of the bond sold the heritable subjects thereby conveyed in security, but the price realised was insufficient by £11,200 to pay off the principal debt. The defender is now called upon to pay £1600 as his proportion of the principal sum still due, or otherwise to pay interest on that sum at the rate foresaid from and after Martinmas 1890 during its not-payment. That demand, so far as concerns the principal sum or any part of it, I understand is not insisted in. The defender never came under any obligation for the principal sum, and therefore cannot be called upon to pay it. It is the alternative demand for interest since Martinmas 1890 which gives rise to the question which the Court is now to decide. The defender pleads that he is not liable for the interest now demanded from him, on the ground that his cautionary obligation came to an end by force of statute on the expiry of seven years from the date of the bond—that is, in November 1888—and that no interest can be demanded from him which fell due after his cautionary obligation ceased to be binding.

The statute on which the defence is founded (1695, c. 5) provides that after the date thereof no cautioner "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."

That provision is plain enough. A cautioner who binds himself for a sum of money is not to be bound by his cautionary obligation for more than seven years from its date. The application of the statute to the present case seems to my mind as easy as the language of the statute is plain. The defender is a cautioner for a sum of money; his cautionary obligation is dated more than seven years before the raising of this action; he is therefore free from his obligation. The Lord Ordinary has so held, and I agree with him.

The contrary view, on which it is proposed to hold the defender liable, does not proceed upon a construction or meaning of the statute other than that which I have put upon it, but rather upon the view that the statute does not apply to a cautionary obligation such as the defender undertook. It has been held that the statute does not apply to every cautioner, which I admit. For example, it does not apply to a cautioner for a judicial factor, and that for reasons which I have no need to question. It is said, however, that to bring a cautioner within the statute and entitle him to the benefit of the limitation thereby created, he must be bound for a sum of money due from the date of his obligation, for which during the whole currency of the seven years the creditor (in the words of Lord Fullerton in *Alexander* v. *Badenach*) "might use diligence." Whether the terms of the Act warrant such a construction on its applicability or operation might, I think, very well be questioned if the question were now raised for the first time. But in view of the decisions and of the opinions by Lord Fullerton and Lord Jeffrey in the case I have cited, I think it is not now open to dispute that the obligation which the cautioner undertook must (to fall within the statute) be one which binds him for a sum of money due—that is, owing—at the date of his obligation. But I dissent from the view that it must be one for which the creditor might do diligence during the whole currency of the seven years. The seven years run from the date of the bond, but I should think it never happened yet that a cautioner became bound in such terms as entitled the creditor to exact payment or do diligence for the recovery of the money guaranteed within an hour or day of the obligation being granted. To illustrate what I mean, suppose that in the present case the defender had become cautioner for the principal sum of £25,000. It was not payable for six months after the date of the bond, and diligence could not have been done by the creditor during that six months. But I do not suppose any of your Lordships are of opinion that because diligence could not be done during that six months (and therefore could not be done during the whole currency of the seven years) that that circumstance would have deprived the cautioner of the benefit of the Act. I would prefer therefore to state the restriction thus—No cautionary obligation falls within the statute which does not bind the cautioner as from its date for a sum of money, and for which the creditor might do diligence at some time within the seven years. Now, taking it to be well decided that there is such a restriction on the operation of the Act, does it apply to the present case? I humbly think not. From the date of the bond the Hydropathic Company, the principal debtors therein, were liable for and due the sum of £25,000, with interest thereon at 5 per centum per annum during the not-payment of the principal sum. The liability for interest, which runs *de die in diem*, commenced when the bond was delivered, and the amount of that obligation for interest in money was just as specific as the principal debt. To say, I bind myself to pay £25,000 and interest thereon at 5 per cent. per annum, is just as specific as to say, I bind myself to pay £25,000 and interest thereon to the extent of £1250 per annum. Neither principal nor interest was exigible for six months after the date of the bond, but the obligation to pay both when exigible was as certain and fixed as the obligation to pay either, and the extent of the obligation was in each case equally determined. The defender became cautioner for the interest payable during the non-payment of the principal debt, and his obligation, if I am right in what I have said, was a distinct and specific obligation for a sum or sums of money—the amount per annum quite ascertained—from the date of the bond, although not at that date exigible. So far, therefore, the condition that the bond (to entitle the cautioner to the benefit of the Act) must be for a sum or sums of money due or owing or for which he is liable at the date of the bond, is fulfilled. Well, then, could the creditor have done diligence against the defender to enforce his obligation during the currency of the seven years. No one can doubt he could. If the first half-year's or the tenth half-year's payment of interest had not been discharged by the principal debtor, there is no room for doubt that the creditor could have enforced payment of it from the cautioner. This, then, fulfils the second part of the condition, namely, that during the currency of the seven years the creditor "might have done diligence" against the cautioner on his bond.

I think it was suggested in this case that the creditor could not have done diligence against the cautioner during the seven years, because during the whole of that period the principal debtor paid the interest. But that is a suggestion to which I would not give any effect. The plain meaning of Lord Fullerton, when he says that the cautioner's obligation must be one on which the creditor "might do diligence" during the seven years is this, that the creditor was in a position to do diligence if occasion arose for doing it. But to say, where a creditor could not do diligence against a cautioner on his cautionary obligation because the principal debtor had discharged it, that therefore a cautioner's obligation is to exist for a longer period than it otherwise would, is to my mind a proposition that cannot be entertained. If the principal debtor fulfils the obligation guaranteed by payment of the money for which the cautionary obligation was granted the cautionary obligation is a dead letter. Pure caution is never more than a subsidiary obligation. What, I think, is plainly pointed out by Lord Fullerton is that the creditor must be unable to do diligence against the cautioner during the seven years, because the terms or nature of the cautionary obligation would not afford ground for such diligence.

These old cases have been cited as authorities against the defender, but in my judgment, when examined, they do not militate against the defender's contention, nor are they necessarily opposed to the views I have been stating. In the case of *Borthwick* the cautioner became bound for payment of a sum of money at the first term after the decease of a certain lady. She survived the date of the bond more than seven years, and the cautioner was held not entitled to the benefit of the Act of 1695, on the ground that it only applied to cases "where sums fell due for which diligence could be used within seven years." In that case obviously diligence could not be done within the seven years, because the date of payment was beyond the seven years. That case decides nothing against the view I have expressed, because I have conceded that to bring a cautionary obligation within the operation of the statute it must be one on which, during the seven years, "diligence might be done" by the creditor. The case of *Miller* is to the same effect. In it the bond was dated in November 1751, and the date of payment was there fixed as at November 1759. No diligence could be done before the date of payment arrived, which was beyond the seven years, and the Court pronounced the same decision as in *Borthwick*. The remaining case is that of *Balvaird*, and it calls for a little more attention than the other two. In *Balvaird's* case a widow was provided with a liferent annuity of £200 Scots, for which her husband's son gave her a bond of corroboration, dated July 1697, and the defender Watson was cautioner in that bond. The annuity was paid for more than seven years, and thereafter the cautioner was sued for the annuity falling due at and after November 1705—that is, nearly nine years after the date of the bond. The defender maintained that he was not liable in respect of the provisions of the Act 1695, but that defence was repelled, and he was found liable in the sum claimed. That decision, I understand, is regarded by some of your Lordships as conclusive of the present case, but I venture to think it is not so, looking to the grounds on which it was decided. The report of this case (as given by Fountainhall) sets forth the grounds of judgment thus—"The Lords argued that though the Act is not restricted to bonds for borrowed money, yet here no diligence could be done so long as the annuity was punctually paid, which they carefully did all the seven years and then failed; whereas, as a bond of borrowed money, I could inhibit and adjudge for the principal, which could not be used for years to run of this annuity, seeing every year *nata erat nova obligatio*." The Lords "by plurality" pronounced this judgment, giving effect to the pursuer's argument, which is thus stated by another reporter (Forbes) — "Nobody was prejudiced by the expiring of the cautionary obligements for sums of money; seeing that the creditor might call for his whole money within the *septennium*." Now, that case is in my opinion quite distinguishable from the present. In the first place, it was not a bond for a sum of money due at the date of the bond. It was a bond under which a new obligation arose or might arise each year, depending upon the survivance of the creditor. Whereas the obligation in this case, as regards the principal sum, was one due at the date of the bond, and which must exist as an obligation till the debt was paid; and as regards the interest, was a fixed obligation (so long as a cautionary obligation could last) for a sum of £1250 per annum, or five per cent. on the principal debt. There was no *nova obligatio* arising from year to year; it was one and the same obligation from first to last. In the second place, what the Court held could not be done in *Balvaird's* case (a consideration which certainly, as much as any other, weighed with the Lords in finding as they did) could have been done here. Diligence could have been done both for principal and interest within the *septennium*, and that being so, "nobody was prejudiced by the expiring of the cautionary obligement." The creditor here could have protected himself by enforcing payment of his whole claim—principal and interest during the seven years—the creditor in *Balvaird's* case could not do so.

I think *Balvaird's* case was decided as it was in respect of the specialties I have pointed out; and if so, it affords no precedent for the decision of this case where the same specialties do not exist. But while I have thus distinguished between that case and the present, I agree with the Lord Ordinary in thinking that the decision in *Balvaird's* case may quite reasonably be regarded as doing some violence to the words of the statute. It may be doubted whether such a judgment would now be repeated except perhaps upon the ground of authority; and against that view might be put the contention that however high the authority of *Balvaird's* case may be the authority of the statute is higher.

I understand that there is no difference of opinion among us as to this, that if the cautionary obligation of the defender had been for principal as well as interest the statute would have applied, and he would have been free from his obligation at the end of seven years from the date of his bond. The judgment now to be pronounced in conformity with the opinions of a majority of the Court involves this striking result pointed out by the Lord Ordinary, that a cautioner for principal and interest is in a better position than a cautioner for interest only; and although both are cautioners in "a bond or contract for sums of money (the language of the statute), one of them would be entitled to plead the limitation of the statute while the other would not. It involves this consequence also, that a creditor holding a bond such as that now sued on has only to delay enforcing payment of his debt for seven years to make the cautionary obligation perpetual and render the cautioner in effect responsible for the principal sum which he never undertook to pay or see paid. And so acting, a creditor has it in

his power to render a beneficial statute nugatory.

For the reasons I have stated, as well for the reasons given by the Lord Ordinary, I am of opinion that the interlocutor reclaimed against should be affirmed.

The Court pronounced this interlocutor:—

"The Lords of the Second Division of the Court having, along with three Judges of the First Division of the Court, heard counsel for the parties on the reclaiming-note for the pursuer against Lord Stormonth Darling's interlocutor of 2nd June 1891, do, in terms of the opinion of a majority of the Judges present at the hearing, recal the said interlocutor; repel the second plea-in-law for the defender; decern and ordain the defender to make payment to the pursuer of the sum of forty pounds sterling, with interest at the rate of 5 per centum per annum from the date of citation on the summons until payment: Find that the defender is liable to the pursuer in interest at the rate of 5 per centum per annum on the principal sum of £1600 mentioned in the summons from and after the term of Martinmas 1890, and that half-yearly, termly, and proportionally during the not-payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of Whitsunday 1891 for the interest due preceding that date, and the next term's payment at Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the not-payment of the said principal sum, the said terms of payment respectively being always first come and byegone, with the interest of such of the said sums at the rate of 5 per centum per annum from the time when the same falls due until payment, and decern: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—Asher, Q.C.—C. S. Dickson. Agents—Davidson & Syme, W.S.

Counsel for the Defender—D.-F. Balfour, Q.C. — Dundas. Agents — Waddell & M'Intosh, W.S.

Tuesday, March 8.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

HALL *v.* MACDONALD.

Succession—Antenuptial Contract of Marriage — Provisions for Grandchildren, whether Onerous or Testamentary—Subsequent Trust-Disposition and Settlement by the Husband — Power to Increase Wife's Provisions.

A husband by an antenuptial contract of marriage disponed his whole estate, heritable and moveable, to his wife in liferent and to the child or children of the intended marriage, and the issue of the bodies of such children, whom failing to his own heirs whomsoever in fee, under a declaration that if there was no child alive at the dissolution of the marriage the wife's liferent should be limited to £150. There was no trust created by this deed, and the husband retained his whole estate in his own possession until his death. He died, predeceased by his only child, and survived by his wife and one grandchild, leaving a trust-disposition and settlement executed a few years before his death under which his wife was given the unrestricted liferent of his whole estate. After her death his whole estate was to be converted into money, his grandchild was to receive a legacy upon attaining twenty-one years of age, and after payment of other legacies the residue of the estate was to be divided among the nephews and nieces of himself and of his wife.

Held (*rev.* Lord Kincairney) that the provisions for children in the antenuptial contract of marriage were onerous and contractual only as regarded the children themselves; that as regarded the issue of such children these provisions were testamentary merely, and might be and had been validly revoked by the husband's subsequent trust-disposition and settlement; and that the restriction of the widow's liferent to £150 in the event of there being no child alive at the dissolution of the marriage was in the husband's favour, but did not oblige him to restrict her provision to that amount.

Held further (*aff.* Lord Kincairney) that under the marriage contract there being no child but only a grandchild alive at the dissolution of the marriage, the widow's provision would have fallen to be restricted to £150.

Case of *Mackie* v. *Gloag's Trustees*, March 9, 1883, 10 R. 746, *rev.* March 6, 1884, 11 R. (H. of L.) 10, commented upon and distinguished.

The late Andrew Hall of Calrossie, near Tain, in the county of Ross, died upon 19th February 1891.

There was an antenuptial contract of marriage between him and his wife, Jane Chisholm Scott, dated 7th May 1849, in the following terms:—"It is contracted, agreed, and matrimonially ended between the parties following, viz., Andrew Hall, farmer, Scibercross, on the one part, and Miss Jane Chisholm Scott, daughter of John Scott, Esq. of Ashtrees, on the other part, in manner following—That is to say, the said parties have accepted of each other and hereby accept of each other for lawful spouses, and promise to solemnise the bond of marriage with all convenient speed agreeably to the rules of the Church. In contemplation of which marriage the said Andrew Hall hereby assigns, dispones, and makes over to and in favour of the said Jane