Court it is impossible to hold otherwise than that the I O U, though still remaining in Mr Bishop's hands, was no longer a document upon which he could sue.

LORD M'LAREN was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff dated 23rd July 1909, reverted to and affirmed the interlocutor of the Sheriff-Substitute dated 26th March 1909, repeated the findings in fact and in law therein, and of new decerned and ordained in terms thereof.

The interlocutor of the Sheriff-Substitute (WELSH) was—"Finds in fact (1) that in the year 1895 the pursuer was in the employment of the defender's then firm of David Bryce & Son, booksellers, Glasgow; (2) that in or about the month of May of said year, said firm was amalgamated with the firm of Thomas Murray & Son, Limited, and was converted into a limited company under the name of Bryce & Murray, Limited; (3) that at or about the time of the flotation of said company, the pursuer arranged with the defender that he would take shares in said limited company; (4) that at that time the defender had in his hands a sum of £100 or thereby belonging to the pursuer, which represented salary or commission which the pursuer by arrangement had left in the defender's hands; (5) that the pursuer handed to the defender a sum of £200 or thereby in order to make up the sum of £300 to obtain thirty first preference shares in said company; (6) that the defender then granted to the pursuer an I O U dated 11th July 1895, for the sum of £300; (7) that said I O U was granted by the defender merely as an acknowledgment of the transaction, or as a temporary receipt until such time as the shares should be issued to the pursuer, and was not granted as an acknowledgment of a loan or advance to him; (8) that thirty fully paid first preference shares were issued to the pursuer in said company on or about 12th September 1895; (9) that on or about 12th December 1895 the pursuer's holding was changed, he having given up his original thirty first preference shares, and obtained in lieu thereof twenty-two first preference shares and eight second preference shares; (10) that said charge was made at the request of the defender in order to provide an applicant for first preference shares with the number required by her, and that the pursuer at said request transferred eight of his first preference shares to the applicant; (11) that the pursuer acted as a director, and for some time as secretary, of said company, and regularly received dividends from said company on the shares held by him; (12) that the said company went into voluntary liquidation in the year 1905; (13) that from the date of said I O U until the beginning of the year 1907 the pursuer made no demand upon the defender for payment of either the principal of the alleged debt therein, or of any interest thereon, and that the defender has paid no sum to the pursuer in respect thereof; (14) that the defender, when said thirty first preference shares were issued to the pursuer, omitted to obtain return of the I O U: Finds in law that the defender's indebtedness under the I O U sued on was discharged by the issue to the pursuer of the thirty first preference shares in Bryce & Murray, Limited, on or about 12th September 1895: Finds that the defender is entitled to have said I O U delivered up to him, and to be assoilzied: Therefore ordains the pursuer, as craved, to deliver up to the defender the I O U granted by the defender in favour of the pursuer for the sum of £300 dated 11th July 1895, and assoilzies the defender from the conclusions of the action: Finds him entitled to expenses," &c.

Counsel for Pursuer (Respondent)—Murray, K.C.—W. T. Watson. Agents—Duncan Smith & M'Laren, S.S.C.

Counsel for Defender (Appellant)—M'Lennan, K.C.—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Thursday, January 20.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

GORDON'S TRUSTEES *v.* YOUNG AND OTHERS.

Cautioner—Relief—Primary or Secondary Cautioners—Cash-Credit Bond—Relations of Sureties inter se—Evidence—Parole—Competency.

A bank agreed to make advances to A. The security given to the bank was a cash-credit bond, which was signed by A and two others, B and C. Further security was provided by A's brothers and sisters conveying to the bank "in security of the personal obligation" in the bond their interest in a certain trust estate. In the bond A, B, and C were all personally bound as principals, though B and C were admittedly only cautioners. A's brothers and sisters were not personally bound in the bond at all. A and B having failed to repay the advance, the bank sued C, who paid the sum due, obtaining from the bank an assignation of its rights not only against A and B but also against the trust estate.

In a claim at the instance of C's trustee for relief from the trust estate conveyed to the bank in security, *held* (1) that while it was competent to prove by parole the relation of the signatories to the bond, the position of the brothers and sisters had not been proved different from what it appeared on the bond, and (2) that on a sound construction of the bond the brothers and sisters were in the position of secondary cautioners, *i.e.*, cautioners for the cautioners, and that as the obligation for the implement of which the security had been granted had been validly discharged, C's trustee had no right to any part of the trust estate, and claim *repelled*.

On 1st June 1908 Charles Duff Young, Cove, Kincardineshire, and others, testamentary trustees of the late Robert Gordon, Summer Lane, Aberdeen (*pursuers and real raisers*), brought an action of multiplepoinding against (first) the said C. D. Young as an individual, and others, the surviving children of the late John Young, musical instrument maker, Aberdeen, and the representatives of a deceased child, Mrs Ann Young or Gray, beneficiaries under the trust; (second) James Brown Nicol, architect, Aberdeen, the testamentary trustee of the late George Thow, clothier, Aberdeen; and (third) Arthur Fyfe Mortimer, ship chandler, Aberdeen (*defenders*). The pursuers sought decree, *inter alia*, that they were only liable in one and single payment of the one-half share of the residue of the late Mr Gordon's trust estate, held by them for behoof of the children of the said John Young.

The *facts* as given by the Lord President in his opinion (*infra*) were as follows—"In 1873 a Mr Charles Duff Young being desirous of obtaining accommodation from the bank, it was arranged that he should be allowed credit on a current cash account. The security given to the bank was a cash-credit bond, which was signed by two gentlemen besides Mr Young, viz., Mr George Thow and Mr Arthur Fyfe Mortimer. In addition to the cash-credit bond certain further security was provided by the members of the Young family conveying to the bank their interest in a certain trust estate. The arrangement was carried out by the execution of a bond, and the bond may be described as a cash-credit bond in ordinary form. It narrates that 'We, Charles Duff Young, George Thow, and Arthur Fyfe Mortimer, considering that the bank has agreed to allow us credit on a current cash account to be kept in the name of me, the said Charles Duff Young, to the extent of £500, hereby bind and oblige ourselves conjunctly and severally, and our heirs, executors and successors whomsoever,' to pay to the bank the said sum of £500. So far the bond is in ordinary form, but it then continues—'And in security of the personal obligation before written, I, the said Charles Duff Young, and we' (then follow the members of the Young family), 'seeing that in security of the personal obligation before written we have agreed to grant these presents, therefore we, the said Charles Duff Young, Mrs Anne Young or Gray' (and then follow the other members of the Young family) 'do hereby dispone to and in favour of' the bank and their assignees, all and whole the one-half share of the following subjects, namely—and then the subjects are described. Mr Charles Duff Young operated on the cash-credit but was unable to repay the advance. Mr Fyfe Mortimer could not pay either, and the bank then sued Mr Thow, who accordingly was obliged to pay. Mr Thow has since died, and the present claim, which is made by his trustee, is to make good to him a certain share of the heritable estate which the Young family conveyed to the bank in security. The ground on which he makes the claim is that as Thow was a cautioner who has paid the debt he has a right of relief against the other parties to the bond, viz., not only against Mortimer (against whom it has proved to be ineffectual), but also against the heritable estate which the bank held in security. The Lord Ordinary has held he has no such right, and I agree with him."

Claims were lodged by, *inter alios*, (1) the said J. B. Nicol, Thow's testamentary trustee, and (2) John Gray and others, the various members of the Young family.

The claimant Nicol averred, *inter alia*—"4. The said advance by the bank was entirely for behoof of the said Charles Duff Young, who was the sole principal in the matter, the said Mr Thow and Mr Mortimer being mere cautioners along with Mr Young's said brothers and sisters, and there was an agreement between Mr Young's brothers and sisters and Mr Thow and Mr Mortimer to the effect that the security of the reversion of the interest in the said Gordon's trust, so far as the other guarantors possessed it, should be available to meet any loss that might be incurred by Mr Thow and Mr Mortimer. The narrative in said deed that the bank had agreed to allow the credit to Mr Young, Mr Thow, and Mr Mortimer was in accordance with the usual form of such deeds to banks under which they require the cautioners to bind themselves as principals. The minute of the directors of the bank agreeing to grant the loan bears that it was granted to the said Charles Young, commission agent, on the security of George Thow and Arthur Mortimer, with collateral security of assignation of the interest of the principal Mr Young and his brothers and sisters in one-half of the property of their grandfather, on which certain liferents subsisted, the then value of the whole of the subjects being upwards of £2000. . . . 9. In terms of the said trust-disposition and settlement of the said Robert Gordon the fund *in medio* falls to be divided into five shares, the said John Young having been survived by five children. One of these five shares falls to the said Charles Duff Young, and this claimant is entitled to said share in payment *pro tanto* of the amount paid by him to the bank, in virtue of the said assignation by Charles Duff Young to the bank and the assignation by the bank to Mr Thow. The remaining four-fifth shares vested respectively in the said Mrs Anne Young or Gray, John Sinclair Young, Eliza Young, and Jessie Young (now Gregor). In virtue of said assignations, and in accordance with agreement come to between the various parties at the time, the said advances were made by the bank . . . this claimant is entitled to receive payment of said four fifth shares in order that he may recover payment of the sums paid by the said George Thow to the bank. In any event he is entitled to receive payment out of the said shares of four-fifth parts of the balance of the sum paid to the bank, and interest thereon at 5 per cent. from the date of payment to the bank by the said

George Thow, after deduction of the amount received from the share of the said Charles Duff Young. The said Arthur Fyfe Mortimer is bankrupt, and no sum has been paid by him or his estate. In these circumstances this claimant claims to be ranked and preferred to the whole fund *in medio* under obligation to count and reckon with the beneficiaries under said assignations, or alternatively to be ranked and preferred to (1) the one-fifth share of the fund *in medio* falling to the said Charles Duff Young, and (2) to such portion of the remainder of the fund as shall, together with the amount of said one-fifth share, make up the sum paid by Mr Thow to the said bank and interest at 5 per cent. from the date of payment by him."

He pleaded, *inter alia*—"(1) The claimant in virtue of the assignations condescended on, and also in virtue of the agreement between the said Charles Duff Young and Mr Thow as condescended on, whereby the whole reversion of the said Robert Gordon's trust estate should be available to meet any loss incurred by Mr Thow, is entitled to uplift the whole fund *in medio*. (2) In any case this claimant is entitled to uplift the fund *in medio* subject to his accounting to the other parties interested. (3) This claimant having paid the said sum to the bank as cautioner for the said Charles Duff Young, and being assignee to the share of the said Charles Duff Young of the fund *in medio*, is entitled to receive the share of the fund falling to the said Charles Duff Young. (4) Mrs Anne Young or Gray, John Sinclair Young, Eliza Young and Jessie Young (now Gregor) having assigned their said shares to the bank in security, this claimant, in respect that Mr Thow paid up to the bank the whole sum due under said cautionary obligation and in virtue of the assignation in favour of Mr Thow, is entitled to relief against the said shares to the extent stated in the second branch of his alternative claim."

The claimant John Gray and others (the various members of the Young family) denied the averment made by the claimant Nicol that prior to the granting of the cash-credit bond there was an arrangement that the interest of Mr C. D. Young's brothers and sisters in the late Mr Gordon's estate should form the primary security for the advances made by the bank. They maintained that they signed the bond merely in security of the personal obligation of the three principal obligants, and that as one of these obligants had paid the debt, the only obligation in security of which the bond was granted had been thereby discharged. They accordingly claimed to be ranked and preferred to their respective shares of the said trust estate.

On 16th February 1909 the Lord Ordinary (SKERRINGTON) allowed the claimant Nicol a proof before answer, and to the other claimants a conjunct probation.

Opinion.—"... In his condescendence and claim Mr Thow's trustee gives a somewhat inartistic account of the circumstances under which these advances were obtained from the bank by Charles Young—who admittedly was the true debtor—and of an agreement alleged to have been entered into between the parties who pledged either their personal credit or their property for his accommodation. On the whole, however, I think that this claimant has sufficiently alleged an agreement between Mr Thow and Mr Mortimer, on the one hand, and Charles Young and his brothers and sisters, on the other hand, to the effect that Mr Thow and Mr Mortimer should have the benefit of the securities pledged by the Young family, and that these securities should be available to indemnify Mr Thow and Mr Mortimer in the event of the true debtor Charles Young failing to fulfil his obligation to the bank. There is no suggestion that the bank were parties to this agreement, and accordingly the claimant is not attempting to prove that the rights of the creditor were different from these conferred on him by the bonds. The members of the Young family, however, and the executor of Charles Young maintain that this alleged agreement is irrelevant, and that in any event it can be proved only by writ or oath, in respect that it goes to contradict the contract expressed in the bonds. Upon the question of relevancy their counsel submitted a very simple argument. He pointed out that the subjects were on the face of the bonds conveyed to the bank in security only of the joint and several obligations undertaken by Charles Young, Mr Thow, and Mr Mortimer, and he argued that as Mr Thow, one of the co-obligants, had paid the debt due to the bank, the debt was thereby extinguished and the security *ipso facto* came to an end and was incapable of assignment by the bank. This argument is, in my opinion, unsound, and it proves too much, as it would follow from it that the assignation was bad *in toto* even as regards Charles Young's personal obligation and the security subjects belonging to him. It is, however, well settled that a co-obligant in a bond who pays the whole debt to the creditor is entitled to demand an assignation both of the bond and of any securities granted to the creditor by the co-obligants. By means of such an assignation he can operate his own relief to the extent to which the rules of equity and the true relations of the parties entitle him to do so, though he cannot make use of it for the purpose of obtaining any larger measure of indemnity. Accordingly, if the assignation of the personal obligations in the bond was valid and effectual to any extent, I see no reason why the assignation of securities granted by third parties should not have been equally valid, provided there existed no equity which disentitled the assignee from claiming the benefit of such securities.

"In regard to the mode of proof, I am of opinion that Mr Thow's trustee is entitled to prove the alleged agreement by parole. It is obvious that the substantive rights of the parties cannot be affected by the accident that Mr Thow paid the debt when called upon to do so instead of allowing the bank to sell the securities and pay themselves. If the bank had taken this latter

course, *prima facie* the owners of the securities would have had a good claim of relief against Mr Thow upon the ground that their property had been sold and the proceeds applied in paying Mr Thow's debt. But I think that Mr Thow would have been entitled to prove by parole that, although he bound himself as a principal to the bank, the debt was not really his but Charles Young's, and that the members of the Young family had agreed that he should be kept *indemnis* out of the proceeds of the securities. Of course no such agreement is to be found within the four corners of the bond, and if attention is confined to what is contained in the bond alone the inference would be quite the other way, viz., that the loss must ultimately fall upon Mr Thow and not upon the owners of the securities. But the bond was not intended to contain the agreement between the co-obligants and the owners of the securities, but only the rights which they desired to confer upon the creditor, and accordingly extrinsic evidence may be resorted to in order to clear up the true rights of the co-obligants and security owners *inter se*. The position seems to be very similar to that which would have arisen if Mr Thow, after paying the bank, had sued Charles Young for repayment of the whole debt. In that case he would have been entitled to prove by parole that Charles Young was the true debtor and he himself only a cautioner, although if no further evidence had been adduced than what was contained in the bond alone, Mr Thow would have been entitled to be relieved only of a rateable proportion of the debt.

"I accordingly allow Mr Thow's trustee a proof before answer of his averments and to the other claimants a conjunct probation."

On 11th June 1909, after the proof, his Lordship pronounced an interlocutor in which he, *inter alia*, ranked and preferred the claimant Nicol to one-fifth of the fund *in medio*, and the various members of the Young family (other than C. D. Young) to the balance thereof.

Opinion.—"Having heard the proof, I have come to the conclusion that the claimant Mr Thow's trustee has failed to prove that there was any agreement between Mr Thow and his co-cautioner Mr Mortimer on the one hand, and the members of the Young family on the other hand, to the effect that the cautioners should be indemnified out of the proceeds of the securities pledged by the Young family. It was quite natural on the part of Mr Thow and Mr Mortimer to believe, as I think they did, that they were entitled to such an indemnity, seeing that they were strangers in blood to the principal debtor Charles Duff Young, and that the securities belonged to the principal debtor and to his brother and three sisters. Such a belief on the part of the cautioners goes, however, a very small way towards proving the existence of an agreement of the kind alleged by Mr Thow's trustee.

"Counsel for Mr Thow's trustee further argued that in the absence of any agreement for an indemnity, Mr Thow, being a cautioner, was entitled to be indemnified out of the securities conveyed to the bank in the cash account bond. I entirely assent to this argument in so far as it relates to the security subjects belonging to and pledged by the principal debtor. I am, however, unable to discover any legal ground for holding that the security subjects which belonged to the brother and sisters of the principal debtor, and which they pledged to the bank in security of the joint and several personal obligation of the principal debtor and his cautioners fall to be applied in indemnifying the cautioners. It will, of course, be kept in view that the brother and sisters of the principal debtor did not undertake personal liability for the debt. Nor am I able to hold that the loss suffered by the cautioner ought to be apportioned between him and the owners of the security subjects.

"Lastly, it was argued that Mr Thow having obtained an assignation of the cash account bonds from the bank, his trustee had in virtue of the assignation the same rights *quoad* the security subjects as were possessed by the bank. In regard to this argument I adhere to the view which I expressed in the note to my former interlocutor to the effect that, while an assignation is a useful piece of machinery, it does not alter the substantial rights of the parties."

The claimant Nicol (Thow's trustee) reclaimed, and argued—The terms of the bond showed that all the parties to it were co-sureties, and that being so, the reclaimer was entitled to relief—Bell's Prin., sec. 255; Gloag and Irvine on Rights in Security, p. 760, *et seq.* Moreover, he had an express assignation to the security pledged to the bank. He was therefore entitled to a *pro rata* contribution from the various members of the Young family. *Esto* that the Young family were not bound as principals, but merely as collateral cautioners, such cautioners were, in the absence of a clear indication to the contrary, as much bound as the original cautioners, for the law presumed that they had intervened on behalf of the principal debtor—Bell's Prin., sec. 272 (*note*); *Lennox and Others* v. *Campbell*, May 18, 1815, F.C.; *Thorburn* v. *Howie*, July 16, 1863, 1 Macph. 1169; *Walker* v. *Inglis*, May 30, 1827, 5 S. 726 (341), *aff.* March 3, 1830, 4 W. & S. 40; *Dering* v. *Earl of Winchelsea*, (1787) 1 Cox. 318, 1 R.R. 41; *Parsons* v. *Briddock*, (1708) 2 Vernon 608; *Goddard* v. *White*, (1860) 2 Gifford 449; *Wright* v. *Morley*, (1805) 11 Vesey 11, at p. 21; Rowlatt on Principal and Surety, 201.

Argued for the claimants, the Young family (respondents) — The respondents were cautioners for the cautioners, not for the principal debtor. That was plain from the terms of the bond. They were only bound therefore as secondary cautioners, and could not be called on where, as here, the primary cautioners had fulfilled the obligation. As to the distinction between primary and secondary cautioners, reference was made to Bell's Prin., sec. 245;

Bell's Com., i, p. 364; Gloag and Irvine (*op. cit.*) 642; *Inglis* v. *Walker*, *cit. sup.*; and *Craythorne* v. *Swinburne*, (1807) 14 Vesey 160, at p. 170.

At advising—

LORD PRESIDENT—This is a multiplepoinding in which the point raised is both interesting and novel. The facts out of which the question arises are as follows— . . . [*After narrating the facts ut supra*] . . . The first ground on which the reclaimer argued his case was that having paid the debt and having got an assignation of the bond from the bank, he had the same rights *quoad* the security subjects as were possessed by the bank. I do not think this matter can be better put than it is by the Lord Ordinary when he says in regard to this argument—"I adhere to the view which I expressed in the note to my former interlocutor to the effect that, while an assignation is a useful piece of machinery, it does not alter the substantial rights of the parties." I think his Lordship is right, and that the mere fact that an assignation has been obtained cannot make any difference.

The novel point, however, is this, that the parties said to be bound with Thow are not in any way personally bound, and that is where the whole difference lies. Thow, no doubt, is a joint principal *quoad* the bank, for he is so bound in the bond, but *quoad* Charles Duff Young he is really only a cautioner, and I should have been prepared to hold that he was so on the terms of the bond alone. Had it been doubtful that he was only a cautioner *quoad* Young, it would have been quite possible to prove it. That, however, is not necessary here, for it is admitted that Young was the principal. It is, however, quite competent to prove by parole what is the true relation between the persons who, in a general sense, are parties to a bond—and by "general sense" I mean signatories to the security—and accordingly an averment was made at an initial stage by Mr Thow's trustee that it was matter of arrangement that all the parties to the bond, including the Young family, should, if I may use the expression, "stand in equally" as regards its ultimate payment. A proof has been led on that matter, and the Lord Ordinary has held that Mr Thow's trustee has failed to prove any such arrangement, and counsel for the reclaimer did not maintain that the Lord Ordinary in so holding was wrong. Accordingly the decision of the question rests on the law which may be deduced from the form of the instrument itself.

It is a familiar law that a person may be truly a cautioner although with regard to the creditor he is in the position of a principal, and being truly a cautioner he is entitled to have relief against the debtor or the co-cautioner if he (the cautioner) pays the debt. That principle is admitted in every system of jurisprudence. It is to be found in the Roman law, in the old French law, and in the English law—which, however, did not borrow it directly from the law of Rome; and the reason for it is plain enough, and it is this, that the principle is based upon equity. Now I have examined with considerable care the sources of the doctrines in all these systems, and what I am going to say rests on a principle underlying them all. I have examined the English cases, our own institutional writers, and Pothier on Obligations, and in all of them I find without exception that the matter is treated from the standpoint of the necessity of the parties being bound *in solidum* in the original obligation. In fact the principle is never applied except when the parties are so bound in the original obligation. That makes the distinction in the present case apparent, for here the Young family were not bound at all.

Nor can Mr Thow crave in aid the doctrine known as the *beneficium cedendarum actionum*, which, if amplified, means not only the assigning of the right to sue, but also the giving over of any security held by the creditor. Here again I examined the cases and I find that "security" always means security over the estate of the debtor. If any of the cautioners gets any part of the debtor's estate he must communicate it to the co-cautioner, unless of course there is some special bargain to the contrary; and the equity of the rule is obvious. Any other doctrine would not work out, for supposing the cautioner who has obtained the security pays the debt, the way it works out is this—the cautioner paying realises the security, deducts the sum so obtained from the amount he has paid, and then sues each of the other cautioners for his proportion of the balance. Now that would not fit in with the arrangement proposed here, for Thow has never said that the whole of the security should be applied to the liquidation of the debt; all he has said is that the security should come in as if it were a single cautioner.

There is another difference, however, in the present case. As a rule, where cautioners have a right of relief the obligation will be divided among the cautioners, the exact quota of each depending on the number of cautioners. What shall we say, however, as to the various members of the family who in this present case have combined to grant this security? It may be convenient to lump them, but each of them has a separate interest which sometime or other will vest. A family is not a *persona*, and yet Thow's trustee has not ventured to say that each member of it is in the position of a single cautioner.

Accordingly it seems to me that special agreement having failed, the question really comes to this—What does the bond in law do? What the security is given for is the performance of a joint and several obligation, and Thow can never ask that security should be given for a debt that he himself was bound to pay. I am of *opinion*, accordingly, that the Lord Ordinary is right.

LORD KINNEAR—I agree with your Lordship.

LORD JOHNSTON—On the question of the demand of Mr Nicol (Thow's trustee) to be relieved of his cautionary obligation at the expense of the heritable subjects embraced in the cash-credit bond, I entirely agree with the Lord Ordinary and adopt all that he says in his judgment on this, the only point in the case in which that judgment has been submitted for review. If I add anything, it is merely to say that I think the principles enounced by Lord Eldon in *Craythorne* v. *Swinburne*, 14 Ves. 160, 9 R.R. 264, are precisely applicable to the present case. The question is, What was the contract? Was it the intention of the Young family to give their property as a co-surety, or only as a surety for the cautioners? The deed must speak for itself. And the terms of the deed are incompatible with anything but one answer, viz., that the property was conveyed in security of the obligation undertaken by the principal debtor and his two cautioners. To hold otherwise would be precisely to reverse the provisions of the deed, and either to make the property conveyed in security the primary cautioner for the principal debtor and to bind his cautioners merely as guarantors of its sufficiency for this primary obligation, or at least to make the property, so to speak, co-cautioner with the cautioners. There is just as much to say for the one contention as for the other, and just as little. I do not, as at present advised, think that any evidence could be admitted so to turn the deed upside down, and at least I should desire to reserve my opinion on that subject. But if it were competent, Mr Thow's trustee has entirely failed to adduce it.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuers and Real Raisers, and Claimants (Respondents) Young and Others — M'Clure, K.C. — Kemp — C. H. Brown. Agents—A. & A. Campbell, W.S.

Counsel for Claimant Nicol (Thow's Trustee) (Reclaimer) — Wilson, K.C. — Lippe. Agents—Henry & Scott, W.S.

Friday, January 28.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

BOSVILLE *v.* LORD MACDONALD AND ANOTHER.

Personal Bar—Mora—Res judicata—Service of Heirs — Parent and Child — Legitimation per Subsequens matrimonium—Declarator of Grandfather's Legitimacy.

In an action of declarator of the legitimacy of the pursuer's grandfather, *per subsequens matrimonium* in 1803, raised in 1909, *held* that, whatever effect there might be upon the *onus* of proof, the pursuer was not barred (1) by *mora*, or (2) by the fact that a litigation between ancestors of the present parties with regard to the possession of the family estates, involving this question of legitimacy, had been compromised by the parties by a private Act which contained no declaratory statement on the point, but settled the estates in the way they would have gone if illegitimacy had been established, or (3) by a younger brother of the grandfather having in 1833 obtained services to their father, as "eldest lawful son and nearest and lawful heir of tailzie and provision" and as "eldest lawful son and nearest and lawful heir of line," which services had remained unchallenged.

On 1st June 1909 Alexander Wentworth Macdonald Bosville of Thorpe Hall, near Bridlington, Yorkshire, raised an action against the Right Honourable Ronald Archibald (sixth) Lord Macdonald of Slate, in the Peerage of Ireland, residing at Armadale Castle, Isle of Skye, and also against the Honourable Godfrey Evan Hugh Macdonald, also residing at Armadale Castle, Lord Macdonald's *curator bonis*, in which he sought to have it found and declared "that by the marriage of the Honourable Godfrey Macdonald, afterwards third Lord Macdonald, to Louisa Maria La Coast, on or about 29th May 1803, or such other date as our said Lords may determine to have been the true date of such marriage, their eldest son Alexander William Robert Macdonald, afterwards Bosville, the pursuer's grandfather, who was born on or about 12th September 1800, was legitimated *per subsequens matrimonium*, and that the pursuer is the great-grandson and nearest and lawful heir-male of the body of the said Honourable Godfrey Macdonald."

The defenders pleaded — "(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The pursuer being barred by *mora, taciturnitas*, and acquiescence from insisting in the present proceedings, the defenders should be assoilzied. (3) In respect that the questions raised in the present action have been the subject of transaction and adjudication, as condescended on, the pursuer is barred from reopening the same. (4) The pursuer's material averments being unfounded in fact, the defenders are entitled to absolvitor. (5) The said Godfrey, third Lord Macdonald, having been a domiciled Englishman at the date of his marriage in 1803, the pursuer's grandfather was not legitimated *per subsequens matrimonium*, and the defenders should be assoilzied. (6) The decree of service in favour of the father of the defender Lord Macdonald, as eldest lawful son and nearest and lawful heir of the said Godfrey, third Lord Macdonald, standing unreduced, and the same being no longer open to challenge in respect of the Statute 1617, c. 12, the defenders are entitled to absolvitor."

The *facts* giving rise to the action are narrated in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on