sult, that the annuity may be sold, it follows that it can also be adjudged. There can be no such right in the owner of any description of property as that he may enjoy it and dispose of it, but can keep it unattachable by the diligence of his creditors. Whoever has a power of voluntary sale holds the property subject to the attachment of creditors in course of law. If a bond of annuity containing an alimentary restriction has no other effect than to put the legatee to possible inconvenience, it follows that the legatee is not bound by the condition, and that the trustees are not entitled against his will to attempt to enforce it.

There have been cases where the Court has sanctioned payments under receipts, which took note of the restrictions, but these cases prove nothing, because it was admitted on all hands that the insertion of restrictions on the right of enjoyment in a receipt has no effect.

The result in my opinion is that there is no right in anyone to insist on the alimentary restriction, and that the legatees are entitled to payment of their legacies.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court found that the pursuers were entitled to two-thirds of Mrs Macfarlane's estate as at her death, free of any trust.

Counsel for the Pursuers—Mackay—C. K. Mackenzie--Constable. Agents--Dundas & Wilson, C.S.

Counsel for Mrs Macfarlane's Testamentary Trustees — Jameson — M'Lennan. Agents—Philip, Laing, & Co., S.S.C.

Counsel for Mrs Macfarlane's Trustees, Patterson Trust—Guthrie—James Reid. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Mrs Macfarlane's Trustee, Cook Trust—W. Campbell—Crole. Agent—W. B. Rainnie, S.S.C.

Counsel for Mrs Miller—Graham Stewart. Agents—Mylne & Campbell, W.S.

HOUSE OF LORDS.

Tuesday, March 19.

(Before the Lord Chancellor (Herschell), and Lords Watson, Macnaghten, Morris, and Shand.)

ALSTON'S TRUSTEES *v.* GIBSON.

Cautioner—Guarantee—Agreement to Give Guarantee — Mercantile Law (Scotland) Amendment Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 6.

C. R. & Co. wrote to G. offering him an investment upon the security of an estate in Ceylon, for which they acted as agents, and saying, "It is an excellent security, apart from our guarantee of principal and interest." G. replied, accepting the investment, "with C. R. & Co.'s guarantee of principal and interest."

Held that C. R. & Co.'s letter amounted to a distinct offer of a guarantee, which became operative as soon as it was accepted, and the loan which was to be the consideration for it was made.

This was an action at the instance of Alexander Gibson against the testamentary trustees of the deceased George Alston for payment of the sum of £7000.

George Alston, who died in 1884, had been a partner of the firms of Campbell, Rivers, & Company, and Alstons, Scott, & Company, and the object of the action was to enforce against his estate a liability alleged to have been undertaken by both these firms.

The averment upon which the pursuer's claim was based was to the effect that in 1883 he had, on the application of Campbell, Rivers, & Company, advanced the sum of £7000 on the security of a mortgage over an estate in Ceylon, and upon the security of their personal undertaking, given on behalf both of Campbell, Rivers, and Company, and Alstons, Scott, & Company, to repay the money.

The defenders admitted that the money had been lent by the pursuer, but denied liability. They pleaded, *inter alia*—"(6) The alleged guarantee not having been expressed in writing, the defenders are, in respect of section 6 of the Mercantile Law Amendment (Scotland) Act 1856, not liable in payment of the said mortgage, interest, and expenses."

The section is quoted in the opinion of Lord Wellwood.

The material circumstances of the case as disclosed by the proof were as follows:—Campbell, Rivers, and Company, and Alstons, Scott, & Company, were separate firms carrying on business in Glasgow and Ceylon respectively. In 1883 the firm of Campbell, Rivers, & Company, consisted of George Alston and four other gentlemen of the name of Alston, and the firm of Alstons, Scott, & Company consisted of the firm of Campbell, Rivers, & Company, or the members of that firm, with the addition of two partners, Buchanan and Bois, who conducted the business in Ceylon. At the time of the transactions in question in this case the business of Campbell, Rivers, & Company was to act in Glasgow as agents of Alstons, Scott, & Company. As part of their business, the firm of Alstons, Scott, & Company acted as agents for persons owning estates in Ceylon, rendering or procuring them assistance on the security of these estates. Among others they had made advances to a considerable extent to Richard Mant, the owner of an estate called "Roeberry."

In 1879, with Mant's authority, a loan of £7000 was obtained by Campbell, Rivers, & Company, from J. W. Hutchison. The terms of the loan were that the money should be repayable in three years—*i.e.*, in February

1882—or after that period on six months' notice on either side, that it should bear interest at 7 per cent., and that the loan should be secured by a first mortgage over the estate of Roeberry, and by the guarantees of both Campbell, Rivers, & Company, and Alstons, Scott, & Company. It was proved that in concluding the transaction on these terms Campbell, Rivers, & Company were following the usual course, and were acting within their authority as agents for Alstons, Scott, & Company. Of the £7000 lent by Mr Hutchison, £2000 was applied in paying off a prior loan upon the estate, and the residue was credited to Mr Mant in account with Alstons, Scott, & Company.

Towards the end of 1882 Mr Hutchison intimated that he would require repayment of his loan in the following June, and in consequence of this intimation John P. Alston, who was a member of both firms, wrote to the pursuer (who had at one time been a partner of Alstons, Scott, & Company) on 4th January 1883 in these terms:—"Four years ago we arranged a loan of £7000 with Mr J. W. Hutchison (son of the late Graham H.) on first mortgage over the estate of Roeberry, in Hewa Elluja. Mr H. has bought a property, and wants the money in June. The estate was then valued at £15,000, and although the coffee is worth less now, the value has been kept up by large plantings of cinchona. It is, therefore, an excellent security apart from our guarantee of principal and interest. Before offering it to anyone else, I think it well to place it before you as a good 7 per cent. investment (interest payable half-yearly) for three years, with six months' notice of repayment on either side." On 5th January the pursuer replied:—"I have yours of yesterday, and write to say that I expect to be able to let you have the £7000 named in June next, on the Roeberry estate, with C., R., and Co.'s guarantee of principal and interest." . . . On 11th January Campbell, Rivers, & Company wrote to Alstons, Scott, & Company—"Referring to our letter of 28th ult., we are glad to advise that we have induced Mr Alexander Gibson, Edinburgh, to take up this mortgage in June (when Mr Hutchison's loan is repayable), with your guarantee of principal and interest as usual." . . . On 7th May Campbell, Rivers, & Company wrote to the pursuer in these terms:—"Referring to your letter of 5th January to our Mr J. P. Alston, a P/Attorney was signed by Mr Hutchison, and forwarded to Messrs Alstons, Scott, & Company by last mail, authorising them to transfer the security to your name. The £7000 is payable here to Mr Hutchison on 26th June, which we hope will be convenient for you."

On 18th June the pursuer transmitted to Campbell, Rivers, & Company a draft for £7000, with the request that the securities for the loan should be sent when completed to his address in Edinburgh. On 17th August an assignment of Mr Hutchison's mortgage to the pursuer was duly executed, but the guarantees in Mr Hutchison's favour by the firms of Campbell, Rivers, & Company, and Alstons, Scott, & Company, were not assigned, nor were fresh instruments of the like kind executed in the pursuer's favour.

In 1891 the firm of Campbell, Rivers, & Company, was sequestrated, and Alstons, Scott, & Company, were adjudicated bankrupt.

On 20th June 1893 the Lord Ordinary (WELLWOOD) pronounced an interlocutor, in which he decerned against the defenders for payment to the pursuer of the sum of £7000 with interest at the rate of 7 per cent. from 30th June 1891.

"*Opinion.*— . . . . . The first question depends upon the construction of the 6th section of the Scotch Mercantile Law Amendment Act (19 and 20 Vict. c. 60), which is as follows:—'From and after the passing of this Act all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect, or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect.' It is remarkable that although more than thirty-five years have elapsed since the passing of the Act, the precise meaning of that section has never been judicially determined, although there has been a good deal of academic or juridical discussion on the subject. Two views have been taken of it, the first being that under the statute writing is essential to the constitution of the contract; and the other, that writing is only required *in modum probationis*. If the latter is the true meaning, the words used are not happily selected. *Prima facie* the words, especially the concluding words, 'otherwise the same shall have no effect,' seem to relate to the constition of the contract. On the other hand, it appears from the preamble to the Act that it was passed for the purpose of assimilating the law of Scotland to that of England in regard to the matters dealt with in it, and it is settled by decision in England that under the English statute writing is required in such cases, not as a solemnity, but as evidence of the contract. The law of England as to guarantees and representations as to credit depends upon the 4th section of the Statute of Frauds, and the 6th section of Lord Tenterden's Act (9 Geo. IV. c. 14). By the former it is enacted—'No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, *shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.*

It will be seen that the words which I have italicised are echoed in the 6th section of the Scotch Mercantile Law Amendment Act, 'Shall be in writing subscribed by the person "undertaking such guarantee," &c., 'or by some person duly authorised by him.' In Lord Tenterden's Act the provisions of the 4th section of the Statute of Frauds was extended to cover the case of assurances and representations on which credit is given, and that Act also required that the assurance must be in writing signed by the party or his agent.

"I think that this Court would be slow to sustain a construction of the Mercantile Law Amendment Act which would establish a difference between the laws of the two countries instead of assimilation, and which would also, according to the opinions of many eminent judges and legal writers, introduce a radical change in the law of Scotland by making the contract of cautionary or guarantee an *obligatio literarum*, which, according to those authorities, it was not before. I do not, however, find it necessary to express a positive opinion upon this vexed question, because I think that there is sufficient evidence in writing to establish the constitution of the contract within the meaning of the 6th section of the Mercantile Law Amendment Act." . . . [*His Lordship then reviewed the facts, and referred to the letters of 4th, 5th and 11th January* 1883]. Now, J. P. Alston's letter of 4th January 1883 contains all the material elements of a guarantee. It is signed by the partner and agent of the guarantors, and is addressed to the person to be guaranteed. The amount, conditions, and duration of the loan are fully stated. The loan is for £7000 to be advanced in June. It is to be for three years with six months' notice of repayment on either side, and interest is to be 7 per cent. The lender is to receive a first mortgage over the estate of Roeberry. Then come the words which are said to import a guarantee—'It is therefore an excellent security *apart from our guarantee of principal and interest.*' Now, it is said for the defender that this is not a guarantee or even an offer of a guarantee, but I think that in the circumstances it amounts to and must be read as an offer. It was intended that the pursuer should stand in the shoes of Mr Hutchison, and the object of the letter was to offer him the investment on the same conditions. It was, as I read it, a complete offer. The reference to the guarantee is elliptical, probably just because the guarantee was given as a matter of course. I read the words last quoted as if they ran—'It is an excellent security, apart from our guarantee of principal and interest, which we offer as usual.' If that is a correct reading of the words—and they were so understood by the pursuer — and the offer was accepted and acted on by payment of the money, that is sufficient both according to Scotch and English law to constitute an effectual and binding guarantee although no words of *de præsenti* obligation were used.

"There is one word which perhaps requires interpretation, and that is 'our' guarantee. J. P. Alston was a partner of Campbell, Rivers, & Company, and also of Alstons, Scott, & Company, but I think there can be no doubt that the word is there used as meaning Alstons, Scott, & Company's guarantee. The loan was being obtained in connection with the business of that firm, and the matter I think is placed beyond doubt by the letter of 11th January 1883 to Alstons, Scott, & Company, in which Campbell, Rivers, & Company say that the pursuer is to take up the mortgage in June 'with your (Alstons, Scott, & Company's) guarantee for principal and interest as usual.'

"Such then being the offer made to the pursuer in writing subscribed by Alstons, Scott, & Company's agents, it was accepted, and loosely as it is expressed, I read the pursuer's letter of 5th January as a final acceptance. It was certainly so regarded by Campbell, Rivers, & Company, because in their letter of 11th January they speak of the transaction as being then complete. Important corroboration is also to be found in the following letter written on 7th May 1883 by Campbell, Rivers, & Company:—'*Glasgow, 7th May* 1883. Alexander Gibson, Esq., Edinburgh. *Roeberry Loan* £7000. DEAR SIR,—Referring to your letter of 5th January to our Mr J. P. Alston a P/ Attorney was signed by Mr Hutchison, and forwarded to Messrs Alstons, Scott & Co. by last mail authorising them to transfer the security to your name. The £7000 is payable here to Mr Hutchison on 26th June, which we hope will be convenient for you. Yours faithfully. (Signed) CAMPBELL, RIVERS, & Co.' That letter was written in reference to the transference of the mortgage to the pursuer, and in it it will be seen that Campbell, Rivers, & Company refer not to verbal communings, but to the pursuer's letter of 5th January, as their authority for holding the transaction concluded.

"Another passage requires notice. In his acceptance of 5th January 1883 the pursuer uses the words 'with C. R. & Co.'s (Campbell, River, & Company's), 'guarantee of principal and interest.' It is said that the acceptance does not square with the offer, but as I have already indicated, I think the pursuer here means Alstons, Scott, & Company, using the name 'Campbell, Rivers, & Company' in this loose sense that the business carried on in Ceylon by Alstons, Scott, & Company was just Campbell, Rivers, & Company's Ceylon business. An example of this use of the name 'C. R. & Co.' by the pursuer is to be found in the pursuer's letter to J. P. Alston of 4th April 1891. The guarantee of Alstons, Scott, & Company carried and included the guarantee of Campbell, Rivers, & Company, or at least of all the partners of that firm; and it was thus a matter of indifference to the pursuer which firm guaranteed the loan. If the offer and acceptance import a guartee by Campbell, Rivers, & Company—and read in one way they might do so—the defenders would still be bound, because George Alston was a partner of both firms, and liable for the debts of both. But in truth

the guarantee given and intended to be given was that of Alstons, Scott, & Company, as the correspondence and books of Alstons, Scott, & Company show. That proves that the pursuer's words were so understood by both firms at the time; and I do not think the defenders can now be heard to say that Alstons, Scott, & Company's guarantee was not given.

"It is pleaded for the defenders that at most this proves that Alstons, Scott, & Company undertook to grant a guarantee in the future, which they did not do. This depends entirely upon whether it appears from the writings and the actings of the parties that they regarded the letters of J. P. Alston and Campbell, Rivers, & Company to the pursuer as containing merely an offer or undertaking to grant a guarantee, or as in themselves constituting a guarantee. *De præsenti* words of obligation are not essential if it appears that parties intended to bind themselves finally. I think it is clear from what followed that the latter is the true view. The pursuer advanced the money in the belief that he had got a guarantee, and Alstons, Scott, & Company acted on the footing that they had given one. It is true that Alstons, Scott, & Company gave J. W. Hutchison a formal guarantee, and it is strongly pleaded for the defenders that the absence of any such guarantee in the pursuer's case is conclusive against his claim. But there are two observations to be made as to this. First, I cannot understand how men of business like Alstons, Scott, & Company could have acted as they did unless what they considered a guarantee had been given; and secondly, it may well be, that looking to the intimate relations which existed between them and the pursuer, which did not exist between them and Hutchison, they thought that the writings which passed between them and the pursuer constituted a sufficient guarantee.

"This is sufficient for the decision of the case, and it is therefore unnecessary to dispose of the other grounds of action." . . .

The defenders reclaimed.

At advising—

LORD KINNEAR—[*After reviewing the facts*] — Now, in these circumstances it appears to me that the defenders are not in a position to plead the provisions of the 6th section of the Mercantile Law Amendment Act in answer to the pursuer's claim. The enactment applies to "all guarantees, obligations, or cautionary obligations made or granted by any person for any other person." These words appear to me to cover only the accessory obligation of a surety on the failure of a primary obligant, and to exclude liabilities attaching in the first instance to the supposed guarantor himself and dependent upon any consideration passing directly between him and a promisee. The case contemplated is that of a guarantee for the debt of some one else given by a person who is entirely free from liability on his own account. Now, it is proved beyond all question by perfectly competent evidence that Alstons, Scott, & Company, through their partner and agent Mr Alston, borrowed the pursuer's money for the purpose of paying their own debt to Mr Hutchison, that the money was in fact applied to that purpose, and that both the borrowers and the lender understood from the first, and acted throughout on the understanding that they had given their personal obligation for repayment. It appears to me that the position now maintained for them that they are really no more than guarantors of another person's debt is untenable. The pursuer's money was not paid to Mr Mant on Alstons, Scott, & Company's guarantee. It never reached his hands. It was paid directly to them and was used by them for their own benefit in course of their own business. I am unable to see any substantial distinction between the liability thence arising and that which would have attached if they had given a direct personal obligation to repay money lent irrespective of any liability on the part of another.

But if, contrary to my opinion, it should be held that they are cautioners and nothing more, I should agree with the Lord Ordinary that their cautionary obligation is well constituted in terms of the Act of Parliament. I do not consider it necessary to consider whether a writing subscribed by the alleged cautioner is necessary to constitute the contract or only to prove it, because I agree with the Lord Ordinary that Mr Alston's letter of 4th January 1883 is in effect a guarantee. He says, after referring to the security that had been given to Mr Hutchison—"It is an excellent security, apart from our guarantee of principal and interest." The expression, as the Lord Ordinary said, is elliptical; but I think it is the natural construction, and at all events it is a perfectly permissible construction, of the words used that they offer to the lender two separate securities—the estate of Roeberry and the guarantee of the writer's firm. In reading the letter we must, of course, take into account the circumstances to which it refers. He offers to the pursuer to transfer the securities which he had given to Mr Hutchison. We know that in point of fact Mr Hutchison had obtained not only a mortgage over the estate, but also the guarantees of the two firms of Campbell, Rivers, & Company and Alstons, Scott, & Company, and I cannot say that I can see any reasonable ground for doubt that what Mr Alston meant was to offer to Mr Gibson exactly the security which had been given to Mr Hutchison, and that that is the fair meaning of the words which he employs. It is evident that the pursuer so read the letter, because his answer is that he expects to be able to let them have the money on the Roeberry estate, "with Campbell, Rivers, & Company's guarantee of principal and interest;' and therefore there can be no doubt at all that he accepts the pursuer's letter as an offer of a guarantee. His interpretation of the words is accepted by the writer of the letter, and the matter is completed by the two letters of 7th May and 18th June 1893 The pursuer therefore puts upon Mr Alston's letter a construction of which it is

certainly susceptible whether it is the only possible construction or not. Campbell, Rivers, & Company accept that construction as the right one, and they take his money on that assumption. We are bound to hold that the true meaning of the words in question was that which was accepted and acted upon by both parties to the transaction at the time the letters passed between them.

But then it is said that the pursuer by his letter accepts the guarantee offered to him as that of Campbell, Rivers, & Company alone, and therefore that he cannot now claim to have relied on the liability of the second firm, Alstons, Scott, & Company. But extrinsic evidence is admissible to identify the firm referred to but not named by Mr Alston when he speaks of "our guarantee." Reading the letter with reference to the circumstances in which it was written in order to determine the relation of the words to the facts to which they refer, I should have come to the conclusion that he meant the guarantee of Alstons, Scott, & Company, to whom the money was to be paid, and by whom it was to be employed. But his meaning is placed beyond doubt by his letter of 11th January, which is good evidence against him and his partners that he intended the guarantee of that firm. The persons whom the pursuer intended, by "Campbell, Rivers, & Company," may in like manner be ascertained by evidence, and I think that reading his evidence with reference to the undoubted facts of the case his statement is quite satisfactory when he says that he understood he was offered the guarantee of the entire firm, including the partners in Glasgow and the partners in Ceylon. It does not appear that he knew the terms of the existing contract between the two houses, but he knew that while there may have been two firms they were carrying on one business, and that the Glasgow firm had the larger interest in the Ceylon firm. It may not be immaterial to observe that in the contract in force while he himself was a partner of Alstons, Scott, & Company, the business of that firm was described as a subordinate business carried on by Campbell, Rivers, & Company in Ceylon. I see no reason to doubt, therefore, that he believed that he had the guarantee of Alstons, Scott, & Company, and I think it certain that was the intention of that firm, and especially of their senior partner Mr Alston, who subscribed the letter of guarantee. I am of opinion that Mr Alston's letter, fairly construed, imports a promise that if the pursuer will lend £7000 on the security of Roeberry, his firm of Alstons, Scott, & Company will guarantee that the money shall be repaid, and that the money was in fact advanced by pursuer on the faith of that promise, and I think nothing more is required to constitute an effectual guarantee.

LORD M'LAREN—I agree with all that has been said by Lord Kinnear in the first part of his opinion . . . That ground appears to me to be sufficient for the decision of this case, and I would rather avoid giving an opinion on the more debatable questions which arise out of the consideration of these letters, assuming that the transaction was, what I think it was not, in any fair sense, one of guarantee. There is some delicacy in saying whether the correspondence amounts to an obligation under the hand of the debtor in the sense of the statute; but as already said, I do not think that question arises. I agree with Lord Kinnear that the conclusion at which the Lord Ordinary has arrived is well founded, and that we ought to adhere to the judgment.

LORD ADAM concurred with Lord Kinnear, and was further of opinion that, assuming that no guarantee had been granted, nevertheless the defenders would have been liable, in respect that Campbell, Rivers, & Company had undertaken, as agents of the pursuer, to see that the securities stipulated for, and in particular the guarantee of Alstons, Scott, & Company, were properly completed.

LORD PRESIDENT—I cannot lay claim to any strong belief in the soundness of the judgment proposed. The view that Campbell, Rivers, & Company, and Alstons, Scott, & Company, or one of those firms, acted as agents for the pursuer in obtaining the guarantee of themselves, or one of their firms, is exposed to inherent difficulties, and was but faintly argued at the bar. I am willing to believe that it is because the subject was not much discussed that my doubts remain, and accordingly I do not oppose my impression to the opinion of the rest of the Court. On the question whether a legal guarantee was ever granted, I entertain a definite opinion in the negative. In view, however, of the opinions of the Court, it is not necessary to detail my reasons for this conclusion.

The Court varied the interlocutor of the Lord Ordinary in certain particulars (not alluded to above, and which need not be referred to), but repeated his decerniture against the defenders for payment to the pursuer of the sum of £7000 with interest at 7 per cent. from 30th June 1891.

The defenders appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, the appellants in this action are the trustees of George Alston, who was at the time of his death a partner in the firms of Campbell, Rivers, & Company of Glasgow, and Alstons, Scott, & Company of Colombo. The latter firm, at the time of the occurrences which have given rise to this action, consisted of the firm of Campbell, Rivers, & Company or the members thereof, and two other partners. The firm of Alstons, Scott, & Company as part of their business acted as agents for persons owning estates in Ceylon, rendering or procuring for them financial assistance on the security of those estates. In the year 1878 Richard Mant, the owner of an estate called Roeberry,

owed £2000 on a first mortgage to a Mr Hamilton, and had also obtained advances to the amount of several thousand pounds from Alstons, Scott, & Company to assist him in developing his estate. With the authority of Mr Mant a loan of £7000 was, in the year 1879, obtained by Campbell, Rivers, & Company from Mr J. W. Hutchison upon a first mortgage by Mant of the Roeberry estate. By this instrument of mortgage Mant became also personally bound to repay the loan. Mr Hutchison obtained further written guarantees by Alstons, Scott, & Company, and Campbell, Rivers, & Company, of payment of the principal sum and interest. £2000 of the sum received from Mr Hutchison was applied in repayment of the previous mortgage debt to Mr Hamilton. The residue was credited to Mr Mant in account with Alstons, Scott, and Company.

In December 1882 Mr Hutchison intimated that he should require repayment of his loan in the following June. In consequence of this intimation Mr John P. Alston, who was a member of the Glasgow and Colombo firms, wrote on the 4th of January 1883 to the respondent a letter in the following terms:—"My Dear Gibson—Four years ago we arranged a loan of £7000 with Mr J. W. Hutchison (son of the late Graham H.) on first mortgage over the estate of Roeberry in Hewa Elluja. Mr H. has bought a property and wants the £7000 in June. The estate was then valued at £15,000, and although the coffee is worth less now the value has been kept up by large plantings of cinchona. It is, therefore, an excellent security apart from our guarantee of principal and interest. Before offering it to anyone else I think it well to place it before you as a good 7 per cent. investment (interest payable half-yearly) for three years with six months' notice of repayment on either side. Hoping you are in good health and wishing you and Mrs Gibson many happy New Years together," I remain, &c., JOHN P. ALSTON.

Mr Gibson replied in the following terms:—"Edinburgh, January 5, 1883. My Dear Alston—I have yours of yesterday, and write to say that I expect to be able to let you have the £7000 named in June next, on the Roeberry estate, with C. R. & Co.'s guarantee of principal and interest. Not having anything coming in to me from my Ceylon estates just now, I have nothing open for investment, but by shifting investments I see my way to doing it. With the best wishes of the season to you and yours, believe me, Yours very truly, ALEXANDER GIBSON."

On the 7th of May 1883, Campbell, Rivers, & Company wrote to Mr Gibson as follows.—"Dear Sir—Roeberry Loan, £7000. Referring to your letter of 5th January to our Mr J. P. Alston, a power of attorney was signed by Mr Hutchison and forwarded to Messrs Alstons, Scott, & Company by last mail, authorising them to transfer the security to your name. The £7000 is payable here to Mr Hutchison on 26th June, which we hope will be convenient to you, Yours faithfully, CAMPBELL, RIVERS, & Co."

On the 18th June following the respondent transmitted to Campbell, Rivers, & Company a draft for £7000, and requested that the securities for the loan should be sent when completed to his address in Edinburgh. On the 17th of August an assignment to the respondent of Mr Hutchison's mortgage was duly executed, but the guarantees in favour of Mr Hutchison by the Glasgow and Ceylon firms were not assigned, nor were any similar instruments executed in favour of the respondent.

Mr George Alston died in 1884. In 1891 the firm of Campbell, Rivers, & Company was sequestrated, and the Colombo firm of Alstons, Scott, & Company was adjudicated bankrupt. The present action was consequently raised. There was an allegation that the loan of £7000 had been procured by fraudulent representations, but this was not pressed at the hearing. Two points were made on behalf of the plaintiff—first, that the two firms had, in breach of an undertaking to him, on the faith of which he had lent the money, that they would give him the guarantee of the firms for repayment of principal and interest, failed to procure such guarantee; and secondly, that the firms, or one of them, had duly guaranteed repayment of the loan.

The Lord Ordinary decerned in favour of the plaintiff, and his interlocutor was not substantially varied on appeal to the Inner House. The grounds of judgment intimated by the learned Judges were not altogether the same. Some of them were of opinion that the firm or firms of which George Alston was a member were liable, as having themselves borrowed the money from the respondent. I am unable to take this view. I do not think either the Glasgow or Colombo firm intended to borrow from the respondent, or that he intended to lend to them. The facts seem to me inconsistent with the idea that they were principals in the transaction.

It was not disputed by the appellants that the money was advanced by the respondent on the terms that its repayment should be guaranteed by the firms or one of them, but it was contended that no such guarantee had in fact been given, and that the action therefore must fail.

It is true that no formal documents of guarantee were signed in the present case similar to those which Mr Hutchison received when he made the original advance. But I think the letter of the 4th of January 1883 amounted to a distinct offer of a guarantee, which became operative as soon as it was accepted and the loan which was to be the consideration for it was made. Whether by "our" guarantee Mr J. P. Alston meant the guarantee of the Glasgow or the Colombo firm or both is immaterial. The respondent understood him to refer to Campbell, Rivers, & Company, and indicated this in his letter of the 5th of January. That letter was, I think, intended as an acceptance of the offer made. The letter of Campbell, Rivers, & Company of the 7th of May following shows that it was so treated by them.

Even if the letter of the 4th of January ought not to be construed as constituting, when the offer contained in it was accepted, a binding guarantee, but ought to be regarded only as a promise if the loan was made to give a guarantee, I think that the respondent is equally entitled to succeed. It cannot be controverted that the letter amounted at the least to such a promise, and that the money was advanced on the faith of it. Why, then, should it not be obligatory? The Mercantile Law Amendment Act, which was so much relied upon by the appellants' counsel, presents no obstacle. The letter of the 4th of January, which, on the hypothesis now dealt with, was certainly a "cautionary obligation," fulfils all the requirements of the statute.

For these reasons I think the judgment appealed from should be affirmed, and the appeal dismissed with costs.

LORD WATSON—My Lords, I am of opinion that the interlocutor of the First Division ought to be affirmed, although I am unable to accept all the reasons which were assigned for their decision by the learned Judges who constituted the majority of the Court.

The only question between the parties is, whether the late George Alston, who was one of the partners of Alstons, Scott, & Company, and also of Campbell, Rivers, & Company, at the time of his death in January 1884, had undertaken, or had otherwise incurred a liability, to indemnify the respondent against any loss which he might sustain through his having lent, in June 1883, the sum of £7000 on the real security of the estate of Roeberry in Ceylon, and the personal security of its owner. The decision of that question appears to me to depend mainly, if not wholly, upon the legal import of two letters, dated respectively the 4th and 5th January 1883, which passed between John P. Alston, a partner of both the firms already mentioned, and the respondent. Apart from these writings the material facts of the case are few and are not in dispute.

By his letter of the 4th January Mr John P. Alston offered to the respondent an investment of £7000, to bear interest at the rate of seven per cent. per annum, payable half-yearly for three years, with six months notice of repayment on either side. He explained that the sum of £7000 had been advanced four years previously on a mortgage of the estate of Roeberry (then valued at £15,000) by Mr Hutchison, who had given notice requiring repayment of the loan in June 1883, and he added the assurance that the investment offered is "an excellent security apart from our guarantee of principal and interest."

The respondent's answer to that letter, written upon the following day, is, in substance, an unqualified acceptance of the offer which it conveyed to him. The respondent intimates that he sees his way to finding the money by shifting investments, and expects "to let you have the £7000 named in June next on the Roeberry estate with Campbell, Rivers, & Company's guarantee of principal and interest."

It may be noticed here that the repayment of Mr Hutchison's loan had been guaranteed by Alston, Scott, & Company, who represented the Ceylon branch of the business, and it would appear that in his letter of the 4th Mr John P. Alston intended to offer the respondent the guarantee of that firm. But the respondent in his answer assumed that the guarantee offered was that of Campbell, Rivers, & Company, who represented the Glasgow branch. The circumstance is not material, because it is not disputed that the writer of the offer had ample authority to bind either firm and its partners, and the late George Alston was a member of both firms.

On the faith of the arrangement embodied in those letters the respondent in June 1883 advanced £7000. An assignation of his mortgage was subsequently executed by Mr Hutchison in favour of the respondent, and the title-deeds of Roeberry were at the same time delivered to him.

It does not appear to me to admit of doubt that these two writings, when read together in the light of the facts which I have mentioned, constitute a concluded contract by which one or other of the firms (it matters not which) represented by John P. Alston, either gave an immediate guarantee to the respondent that his loan would be duly repaid with interest, or undertook to give him a guarantee to that effect if and when required to do so. Either of these obligations is, in the sense of Scotch law, a "cautionary obligation," and has been validly constituted according to that law, because the letter of the 4th January 1883 complies with the requirements of section 6 of the Mercantile Law Amendment Act (19 and 20 Vict. c. 60).

In my opinion the letter of 4th January, according to its true import, amounts to a direct obligation of guarantee. The only reference to the subject of a guarantee is to be found in the words, "It is therefore an excellent security apart from our guarantee." The sentence is elliptical and may be completed by adding "which we hereby offer," or "which we will give when required." I think the first of these expressions was that which the parties had in view in their offer and acceptance. It appears to me that an unqualified offer of "our guarantee" would, when accepted, be understood by business men to impart a complete obligation of guarantee and not a mere obligation to give a guarantee at some future time.

That the document was meant to convey the meaning which I have suggested, and was so understood by the acceptor, is strongly corroborated by the fact that both parties appear to have treated it from the first as an operative guarantee. The respondent undoubtedly did so, and on the 11th January 1883 Campbell, Rivers, & Company, writing from Glasgow, advised Alstons, Scott, & Company in Ceylon "that we have induced Mr Alexander Gibson, Edinburgh, to take up this mortgage in June (when Mr Hutchison's loan is repayable), with your guarantee of principal and interest as usual." These words naturally

imply that Mr Gibson had got the guarantee which was offered him; and during the years which elapsed between the date of the loan and the institution of this action it never seems to have occurred to either firm or to the respondent that the obligation was incomplete, and that a formal guarantee was necessary.

I think it right to add that even if it had been clear that the letter in question merely imported an understanding to give a guarantee when required, that circumstance could have made no difference in the rights and liabilities of the parties to this action. Such an understanding, though not a direct, is a good cautionary obligation, and it would have been as binding on George Alston and his representatives as a direct obligation.

It was contended by the respondent, both here and in the Courts below, that the firm of which the late George Alston was a partner, were in reality borrowers from him, and alternately that they were liable to him on the ground that they had failed in their duty as his agents by neglecting to obtain from themselves a formal guarantee. The first of these contentions appears to me to be without any foundation in fact, and the second equally fails if the letter of the 4th of January is in itself a guarantee which became complete by acceptance.

I do not think it necessary to discuss whether, under section 6 of the Mercantile Law Amendment Act, writing and subscription are made essential to the constitution of a cautionary obligation, or are merely required *in modum probationis*. In a Scotch Court that question can never be of any except academical interest. In a foreign court, whose curial rules differ from the law of Scotland, the question might become of importance.

LORD MACNAGHTEN—My Lords, I concur in thinking that the appeal fails. I propose to confine my observations to the letter of the 4th of January 1883, addressed to the respondent Mr Gibson by Mr John P. Alston, who was a member of the Glasgow firm of Campbell, Rivers, & Company, and as such also a partner in the Ceylon firm of Alstons, Scott, & Company. The letter was written in the common interest of both firms, and having regard to the evidence, it must, I think, be taken that the writer was duly authorised by both firms to subscribe it on their behalf. It seems that at the date of the letter there was a mortgage for £7000 on an estate in Ceylon called Roeberry, which was under the management of the Ceylon firm. Accompanying the mortgage were letters of guarantee by which each of the two firms made themselves answerable for the due payment of the moneys secured by the mortgage. The mortgagee, a Mr Hutchison, had just called in his money. The demand was inconvenient, to say the least, and the letter of the 4th of January was written with the object of inducing Mr Gibson to take Mr Hutchison's place. On the faith of the proposal contained in the letter of the 4th of January, and in response to Mr John P. Alston's invitation, Mr Gibson advanced the money required to satisfy Mr Hutchison's claim, and thereupon in due course the mortgage was transferred to Mr Gibson with the formalities required by the law of the island. It is conceded by the appellants that it was intended that Mr Gibson should also have a guarantee for the due payment of the moneys secured by the mortgage. Mr Gibson, it seems, is not in a position to claim the benefit of the guarantees which were given to Mr Hutchison. No fresh guarantee was given to Mr Gibson on the occasion of his advance, and the result is that Mr Gibson obtained no legal guarantee for the due payment of the moneys secured by the mortgage, unless the letter of the 4th of January 1883 is in itself a guarantee which satisfies the requirements of the Scottish Mercantile Law Amendment Act.

It is contended on behalf of the appellants that the letter cannot be construed as a guarantee, and that if anything approaching a guarantee is to be found in it, there is at any rate nothing more than a promise to give a guarantee at some future time, if and when required.

I agree with the Lord Ordinary in thinking that under the circumstances that letter is a guarantee which satisfies the requirements of the Scottish Mercantile Law Amendment Act. The letter is not as well expressed or as explicit as it might have been, but the meaning, I think, is plain enough. "The estate," it says, "is an excellent security, apart from our guarantee of principal and interest." That can only mean it is an excellent security without taking into account our guarantee, which goes with the mortgage. Then the writer says—"Before offering it to anyone else, I think it well to place it before you as a good 7 per cent. investment." That can only mean we offer you the security with our guarantee included. It has never even been suggested that the object of the writer was to get the mortgage accepted without a guarantee. That would have been an absurd proposal to make to a business man. It would have involved an investigation into the sufficiency of the mortgage, which probably was the last thing the writer of the letter of the 4th of January desired. Now, if the meaning of the letter is that attached to it by the Lord Ordinary—and I do not think that it really admits of any other construction—it seems to me that as soon as Mr Gibson advanced the money required to take up the mortgage, the proposal contained in the letter became a binding contract, and the guarantee offered by the letter became at once operative and effectual.

It appears from the correspondence in evidence that both parties understood the letter of the 4th of January in the sense attributed to it by the Lord Ordinary. Mr Gibson writes on the next day, and says—"I expect to be able to let you have the £7000 named in June next, on the Roeberry estate, with C., R., & Co.'s guarantee of principal and interest." It is quite plain that he thought that he was doing nothing

more than intimating that he hoped to avail himself of the offer as made to him. He was not stipulating for anything more than was offered. Then a few days afterwards, on the 11th of January 1883, Campbell, Rivers, & Company, writing to Alstons, Scott, & Company, say—"We have induced Mr Alexander Gibson to take up this mortgage in June, when Mr Hutchison's loan is repayable, with your guarantee of principal and interest as usual." How did they induce him to take up the mortgage? The only inducement was the proposal contained in the letter of the 4th of January.

For these reasons I think the offer contained in the letter of the 4th of January, accepted and acted upon by Mr Gibson, became a binding guarantee on one or other or both of the two firms of Campbell, Rivers, & Company, and Alstons, Scott, & Company (for the purposes of this case it matters not which), and I concur in thinking that the appeal ought to be dismissed.

LORD MORRIS—My Lords, in my opinion the letters of the 4th and 5th of January 1883, read by the light of the letter of the 11th January 1883, from the Glasgow firm to the Ceylon firm, sufficiently disclose an obligation and constitute an effectual guarantee by one or other of the firms to Alexander Gibson, and consequently the interlocutor appealed from should be affirmed.

LORD WATSON—My Lords, I am requested to read the following judgment by my noble and learned friend Lord Shand:

LORD SHAND—(read by Lord Watson)—My Lords, I am also of opinion that the appeal in this case ought to be refused, although I am unable to adopt certain of the grounds of judgment of the learned judges who have held, as I do, that the pursuer is entitled to the decree he claims.

It seems to me, in the first place, that the defuncters were not principals in the transaction of loan or advance into which the pursuer entered, and that they cannot be held liable in repayment of the loan as having been themselves borrowers. They were, no doubt, deeply interested in the money being obtained, for they were in the management of the estate of Roeberry, and themselves considerably in advance to the owner. It was of consequence to them that Mr Hutchison's loan should be taken over by another lender, not only because of the advances they had already made, but because they had the prospect of continuing to act as agents of the property, or rather of Mr Mant, the owner, with the profits or commission which resulted from that relation and employment. In the same way it is often greatly to the advantage of a banker that his customer should be able, with his assistance it may be, to get advances from third parties, of which the bank obtains the benefit indirectly in the reduction of a debt due to them, but without incurring liability as borrowers. The principles which regulate such cases, and which I think apply to this case, will be found stated in the case of *Gibbs* v. *The British Linen Company*, June 23, 1875, 4 R. 630, and the cases of *Eyre* v. *Burmester* there cited. But I cannot find anything, either in the relations between the parties or in the nature of the particular transaction here in question, which made the firm of Campbell, Rivers, and Company principals. On the contrary, it seems to me that they made their position quite clear by Mr Alston's letter of 4th January 1883 containing the proposal for the advance. The proposal there made is for a loan, or assignment of an existing loan on mortgage over the estate of Roeberry, which distinctly indicates that the owner of that estate was the borrower, and the words "apart from our guarantee of principal and interest" appear to me to make it clear that the firm were not themselves to be the borrowers, but were to be guarantors that the borrower should repay the loan and interest. The subsidiary liability thus expressed, I think, excludes the idea of primary liability as principal obligants. And Mr Gibson's answer of the 5th of January shows that he regarded the firm as guarantors and not as principals, and his evidence, when examined as a witness, confirms that view.

Again, I am further of opinion that neither of the firms of which Mr P. Alston was a partner, granted any guarantee for the repayment of the advance. I am unable to find in the terms of the letters of 4th and 5th January, and 7th May 1883, relied on by the pursuer's counsel, any words which I can say amount to a direct guarantee, express or implied, as then given by either of the firms. The letter of 4th January is a proposal or offer to give a guarantee should the transaction go on, but not the granting of a guarantee. The terms used are—"It is therefore an excellent security apart from our guarantee of principal and interest." It is said that there is to be added by implication some such words as these—"which (guarantee) we hereby give in the event of your making the advance." It appears to me that there is nothing in the letter or in the nature of the transaction to warrant the addition of any such words which would be the unusual course of granting, as it were, by anticipation of a *de presenti* guarantee, to take effect in the event of the answer being favourable. I can see no good reason for holding such an addition to the language, by implication, in a letter merely presenting the proposal for an advance to Mr Gibson for his consideration. The letter would, I think, more readily bear the construction that the pursuer would get the benefit of the existing mortgage and guarantee in favour of Mr Hutchison by assignation from him. Such an assignation, at least as regards the guarantee, would, however, be a transaction of an unusual nature, and the very general terms used seem to me rather to point to the discharge of the existing security, and particularly of the existing guarantees, and the granting of a new mortgage and guarantee directly in the pursuer's favour. And it is clear that this was what Mr Alston's firm intended, for in their letter of

11th January to their foreign house, in which they write to say they have induced Mr Gibson to advance the money, they say —"We presume that we will get the mortgage discharged by Mr Hutchison when the money is paid, and give Mr Gibson an obligation to hand him a new mortgage as soon as possible." In the same letter they say that Mr Gibson is to take up the mortgage "with your guarantee of principal and interest as usual," which I think clearly means that a new guarantee is to be given as usual in other cases.

But on other grounds I am satisfied that the pursuer is entitled to succeed in the action. Mr Alston's letter of the 4th January cannot, in my opinion, for the reasons I have now stated, be regarded as in itself a guarantee. It is, however, a distinct offer to give a guarantee should Mr Gibson agree to advance the money. I cannot attach any other meaning to the words following the recommendation of the security as an excellent one "apart from our guarantee of principal and interest." Mr Gibson clearly acted on that view when, in his reply, he stated that he expected to be able to make the advance on the Roeberry estate "with Campbell, Rivers, & Company's guarantee of principal and interest."

The terms of these letters plainly amount to the offer of a guarantee, and a statement that if the money is given it will be on the faith of such a guarantee to be given.

The money having been advanced on this promise, as appears from Mr Gibson's letter of 7th May, the offer of Mr Alston on behalf of his firm became an obligation which the firm was bound to fulfil by granting their guarantee. A question has been raised as to whether the guarantee was to be granted by the Glasgow firm of Campbell, Rivers, & Company, or the foreign house of Alstons, Scott, & Company, or by both of these firms. It appears to me, having in view the terms of the pursuer's letter of 5th January, that the guarantee stipulated for by him was that of the Glasgow firm, but the point is of no consequence, because Mr Alston, whose representatives are the defenders in this action, was a member of both firms. The correspondence, then, amounts to an obligation in writing that the firm would grant a guarantee for the payment of the principal and interest to become due under the mortgage. I can see no reason to doubt that an obligation so constituted is effectual. It may be, looking at the matter critically, that the proper form of action would be to have the defenders in the first instance ordained to procure and deliver to the pursuer the guarantee of the firm. If there be no defence to that demand the pursuer is entitled to succeed in his present claim for fulfilment of the guarantee by payment of the money which cannot now be recovered either from the principal obligant or the property of Roeberry, and in substance that is really the claim which is now made, and to which effect can therefore be given in the present action.

Apart from this ground, however, I am further of opinion that as the result of the correspondence and the relations between the parties the Glasgow firm undertook as agents for the pursuer that the securities, including under that term the guarantee offered and for which the pursuer stipulated, should be procured or granted and handed to him, or held by them on his behalf. There was no suggestion that the pursuer should employ any law-agent in the matter. His sole agents were the Glasgow firm, and I am satisfied on the correspondence that they led him to understand and believe that they would see to the completion of the security in all its particulars by obtaining a proper mortgage and by granting the guarantee which they undertook to give, but which they failed to grant as they were bound to do.

On this ground also I think the pursuer's claim is well founded. In this view the claim would be one of damages, but the damage would be the amount claimed in the action, viz., the sum lent and which cannot now be otherwise recovered.

On these grounds I agree with your Lordships in thinking that the appeal on the part of the defenders ought to be refused.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Pursuer and Respondent —Asher, Q.C.—Haldane, Q.C. Agents—Faithfull & Owen — Menzies, Black, & Menzies, W.S.

Counsel for the Defenders and Appellants —Graham Murray, Q.C.—Ure. Agents—Grahames, Currey, & Spens—F. J. Martin, W.S.

Monday, May 13.

(Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, and Shand.)

LORD PROVOST AND MAGISTRATES OF GLASGOW *v.* THE GLASGOW & SOUTH-WESTERN RAILWAY COMPANY AND ANOTHER.

(*Ante*, vol. xxxi. p. 883, and 21 R. 1033.)

Road—Public Road—Power to Lay Water-Pipe—Land not Dedicated to Public Use —Waterworks Clauses Act 1847 (10 *and* 11 *Vict. cap.* 17), *secs.* 28 *and* 29.

Section 28 of the Waterworks Clauses Act of 1847 provides that the undertakers "may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets or bridges, and lay down and place within the same limits pipes, . . . and for the purposes aforesaid remove and use all earth and material in and under such streets and bridges, and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district." Section 29 provides "that nothing herein con-