would have had no case, so that her contention rests entirely upon that statute. She says that she had a sum of £70 at the time of her marriage, and that her husband during the marriage gave her certain sums, and she put all these sums together in two deposit-receipts, one for £305 and the other for £140. She admits that the donations by him to her would not interfere with the trustee in bankruptcy taking the property gifted to her during the marriage. The only claim she has is as to the property she had at the date of her marriage, and she proposes to prove that this sum of £70 exists separately in the two deposit-receipts, and the question is whether that is competent.

Now, undoubtedly this £70, which I will assume belonged to her at the time of her marriage, was mixed up with the other sums in the two deposit-receipts for £305 and £140. The provisions of the statute alone give any substance to her contention that she is entitled to recover this sum of £70, but then they expressly exclude her getting it unless she has kept it separate and unmixed with her husband's estate. But she has not kept it separate and unmixed; she has put this sum of £70 into two deposit-receipts payable to her or her husband or the survivor, along with other money which admittedly passes to the husband's trustee. The case is just the same as if she had lent this £70, along with other money belonging to her husband or any third person on a bond which acknowledged that the money had been received from him or her, and by which the borrower had bound and obliged himself to repay the money borrowed to her or her husband or the survivor of them. In that case there is no doubt the sum repaid would fall to the bankrupt's trustee. I am of opinion that the Lord Ordinary's judgment is right.

Lord Trayner and the Lord Justice-Clerk concurred.

Lord Rutherfurd Clark was absent.

The Court adhered.

Counsel for Reclaimers — J. C. Watt. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondents — Dundas. Agents—W. & J. Burness, W.S.

Wednesday, October 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON'S TRUSTEES *v.* M'GREGOR'S EXECUTORS.

Caution—Septennial Limitation Act 1695, c. 5—*Allegation of Agreement Barring Cautioner from Pleading Statutory Limitation—Relevancy.*

The creditors in a bond sued the cautioner upon it more than seven years after its date. They averred that they had intimated to the cautioner their resolution to call up the bond within seven years from its date, and that the cautioner "made application for indulgence, and specially requested that the loan should be allowed to lie over until the children of his said son (the principal debtor) were of age. He further informed the executors (the creditors) that if this indulgence were granted, he would negotiate a further loan of £500 from the bank and advance £400 to his said son in order that he might make a fresh start in business, and so improve his financial position. Said loan was negotiated and said advance made, and the executors granted the indulgence craved and permitted the bond to lie over." The creditors pleaded that the cautioner was barred from pleading the operation of the Act 1695, c. 5, as extinguishing his liability under the bond.

The pursuers admitted that the children of cautioner's son were still under age.

The Court *assoilzied* the defender, *holding* that the creditors had made no relevant averment of an agreement on the part of the cautioner to abstain from pleading the operation of the statute; the Lord President and Lord Adam further *holding* that such an agreement could only have been proved by writing.

By personal bond dated 25th and 31st May 1882 James Anderson junior, as principal debtor, and James Anderson senior and another as cautioners, bound themselves conjunctly and severally to pay the executors of Mrs Catherine M'Gregor the sum of £300.

On 20th February 1893 the executors of Mrs Catherine M'Gregor, having failed to recover the full amount of the claim from James Anderson junior, sued the trustees and executors of his father James Anderson senior, who was by that time deceased, for the balance remaining due under the bond.

The pursuers averred—"(Cond. 3) During the year 1888 the said executors resolved to call up said bond, and intimated this resolution to the cautioners. On receipt of this intimation the said deceased James Anderson made application for indulgence, and specially requested that the loan should be allowed to lie over until the children of his said son were of age. He further informed the executors that if this indulgence were granted he would negotiate a further loan of £500 from the bank, and advance £400 to his said son in order that he might make a fresh start in business, and so improve his financial position. Said loan was negotiated and said advance made, and the executors granted the indulgence craved, and permitted the bond to lie over. But for the intervention and actions of the said deceased James Anderson the executors would have called up the bond in the year 1881."

At the bar the pursuers admitted that the children of the cautioner's said son were still under age.

The pursuers pleaded—"(3) Delay having been granted in consequence of the intervention and actings of the deceased James Anderson, as condescended on, defenders are barred from pleading the operation of the Statute 1695, c. 5."

The defenders pleaded—"(2) The obligation of the said deceased James Anderson senior under said bond having been extinguished by the operation of the Statute 1695, c. 5, the defenders should be assoilzied."

The Act 1695, c. 5, provides . . . "That no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than seven years after date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution." . . .

On 17th June 1893 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor —"Finds that the Statute 1695, c. 5, applies to the obligation of the deceased John Anderson senior as cautioner under the bond libelled: Before answer, and under reservation *quoad ultra* of all the pleas of parties, allows the pursuers a proof of their averments, and to the defenders a conjunct probation, and appoints the same to proceed on a day to be afterwards fixed.

"*Opinion*—This is an action by the creditors in a personal bond dated 25th and 31st May 1882, against the representatives of a party who was bound by the bond expressly as a cautioner, and the question which has been debated is whether the cautionary obligation has been extinguished by operation of the Statute 1695, c. 5, through the lapse of seven years since the date of the bond.

"The pursuers maintained in argument (1) that the statute did not apply because the bond covered interest as well as principal, and (2) that it did not apply to the obligation for the interest which fell due after the expiry of seven years from the date of the bond. There are no pleas in law for either contention, and I am of opinion that both are totally untenable. The pursuers quoted *Morrison* v. *Henderson*, March 9, 1892, 19 R. 581, in support of the second contention, but I am of opinion that it has no application. There the question was, whether a cautioner, who was bound only for the interest and not for the principal due under a bond, was relieved by operation of the statute after the lapse of seven years from the date of the bond. There was much difference of opinion on the bench, but the majority in the Inner House held that the cautioner was not relieved. The distinction between that case and the present is too obvious to require comment, and none of the reasons for the judgment apply. I do not think it necessary to say more on this point, which is not open to question, and I am therefore of opinion that the statute applies to the bond libelled. But the pursuers have pleaded (3) that the defenders are barred from pleading the statute because of the delay granted in consequence of the intervention and actings of the cautioner. This is a plea of bar, not a plea that there has been any alteration on the conditions of the contract in the bond, or any contract other than the bond, and it raises a question of much greater difficulty. The averments on which the plea is based are contained in the third condescendence. It is there averred, that before the expiry of the seven years from the date of the bond, the creditors intimated to the cautioner their resolution to call it up, that the cautioner then 'made application for indulgence, and specially requested that the loan should be allowed to lie over until the children' of the debtor, who was his son, were of age, and he informed them that if this indulgence were granted, he would advance £400 to his son; that he made this advance, that the creditors granted the indulgence, and permitted the bond to lie over, and that but for this intervention of the cautioner, the creditors would have called up the bond. The question is, whether these averments are relevant, and whether, if they were proved, the defenders' plea on the statute would be excluded. It is to be regretted that these averments are not made with more exactness, distinctness, and precision. The pursuers declined to amend them. But although they are extremely defective, I think they cannot be safely treated as wholly irrelevant.

"If it be true that when the period of seven years was drawing to a close, the creditors were induced to delay to enforce payment by the solicitations of the cautioner, it seems, *prima facie*, unjust that the cautioner should escape under cover of the statute by reason of a delay which he himself solicited, and in that case that result will not be readily reached.

"It was maintained by the defenders with much plausibility and force that the provisions of the statute were peremptory, and that it absolutely extinguished the obligation of the cautioner at the expiry of the seven years, that no conduct of the cautioner could prevent the application of the statute or bar him from pleading it; that his obligation under the bond ceased *vi statuti* when the seven years were completed, and that he could not be liable for the sum in the bond except by virtue of some separate or additional contract, of which it was maintained there was no relevant averment. Reference was made to the somewhat remarkable case of *Carrick* v. *Carse*, August 5, 1778, M. 2931, where a cautioner was held entitled to repayment of a debt which he had paid in ignorance of the statute on the day after the seven years had expired; and to the cases of *Douglas, Heron, & Company* v. *Riddick*, March 1, 1793, M. 11,045, and 4 Paton's Appeals, 133; *Scott* v. *Yuille*, November 27, 1827, 6 S. 137, February 9, 1830, 8 S. 485, *aff.* 5 W. & S. 436; and *Stocks* v. *Maclagan*, July 11, 1890, 17 R. 1122.

"The pursuers, if I understood them rightly, rested an argument on the assumption that they had averred a new contract or change on the original contract, and

they argued that they were entitled to prove such new contract or change of contract by parole evidence. But I am of opinion that there is no averment in condescendence 3 of any new contract or alteration of contract with the cautioner, and that it is unnecessary to consider whether such an averment could be proved by parole if it had been made. There is, besides, no plea-in-law bearing on any such ground of defence. I read the averments in condescendence 3 as directed only to support the plea in bar. And it is to be observed that if the pursuers mean to aver that they agreed to delay the enforcement of their claim until the children of their debtor were of age, the result would be that this action would have to be dismissed as altogether premature; but I do not think there is such an averment, and there is no plea by the defenders to the effect that the action is premature. But it appears to me that there is considerable authority to support the proposition that a cautioner may be barred by his actings from pleading the benefit of the statute. Professor Bell says expressly that the obligations of the cautioner will be extended beyond the seven years when there have been 'negotiations for answering the demand of the creditor, carried on with the cautioner, so as to bar him, *personali exceptione*, from pleading on the Act.' In support of that proposition he quotes the case of *Douglas, Heron, & Company* v. *Riddick*, which he considers to have been decided on that ground. There seems some difficulty in affirming that a party can be debarred from pleading that the law is what it has been decided to be, or what has been enacted, and there is room for the contention that the case of *Douglas, Heron, & Company* was not decided on the ground of personal bar, but on the ground of a promise to pay expressed in a correspondence.

"The case of *Carrick* v. *Carse* does not seem an adverse authority. It raised nothing but a question of *condictio indebiti*, and some doubt seems thrown on it by Lord Eldon in *Douglas, Heron, & Company*. The cases of *Scott* v. *Yuille* and *Stocks* v. *Maclagan* seem only to import that the actings there founded on did not give rise to any personal bar or import any new contract.

"Without expressing any more decided opinion at present, I have come to the conclusion that the case cannot be safely decided without inquiry into the averments made by the pursuers in their third condescendence. If the result of that inquiry shall be that it shall be held that nothing has happened which can prevent the application of the statute, then of course there can be no other question, and the defenders will be assoilzied; but if it should appear that the defenders are barred from pleading the statute, then there may be other questions as to the extent of the defender's liability, and I think that therefore a proof should be allowed in general terms before answer, and under reservation of the pleas of parties."

Argued for the defenders—A cautioner was relieved *eo ipso* by expiry of seven years from the date of the bond under which he was bound—Act 1695, c. 5; *Scott* v. *Yuille*, September 15, 1831, 5 W. & S. 436. In order to elide the operation of the statute the pursuer had to show that the cautioner had come under a new contract apart from the bond—*Douglas, Heron, & Company* v. *Riddick*, March 1, 1793, M. 11,045, and 4 Paton's App. 133; *Stocks* v. *M'Lagan*, July 11, 1890, 17 R. 1122. They had, however, made no sufficiently definite averment of such contract. Further, the agreement which they seemed to suggest had been made was on their own showing one binding them to grant delay until the children of James Anderson junior were of age, and it was not disputed that they were still in minority. For both these reasons the pursuers' averments must be held irrelevant.

Argued for the pursuers—There was nothing in the statute to prevent a cautioner abandoning his rights. In the cases quoted by the Lord Ordinary the proof of abandonment was held to be insufficient, but in none was the plea of bar held incompetent. Here the pursuers had averred that the delay granted by the creditor had been granted at the cautioner's request. If that were true the cautioner must be held to have entered into an agreement which barred him from pleading the operation of the statute—*Wallace* v. *Campbell*, July 13, 1749, M. 11,026. A cautionary obligation could be varied by verbal negotiations followed by *rei interventus*, and the result of the negotiations was provable by parole—*Kirkpatrick* v. *Allenshaw Coal Company*, December 17, 1880, 8 R. 327. The Lord Ordinary was therefore right in allowing the pursuers proof of their averments.

At advising—

LORD PRESIDENT—The bond of caution on which this action is brought is undoubtedly prescribed, and the legal consequence under the statute is that no action lies upon it. It is said, however, that the averments in article 3 of the condescendence entitle the pursuers to prevail, but when we examine these averments, we find that they do not amount to anything like the representations which the House of Lords in *Douglas, Heron, & Company* v. *Riddick* held to be necessary in order to enable the creditor in a cautionary obligation to get over the statute. If the pursuers' averments could be read as an assertion that Mr Anderson, on condition of time being granted to him, gave an undertaking that he would pay the sum due under the bond after the expiry of the statutory period, then there would be a sufficient answer to the plea of prescription, but when the averments in condescendence 3 are scrutinised, we find no averment that any such transaction was entered into. All that is said is that the defender "requested that the loan should be allowed to lie over until the children of his said son were of age," and "informed the executors that if this indul-

gence were granted he would negotiate a further loan of £500 from the bank, and advance £400 to his said son in order that he might make a fresh start in business, and so improve his financial position. Said loan was negotiated and said advance made, and the executors granted the indulgence craved, and permitted the bond to lie over." But was there any legal obligation on Mr Anderson's part to pay after the bond had expired? That does not appear on the averments, and the case accordingly falls short of what according to the judgment of the House of Lords is necessary to elide the operation of the statute.

But even if the pursuers had set out a relevant answer to the plea of prescription I think it could only be proved by writing, and the pursuer has no document under the hand of the cautioner at all. Accordingly on both grounds I am of opinion that the pursuers must fail.

LORD ADAM—I am of the same opinion. The pursuers seem to me to be in a dilemma, because their averment is that Mr Anderson requested that the loan should be allowed to lie over until his son's children were of age, and on that footing offered to do certain things, and that the pursuers granted the indulgence craved. Now I could have understood, that being an averment of an obligation on the part of the pursuers to grant delay until the children came of age, that the children not being of age the action must be dismissed on that ground. But the pursuers say that that was not the arrangement, and that they might have sued the debtor the next day. If the indulgence granted was quite indefinite, how can it be said that there was a definite agreement on the part of the debtor not to plead the Act? I agree, therefore, that the averments made with regard to the alleged agreement are utterly irrelevant, and I further agree with your Lordship, that this alleged arrangement could only be proved by writing, and that as none is averred the pursuers' case also fails on this ground.

LORD M'LAREN—I agree with your Lordships in holding that there is no relevant averment entitling the pursuers to proof of an obligation of the kind they seek to establish against the defenders.

LORD KINNEAR—I am of the same opinion. I think it is conclusively settled that the original cautionary obligation became extinguished on the lapse of seven years from its date, so that the creditor could not sue the debtor unless he obtained a new and independent obligation on which he might proceed against the debtor. It appears to me that what the pursuers have undertaken to aver is, that there is a new and distinct obligation by the debtor, because they say that upon intimation being given to the debtor that they were going to call up the bond he requested that the loan should be allowed to lie over until the children of his son were of age, and agreed that, if this indulgence were granted him, he would negotiate a further loan for his son, and make him an advance in order that he might make a fresh start in business. That is the offer which the defender is averred to have made, and therefore it is a conditional undertaking which he is alleged to have given; and they go on to say that the indulgence craved was granted, and that on that condition the defender procured the loan and made the advance. If the averment means anything, it means that the pursuers undertook to allow the bond to lie over until the son's children came of age. If that is the pursuers' averment, even assuming that it could be proved by them, the case could not be maintained, because the action is brought while the children are still under age, and it is now said that the pursuers were all the time at liberty to bring an action for the amount of the bond against the debtor; but though the pursuers aver that their right to sue was in no way limited, they assert that the defender had lost his right to plead the statute. It appears to me that the pursuers are in a dilemma as Lord Adam said. Either there is a good obligation binding upon both parties, and in that case the pursuers can bring no action until the children are of age, or there is no good obligation at all, and in that case the debtor is entitled to plead the septennial limitation as extinguishing his debt under the bond.

I do not wish to say that a debtor in a cautionary obligation may not be personally barred from pleading the operation of the statute, just as he may be barred from pleading any other of his legal rights, but in order to give rise to the plea of personal bar it is indispensable that there should be an averment that by his representations or his conduct the one party has intentionally induced the other to believe in the existence of a certain state of things, and to act on that belief. But nothing appears on the averment of facts here made to support a plea in that sense. If the averment amounts to anything at all, it is an averment of a promise made by one party and accepted by the other, and partly carried into effect.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

Counsel for Pursuers—Dewar—W. L. Mackenzie. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for Defenders—Shaw—Craigie. Agent—Robert Stewart, S.S.C.