The other Judges concurred.

Appeal dismissed.

Agents for Defender and Appellant—Wotherspoon & Mack, S.S.C.

Agents for Pursuers and Respondents—Campbell & Smith, S.S.C.

Tuesday, October 18.

HOWARD *v.* MUIR.

Bona Fide *Possession, Interruption of.* Where possession had begun in *bona fides*, and no interruption of *bona fides* occurred till the production of certain documents in an action of ejectment against the possessor—*Held*, in a subsequent action of damages, that he was not bound to submit until he had taken the final judgment of the Court upon these documents, and that his *mala fides* could only be counted from the date of that judgment, not from that of the production.

This was an appeal from the Sheriff-court of Lanarkshire. The petitioner had obtained a lease for seven years, from Whitsunday 1862, of a spirit shop in Stobcross Street, Glasgow, and continued in possession up till Whitsunday 1867. He then sold the lease and good-will of the shop, together with the stock-in-trade, to Douglas Gow, conform to missive letters of date May 6th 1867. As part of the price, Gow accepted three bills, and gave a back letter of date May 15th 1867, acknowledging that, until these bills were paid by him, he remained Howard's tenant in the premises. Gow entered upon and continued the business till October 1867, when he sold his lease, business, and stock to the defender, who thereupon took possession. Gow's bills remained unprovided for. Howard thereupon brought an action of ejectment against Muir in January 1868, which was not concluded until after Whitsunday 1869, when Howard's right had expired. After a variety of procedure, Howard's right to the premises was sustained by the Sheriff, though too late to be effectual. Howard did not produce either to Muir or to the Court Gow's back letter to him, on which his right rested, until required to do so by the Sheriff in the process of ejectment in January 1869. Howard thereafter brought the present action of damages against Muir for wrongous possession, concluding for £150. The Sheriff assoilzied the defender from the conclusions of the action, holding his possession *bona fide*, at any rate up to 14th April 1869, and considering that there was no evidence whereon he could assess any material damage between that date and Whitsunday 1869.

The pursuer appealed.

BRAND for him.

WATSON and MACKINTOSH for the respondent.

LORD PRESIDENT—There can be no doubt of Muir's *bona fides* at the out set. When he took the shop from Gow he must have seen the missives of May 6th 1867,—these were Gow's title to sub-let, and, as such, *ex facie* absolute. There is nothing to interrupt Muir's *bona fides* until Howard produced the letter of 15th May 1867 qualifying Gow's right. But the production was not made by Howard till required by the Sheriff in January 1869. Farther, when produced there was need of additional evidence to connect the back letter of Gow with the bills founded on. Being therefore in *bona fide* when the action was raised, I cannot think that Muir was bound to depart from his defence the minute these documents were put in. I think the result of the action was quite right, that Howard should be found entitled to get back possession, but I do not think that there was any legal interruption of Muir's *bona fides* until the action came to an end. I therefore agree with the Sheriff.

LORD DEAS—The document which Gow had to show was *ex facie* absolute, and I do not see that Muir was bound to go and inquire if it was otherwise qualified. It would have been different had there been anything of a qualificatory nature in Gow's document, or anything even to cause suspicion. But there was not, and I can see nothing to discredit the *bona fides* of Muir until the action of ejectment was brought to a final conclusion.

LORDS ARDMILLAN and KINLOCH concurred.

Appeal dismissed.

Agent for Appellant—A. Kirk Mackie, S.S.C.

Agents for Respondent—J. & R. MacAndrew, W.S.

Thursday, October 20.

SECOND DIVISION.

MORRISON *v.* HARKNESS.

Cautioner—Direct Obligation—Discussion—Mercantile Law Amendment Act—19 *and* 20 *Vict., c.* 60, § 8. A law-agent granted a holograph obligation in the following terms:—"I will see the above account settled when taxed, reserving Mr Gun's plea.—Chr. Harkness." *Held* that this document constituted a direct and primary obligation against him, which was enforceable by action without the necessity of constituting the debt against the principal debtor, or of discussion.

Observed, that if it was to be held to be a cautionary obligation, the result would have been the same.

This was an action for the amount of a business account, due by the appellants Mrs Morrison and her sister to Mr Wilson, solicitor in Dumfries, in the following circumstances:—The appellants, who were creditors in two bonds and dispositions in security over certain property in Dumfries, employed Mr Wilson to call up the said bonds, and if necessary to sell the subjects to pay the amounts contained in them. The respondent Mr Harkness was agent for the trustee on the sequestrated estate of one of the debtors, while Mr Gun was trustee on the estate of the other debtor.

On 17th May 1869 the agent of the appellants, Mr Wilson, met with the respondent, and received from him the amount of the debt, with interest; he tendered at the same time his business account. Mr Harkness, the respondent, thereupon granted an obligation in the following terms:—"I will see the above account settled when taxed, reserving Mr Gun's plea.—CHR. HARKNESS."

The appellants accordingly brought an action in the Sheriff-court of Dumfries against Mr Harkness for the amount of the account.

Harkness pleaded—"The account being disputed by one of the principals, viz., Mr Gun, trustee for John Henderson, it was necessary, in the first instance, to constitute the debt against the principals along with the defender, the cautioner, and it is incompetent to prosecute the defender alone, in respect, in the cautionary obligation libelled, the plea of Mr Gun was specially reserved—that con-

dition is not yet purged, and the only mode of having it discussed was to have called him as a party to the action. Whatever claim the pursuers may have against the debtors in the said bonds for expenses incurred by their agent thereanent, being primarily due by the Hendersons or their trustees, and the defender having undertaken the obligation libelled on simply as their agent and cautioner, and the principals not having been called, the action ought to be dismissed, with expenses."

The Sheriff-Substitute (HOPE) pronounced this interlocutor:—

"*Dumfries, 14th December* 1869.—Having resumed consideration of the preliminary pleas and whole process, finds that the action is laid for payment of an account incurred by the pursuers to Mr Robert Wilson, solicitor, Dumfries, and which it is averred that the defender bound himself to pay when taxed, conform to his holograph obligation, dated the 17th day of May last, and other documents referred to in the Summons: Finds that the persons primarily liable in payment of the account referred to were Mr Thomas Tait, writer in Moffat, the trustee on the sequestrated estate of James Henderson, shoemaker in Moffat, and Mr William Gun, writer in Dumfries, as trustee for the creditors of John Henderson, shoemaker in Moffat, but that they have not been called as parties to this action: Finds that the said William Gun, long before the raising of this action, and before the date of most of the items in said account, intimated to the said Robert Wilson that he objected to the greater part of said account being incurred, and repudiated liability therefor: Finds that the obligation granted by the defender, and founded on in the summons, is in the following terms:—'I will see the above account settled when taxed, reserving Mr Gun's plea:' Finds that the defender was when he signed said obligation, and still is, agent for the said Thomas Tait, as trustee foresaid: Finds, in law, that the obligation granted by the defender as aforesaid was only a cautionary obligation, and that therefore the pursuers were bound to have called and discussed the principal debtors: Finds, therefore, that the action is incompetently laid against the defender alone; therefore sustains the third preliminary plea for the defender, and dismisses the action: Finds the pursuers liable in expenses; allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report; and decerns.

"*Note.*—The Sheriff-Substitute is of opinion that the document, 2/1 of process, contains only a cautionary obligation on the part of the defender. The summons is incorrect when it sets forth that by that document, he 'bound himself to pay the account when taxed,' the words being 'I will *see* the above account settled when taxed,' or, in other words, 'I undertake that my client and the other debtor shall pay the account, but if they do not, I will, in some way or other, get it paid.'

"This is clearly a cautionary obligation, or else the defender would have said, 'I will pay the account.' The expression '*see* the account paid,' clearly means that some one else was to do it, but that the obligant was to get it done. The case of *Hume* v. *Lockhart* (M. p. 2072) is strongly in favour of this view. But all doubt is removed by the words that follow, 'reserving Mr Gun's plea.' Mr Gun was one of the parties liable (officially) for the account, or rather whom Mr Wilson was seeking to make liable, because he had protested against most of the business being done which is charged for in the account. The introduction of this reservation shows that the defender only meant to be a cautioner, and that he meant the estates of the two Hendersons to pay the claim. Hence his care to keep John Henderson's trustee unprejudiced by his obligation, and, at the same time, his own cautionary obligation limited to the amount that might be found due after Mr Gun's plea was disposed of.

"Even if this action had been rightly brought against the present defender alone, the pursuer could not prevail to any extent until the matter raised by Mr Gun has been disposed of, because they must take the obligations as a whole, and it reserves the plea. Mr Gun should therefore have been called, and also Mr Tait; and if this had been done the defender might have been cited as a cautioner in the same action. There does not appear to have ever been any objection on the part of the real debtors to pay whatever part of the account should be found to be a good charge against the estates of James and John Henderson, but Mr Wilson appears to have objected to this being ascertained in any of the ways proposed by the trustees. The way which he has chosen to adopt does not seem the best, and neither in this nor in any other way can he avoid facing the objections which Mr Gun may have to state to his account.

"The Sheriff-Substitute does not think it necessary to dispose of the objections contained in the first preliminary plea, and he is relieved at not having to do so, because, if they be good ones, they were very technical. His impression is, that the objection to the amount of the account should only be sustained to the effect of cutting down the account libelled to the state in which it was when the obligation was granted. The taxing, however, might have enlarged instead of diminished it. The objection to the heading of the account is more difficult, but it is very technical, for there is no doubt that the accounts refer to the same business, and that Miss Newall was concerned in it."

The Sheriff adhered; and the pursuer appealed.

JOHNSTONE, for him, pleaded that if the document constituted a cautionary obligation, the Sheriff-Substitute had overlooked the enactment contained in section 8 of the Mercantile Law Amendment Act. That section is as follows:—"Where any person shall, after the passing of this Act, become bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, to use all action or diligence against both or either of them, which is competent according to the law of Scotland."

He further pleaded that the document constituted a direct and primary obligation against Harkness; *Galloway*, 1st July 1823, 4 S. 132.

MILLAR, Q.C., and M'KIE, for the respondent, answered, that notwithstanding the terms of the above quoted section, the debt must be constituted against the principal before the cautioner could be sued.

The Court unanimously recalled the Sheriff's interlocutor, and remitted to the auditor of Court to tax the account sued for, and consider the objection of Mr Gun, reserved in the obligation granted by

Mr Harkness. They were of opinion that, whether the obligation was a direct obligation or a cautionary one, there was at common law, and under the terms of section 8 of the Mercantile Law Amendment Act, a competent action against Mr Harkness, without the necessity of discussing or doing diligence against any other person. They indicated an opinion that, on the authority of the case of *Galloway* (*supra*), such a writing as the present constituted a direct and primary obligation against the granter. The consideration for which Mr Harkness granted the obligation was the delivery of the discharges; without it, Mr Wilson would not have given these up.

Agent for Pursuers—R. P. Stevenson, S.S.C.
Agent for Defender—W. S. Stuart, S.S.C.

Friday, October 21.

FIRST DIVISION.

HOSEASON *v.* HOSEASON.

Aliment—A father-in-law cannot be compelled to aliment the widow of a deceased son.

This was a claim of aliment made by the widow of Hosea Hoseason junior against her husband's nephew Robert Hoseason, on the ground that he represented his grandfather Hosea Hoseason senior, who, the pursuer maintained, would have been liable for her aliment if he had been alive. Hosea Hoseason senior died in 1824, leaving a settlement by which he conveyed a small heritable estate to his eldest son in liferent, and the heirs-male of his body in fee; whom failing, to his second son in liferent, and the heirs-male of his body in fee, &c.

The eldest son, the husband of the pursuer, died without male issue, and the estate has now devolved on the defender Robert Hoseason, son of the second son of the testator. The defender is absent from Scotland, and his brother Charles has been appointed judicial factor on his estate. It was admitted that the pursuer had no relations of her own able to support her.

The questions raised were, first, Whether Hosea Hoseason senior, if he had been alive, would have been liable to aliment his son's widow? and, second, Whether that obligation transmitted to his grandson, the son of a younger son, upon his coming to represent his grandfather?

The Lord Ordinary (GIFFORD) decided the first question in the negative, and accordingly assoilzied the defender, it being unnecessary to decide the second point.

The pursuer reclaimed.

SPEIRS, for her, founded chiefly on the case of *De Courcy* v. *Agnew*, 3rd July 1806, Mor. App. *voce*, "Aliment," No. 8.

CHEYNE, for the defender, referred to *Duncan* v. *Hill*, 28th Feb. 1809., F.C.; *Yule* v. *Marshall*, 21st Dec. 1815, F.C.; and *Pagan* v. *Pagan*, Jan. 27, 1838, 16 S. 399.

LORD PRESIDENT—The question here is whether, apart from special circumstances, the relation between father-in-law and daughter-in-law is such as to found a claim of aliment. It is unnecessary to impugn the decision in the case of *De Courcy*, though it has been much criticised. The ground of decision in that case was, that Sir S. Agnew was bound to support his daughter-in-law, as the mother of his heir of entail. The other cases in which the point has been raised form an unbroken series of decisions negative of the pursuer's contention.

LORD KINLOCH—Whether a father is bound to support the widow of a son is a question of positive law, not to be decided on theoretical grounds. Authority shuts us up to a negative answer.

The other Judges concurred.

The Court adhered.

Agent for Pursuer—John A. Gillespie, S.S.C.
Agents for Defender—Stuart & Cheyne, W.S.

Friday, October 21.

SECOND DIVISION.

THE SCOTTISH LEGAL BURIAL AND LOAN SOCIETY *v.* LEITCH.

18 *and* 19 *Vict.*, *c.* 63, § 40—*Appeal—Finality.* Section 40 of 18 and 19 Vict., c. 63, enacts—"every dispute between any member or members of any society established under this Act, or any of the Acts hereby repealed, or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer, or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties without appeal." Leitch, the representative of a deceased member of a friendly society, sued the society and the agent of the society at Greenock. The Sheriff-Substitute dismissed the action, in respect that the secretary of the society had not been made a defender. The Sheriff-Principal having recalled this interlocutor, thereafter decerned in favour of Leitch for the amount of his claim. Appeal against this interlocutor to the Court of Session *dismissed* as incompetent.

18 *and* 19 *Vict.*, *c.* 63, § 40—*Finality—Review—Decision of the Dispute. Held* that the finality of judgments pronounced under the above Act extended only to judgments on the merits, *i.e.*, "decisions of the dispute;" and that it was competent to appeal judgments of the Sheriff-Substitute upon questions of procedure, &c., to the Sheriff-Principal.

18 *and* 19 *Vict.*, *c.* 63, § 40—*Sheriff—Sheriff-court.* Opinions *per* Lords Justice-Clerk and Cowan, that the word "Sheriff" in the above section meant "Sheriff-court;" and that judgment on the merits was reviewable by the Sheriff.

This action was raised in the Sheriff-court of Greenock at the instance of the respondent, as executor of his mother, to recover the amount for which the deceased had insured her life with the appellants' society. The defence was a denial of the resting-owing, on the ground of misrepresentation as to the deceased's age at the time of effecting the insurance, but an offer to pay what would have been due in respect of the premium really paid, and calculating the deceased's right upon her real age and not her age as represented.

The Sheriff-Substitute (TENNENT) sustained the second plea in law for the defender, which was that the secretary of the society had not been made defender in terms of section 7 of 21 and 22 Vict., c. 101, and dismissed the action. The action had been directed against the society and its agent at Greenock. On appeal, the Sheriff recalled this interlocutor, and remitted to the Substitute to proceed with the cause. Thereafter the Sheriff-Sub-